The Law and Practice of the International Criminal Court

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2 The ICC and the Politics of Peace and Justice

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2.1 Introduction

The indictment of sitting heads of state and rebel leaders during active conflict, though still more exceptional than normal, has radically altered the debate surrounding international justice. Arrest warrants for former Yugoslav president Slobodan Milošević, Sudanese president Omar al-Bashir, Liberian president Charles Taylor, and Colonel Gaddafi all ignited an intense controversy over the timing of justice and its impact on the prospects for peace. In the former Yugoslavia, Sudan, Liberia, Libya, and even Syria, it has become clear that there are still significant barriers to achieving both peace and justice simultaneously, especially when perpetrators of atrocities maintain significant power. Nonetheless, advocacy for justice continues to reflect the view that such trade-offs do not exist. Leading advocacy organizations and even the first Chief Prosecutor of the ICC have stressed the role of international justice in delivering results, especially peace, the rule of law, and stability. Such an approach presents a stark contrast to rationales for prosecution that claim that there is a moral

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2 Notably, even key advocacy organizations promoting international justice have issued important reports evaluating it on the basis of its contributions to other values. Several recent reports reflect this trend. See e.g. most notably, Human Rights Watch, ‘Selling Justice Short: Why Accountability Matters for Peace’ (July 2009); D Orentlicher, ‘Shrinking the Space for Denial: The Impact of the ICTY in Serbia’, Open Society Justice Initiative (May 2008). There are also numerous academic studies evaluating transitional justice, and the 2010 Special Issue of the International Journal of Transitional Justice, ‘Transitional Justice on Trial: Evaluating its Impact’ is devoted to evaluations of its impact.
obligation or a legal duty to prosecute the perpetrators of genocide, crimes against humanity, and war crimes. Instead, recent arguments have emphasized the instrumental purposes of justice, essentially recasting justice as a tool of peacebuilding and encouraging proponents and critics alike to evaluate justice on the basis of its effects on atrocities, violence, and peace negotiations. Indicting national leaders and rebels pivotal to ongoing peace talks has turned previously academic conversations about the relationship between peace and justice into pressing policy dilemmas.

Since the 1990s two historical ‘facts’—that war crime trials are held by victors, and that they are only initiated after war’s end—have been challenged. Proponents of trials for Nazi war criminals emphasized the moral value of a legal approach, but deferred discussions of justice until an Allied victory was clearly in sight. The International Military Tribunal at Nuremberg was convened only when Germany was defeated and occupied. The expectations for what justice could achieve were transformed by the outbreak of war and, especially, by the horrors associated with the attempt to ethnically cleanse Bosnia. During the summer of 1992, as war raged in Bosnia and Herzegovina, human rights advocates campaigned successfully for the immediate establishment of a war crimes tribunal even before any prospect for peace had emerged. A tribunal was established in the spring of 1993. In its 1994 Annual Report, the ICTY stated: ‘the Tribunal is intended to act as a powerful deterrent to all parties against continued participation in inhuman acts’. Bosnian Serb political and military leaders Karadžić and Mladić were indicted in the summer of 1995, just months before a peace agreement was signed in Dayton, Ohio. And, five years later, in 1999, the speed with which the indictment of Yugoslav president Slobodan Milošević followed the NATO bombing of Serbia contributed to the public perception that justice and peacemaking were part of the same project.

This judicial intervention during the war in Bosnia unleashed a discussion about the effects of justice on peace. Very quickly an unofficial consensus seemed to emerge that justice could be legitimately evaluated on the basis of its effects. In the former

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4 The American Jewish Conference argued for the ‘moral obligation’ to prosecute those who had committed crimes, but also suggested this would serve as ‘a warning against future attempts to instigate or commit similar crimes’. Statement on Punishment of War Criminals Submitted by the American Jewish Conference to the Secretary of State, Cordell Hull (25 August 1944) (National Archives, RG 107). See also A Kochavi, Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment (Chapel Hill: University of North Carolina Press 1998).


Yugoslavia, Uganda, the Democratic Republic of the Congo, Libya, and even Syria, the potential for justice to facilitate peace negotiations, reduce violence, consolidate peace, and introduce the rule of law has been the subject of advocacy, research, and policy analysis. On the first day of peace talks designed to bring Liberia’s civil war to a close, an arrest warrant against the then Liberian president and warlord Charles Taylor was unsealed. Taylor exited the talks and within weeks accepted an offer of exile in Nigeria. When Taylor was later transferred to The Hague, an intense debate broke out about the credibility of future deals designed to remove brutal dictators. Many feared that the ‘Taylor precedent’ would make it impossible to remove spoilers from peace talks in the future.

This focus on the short-term effects of international justice has left some advocates wary that the basic value of a criminal justice approach to accountability is being overshadowed by the emphasis on deterrence and peace. In the following pages, I discuss the shift in international justice advocacy from a principle or duty-based logic to one that is results based. I then evaluate the results-based rationales that have played an increasingly central role in public advocacy for international justice. Finally, I examine the implications of evaluating justice on the basis of its ability to deliver peace to situations of ongoing conflict.

2.2 Arguing for Justice

The most prominent arguments about justice have stressed two outcomes: peace and democracy. First and most visibly, a deterrence rationale has been strategically deployed as a logic that links justice to peace through its ability to prevent atrocities. This rationale has been central in the most highly visible and hotly contested cases. Second, a rule-of-law rationale has been championed for justice. The symbolic power of trials increases the appeal of the law as a mechanism for dealing with atrocities. This, combined with a direct material transfer of legal skills and resources, makes justice an important mechanism for consolidating the rule of law, a central component of democracy.


8 A third category of rationales that stress the effects of justice draws on the notion of restorative justice. Although many theorists of restorative justice are solely concerned with restoring relations between victims and perpetrators, this type of explanation can also be used to suggest the positive effects of justice on state building. Establishing guilt and innocence may be crucial not as a means to punish perpetrators and assuage victims, but instead as a mechanism designed to reintegrate these two communities and thereby lay a foundation for reconciliation and restoration. International justice is a weak cousin of other non-legal strategies preferred by those who seek to promote restorative justice. Mechanisms designed to bring victims and perpetrators together through truth telling have been at the centre of this approach to justice. Efforts to advance international justice on the basis of its capacity to restore and repair social relations and thereby advance the project of state building are as suspect as those that base their support of justice on its capacity to deter and democratize.

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Deterrence emerged as an important justification for war crimes trials in Bosnia. The boldest claim made on behalf of criminal law was summed up in the argument most central to international justice in the 1990s: ‘no peace without justice’.\footnote{An Italian NGO established in 1993 used this name and became a key advocate of international criminal justice. See No Peace Without Justice <www.npwj.org/> accessed 6 August 2014.} This was trumpeted as a core motivation for holding perpetrators of mass atrocities in the Balkans accountable. Its proponents argued that justice was crucial for its purported capacity to prevent and deter individual perpetrators from committing further atrocities.\footnote{P Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’ (2001) 95 American Journal of International Law 7.} Since these individuals faced personal sanction, the prospect of accountability would directly alter their incentive to commit war crimes.\footnote{Mark Drumbl develops a critique of this assumption that international criminal justice can prevent collective violence in M Drumbl, Atrocity, Punishment, and International Law (Cambridge: Cambridge University Press 2007).} Advocates of this deterrence rationale have made claims about the capacity of this model to deliver both specific deterrence and general deterrence.\footnote{See e.g. P Akhavan, ‘Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal’ (1998) 20 Human Rights Quarterly 737; R Lebow, Coercion, Cooperation, and Ethics in International Relations (New York: Routledge 2007) 188.} The most basic claim about deterrence is a general one. The effects of international justice are not confined to a particular individual or territory nor time-bound. This is a long-term project that increases the costs to perpetrators of atrocities—one that will gradually lead individual would-be perpetrators to make a rational choice to comply with human rights and humanitarian norms.\footnote{ICTY Judge Wolfgang Schomburg argued strongly on behalf of the long-term deterrent effect of contemporary tribunals. See Orentlicher, ‘Shrinking the Space for Denial’ (n 2) 94 footnote 34.}

Despite this overarching claim, advocates of judicial deterrence have increasingly emphasized the capacity of tribunals to deter ongoing crimes in specific conflicts.\footnote{This claim has underpinned much of the logic behind arguments in support of recent ICC indictments. It also guided the logic of those who argued that the ICTY would reduce violence and contribute to state building within the former Yugoslavia and especially in Kosovo. Indeed, Human Rights Watch argued in its study Under Orders: War Crimes in Kosovo (New York: Human Rights Watch 2001) that the violence in Kosovo was muted because of the work of the ICTY.} The logic rests implicitly on two distinct causal mechanisms. The first assumes the threat of justice will lead perpetrators of atrocities to engage with peace processes. A second logic anticipates that justice will marginalize perpetrators from power and enable peace. The logic of engagement assumes that indictments of particular perpetrators reduce their options and give them an incentive to participate in peace talks by removing the opportunity to retain or extend their power through military methods. Human Rights Watch and others have argued that the ICC’s indictment of leaders of the Lord’s Resistance Army (LRA), a sectarian Christian militant group based in northern Uganda, is evidence of the validity of this deterrent mechanism. The LRA’s decision to negotiate with the Ugandan government in July 2006, they argued, was a direct consequence of the ICC action.\footnote{This argument is made, e.g., in P Hayner, ‘Negotiating Justice: Guidelines for Mediators’, Centre for Humanitarian Dialogue and International Center for Transitional Justice (February 2009) 17. Human Rights Watch, ‘Selling Justice Short’ (n 2).} The ability of tribunals to execute, that is, to
enforce arrest warrants, is essential for the success of a strategy that seeks to engage perpetrators by threatening their arrest.

A second logic holds that justice is a tool for marginalizing rather than engaging perpetrators of mass atrocities.\textsuperscript{16} Indictments undermine the domestic legitimacy of their targets and thereby weaken their base of support. This facilitates a transition of power away from those who threaten to spoil the prospects for peace. Even in the absence of an arrest, proponents of justice argue that indictments alone have powerful shaming effects. The logic of marginalization is compelling but flawed. Indictments and arrest warrants may have the opposite effect. Savvy leaders in Sudan and Kenya under arrest warrant by the ICC have mobilized domestic support by treating the ICC as a threat to sovereignty and democracy. Sudan’s president al-Bashir was not marginalized by the ICC arrest warrant. Instead, he ran for political office and succeeded in securing the presidency once again. In the short term, the indictment generated a backlash from the African Union and the Arab League, and prompted al-Bashir to force the exit of many key humanitarian agencies providing relief in Sudan. In Libya, an arrest warrant against Muammar Gaddafi did not diminish his determination to fight. In the former Yugoslavia, the indictment of Bosnian Serb political and military leaders Karadžić and Mladić reinforced the Milošević strategy which entailed a decision by the US government to work directly with Milošević, and not the Bosnian Serbs, to secure a peace agreement. Justice followed, but it did not lead in the former Yugoslavia.\textsuperscript{17}

The assumption that removing key individuals is a sufficient basis for ending violence is central to both logics for pursuing justice in conflict. At its core, criminal justice assumes that individuals rather than groups are central to preventing atrocities. International justice has been seen as a tool that can help shift responsibility away from the group and back to the individual.\textsuperscript{18} By refocusing polities away from dangerous clan identities and attributions of guilt, the focus on individual accountability seeks to defuse future cycles of violence, and especially revenge killings. Thus, rather than blaming ‘the Serbs’ for the atrocities in Srebrenica, for example, this form of accountability seeks to ensure that blame is placed squarely on the shoulders of key individuals. International tribunals do not take the side of any particular warring party. In this sense they are at least theoretically neutral; they seek to deter all perpetrators of the crimes associated with war rather than to privilege the values, interests, or rights of a particular party to conflict. In practice, though, international criminal tribunals have more often pursued only one side in a conflict.

Ultimately, deterrence is difficult to measure and even more difficult to achieve. The capacity of justice to deter atrocities is undermined in part because enforcement is so difficult to achieve. The threat to inflict justice also cannot easily be matched by a promise not to pursue justice. The law lacks this kind of flexibility.\textsuperscript{19}


\textsuperscript{17} Snyder and Vinjamuri, n 6.

\textsuperscript{18} For a critical perspective on this and related issues, see Drumbl (n 11).

\textsuperscript{19} For contrasting perspectives, see e.g. K Rodman, ‘Darfur and the Limits of Legal Deterrence’ (2008) 30 Human Rights Quarterly 529; K Sikkink and C Walling, ‘The Impact of Human Rights Trials in Latin
A second rationale for promoting international criminal justice is that this strengthens the rule of law in post-conflict and transitional states through a demonstration effect. Trials perform a symbolic and social function that spreads the rule of law by example. This logic has been central to campaigns for justice. Its moral appeal rests in part on its use of one morally desirable value (international justice) to advance a second morally desirable value (democracy and the rule of law). War crimes trials provide a beacon of hope, a symbol of moral authority for all of humanity, and it is the power of this symbol that facilitates an acceptance and embrace of the rule of law. This logic is intuitively compelling, but only in the presence of other conditions that facilitate a transition to democracy. All too often, elite perpetrators have drawn on a range of tactics to counter any positive symbolic effects of international justice by casting international courts especially as the handmaiden of colonial powers.

On a more practical level, advocates have argued that international tribunals help consolidate the rule of law by providing groups and individuals in civil society with a legal resource that facilitates their ability to mobilize and press for compliance with the law. In some cases linkage has been fostered by international non-governmental organizations (NGOs) that have sought out local NGOs and national governments to develop accountability strategies and practices. In Kenya and Liberia, for example, the International Center for Transitional Justice worked extensively with local NGOs to develop practical solutions for increasing accountability in the aftermath of serious crimes.

Democracy promotion through the mechanism of international tribunals also operates through tangible material transfers. Skills and practices associated with the rule of law are transferred through a ‘spillover’ logic that involves the transfer of human and material resources, such as courtrooms and support for reform of the legal sector. The material component of democracy promotion has been formalized through a range of institutional mechanisms, such as the ICC’s ‘complementarity principle’ and the ICTY’s ‘Rules of the Road’. In effect, complementarity encourages states to develop legal capacity by offering the carrot of national rather than international trials if they are found to be both ‘willing and able’ to investigate the crimes of their own nationals. Similarly, the Rules of the Road sought to inspire legal capacity building by introducing a formal mechanism for transferring expertise and cases from the ICTY to the former Yugoslavia.

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2.3 The Triumph of Consequences

Deterrence and democracy promotion have formed the basis of advocacy campaigns for justice, inspired criticism, and defined research programmes across a broad array of public policy and academic institutions. Public justifications that stress the fundamental values of ‘guilt and innocence’ have become less common paradoxically as have attacks on the basic principle of justice and accountability, even by those who adamantly oppose specific cases or are themselves targets of arrest warrants. Instead, advocates and opponents alike have debated the effects of international justice. In some cases, opponents of international justice have sought to challenge the legitimacy of particular forms of institutional authority to be the arbiter of justice. But, international human rights advocates share a commitment to the non-negotiable nature of core universal human rights. Individuals who have come under the purview of the ICC have refrained from undertaking overt attacks on the basic tenets of justice. In Kenya, elites asserted that heads of state should have immunity but did not contest the basic principle of accountability. Likewise, Sudan’s President al-Bashir challenged the legitimacy of the ICC, but not the basic principle of justice.

The consensus that has emerged on an impact-based evaluation of international justice is the by-product of several closely related developments, most notably the international community’s use of soft policy instruments, especially international justice, to respond to violence and mass atrocities, and an inherent organizational tendency, especially in new institutions, to expand and extend their role.

In the former Yugoslavia, soft policy instruments were a substitute for military intervention. Pressure for military intervention in the former Yugoslavia was initially met with great reluctance. The European and American response stressed diplomatic negotiations, peacekeepers, and an ad hoc international war crimes tribunal. In Sudan and especially Libya, the ICC was also conceived in part as an instrument deployed by the international community to enhance the prospects for peace.

In each of these cases, discussion about the effects of justice on peace intensified. New tribunals created to investigate abuses and atrocities have also taken on increasingly challenging cases and sought to extend rather than limit their engagement in ongoing conflict. The ICTY’s indictments of Radovan Karadžić and Ratko Mladić during the conflict in Bosnia and Herzegovina and its pursuit of Slobodan Milošević during the bombing of Kosovo ensured that the Court would be viewed as a player that could not be ignored in any analysis of the peace process. The pursuit of justice prior to a settlement radically altered the terms of the ensuing debate, and


international justice became an instrument that was evaluated in terms of its impact on efforts to negotiate peace with Serbia. Indeed, much of the immediate controversy centred on whether the indictment would impede or facilitate peace negotiations rather than whether it fulfilled a legal duty or satisfied a moral imperative. As one commentator argued, ‘[t]he tribunal has always said it wants to stay clear of politics, but charging a current head of state with war crimes will take it right to the center of the diplomatic and political arena’.24

Pursuing justice ‘in real time’ increased the visibility of the tribunals and generated heightened expectations of what they could accomplish. Practitioners often fell into a trap of trying to oversell the tribunal’s activities, pursuing an overly ambitious agenda in their efforts to secure the strategic goods of peace, deterrence, and democracy. Just a few days after the indictment of Milošević, ICTY Chief Prosecutor Louise Arbour argued, ‘I have been stressing… our commitment to functioning as a real time law enforcement operation.’25 The need to consolidate a public role and secure public support may inadvertently bias tribunals against deferring justice until conflicts are resolved. Proponents argue that the arrest warrant issued for Sudanese President al-Bashir may bolster moderates and weaken his base of support domestically, thereby paving the way for the selection of a new leader in forthcoming elections. This tendency to oversell criminal law’s contribution to stopping ongoing conflict has been intensified by concern that international justice will be marginalized or obstructed by mediators and political leaders with conflicting priorities. The concern is not unwarranted. Historically, the formal incorporation of provisions for justice into peace agreements has been exceedingly limited. Even over the past decade there have been several peace agreements that have remained silent on the issue of accountability.26

2.4 Four Dilemmas

The pursuit of international justice during ongoing conflict has produced four dilemmas for the future of accountability in general and international justice in particular.

2.4.1 Sequencing justice

Judicial interventions in ongoing conflict have generated intense debate about the optimal sequencing of policies designed to deliver justice and peace. But little consensus has emerged and the prospect of an ideal standard for the role that justice should play during conflict remains elusive. Three prominent rationales that underscore contemporary debate recognize that peace should be given some measure of priority when accountability measures are pursued during violent conflict. First, a ‘do no

harm’ rationale suggests that the standard for pursuing justice during conflict should be that such an intervention will not impede the prospects for achieving peace. A second set of arguments sets a higher bar by suggesting that support of justice in ongoing conflicts should follow a ‘positive effects’ standard. That is, justice should only be pursued when there is clear evidence that it would be possible to achieve some measure of justice, and also to help the cause of peace.27 This view has shaped arguments against international justice as well as those on its behalf. In a powerful op-ed to The New York Times, South Africa’s former president Mbeki and Columbia University scholar Mahmood Mamdani argued that ‘courts can not do justice’.28 A third rationale suggests that justice should be pursued during conflict only as a ‘last resort’. If all other instruments of statecraft, short of military intervention, have been tried and failed, then it is okay to pursue international justice.

In the debate over a possible Security Council referral of Syria to the ICC, each of these three standards informed the arguments made by different audiences. Some suggested that diplomacy had failed at Geneva II as had other soft measures, and so ‘why not’ try a referral, thus implicitly adopting a ‘last resort’ rationale. Others argued on the basis of ‘positive effects’ that unless the ICC could help increase the prospects for peace, it should not open a case.29 Still others implicitly applied a ‘do no harm’ standard, suggesting that the ICC was unlikely to have an impact on Assad’s behaviour, so why not refer Syria to the ICC?30

Ultimately, though, these differing standards and rationales were confronted by the reality of an increasingly diminished flexibility to argue critically in the public sphere about justice. By establishing a powerful precedent, judicial interventions in the former Yugoslavia galvanized moral sentiment around an uncritical support of justice and cast a shadow over debates about sequencing.

The debate about sequencing re-emerged in the context of Libya’s 2011 war when the Security Council referred Libya to the ICC. The rapidity with which an arrest warrant was issued for Muammar Gaddafi and the move by NATO to defeat him sparked a new openness to debate and a scepticism about the pursuit of ICC justice during ongoing conflict. Some feared that the arrest warrant against Gaddafi would inhibit efforts to negotiate a settlement that could bring the violence to an end. Many justice proponents felt that the Security Council referral undermined the independence of justice by linking it too closely to the Security Council and especially to its peace and security mandate. Louise Arbour, a long-time proponent of justice, argued for separate, or parallel, tracks. Ultimately, though, recognizing the difficulties of achieving such a separation, Arbour recommended that although both justice

29 Vinjamuri, ‘Syria and the International Criminal Court’ (n 27).
and peace should be pursued independently, proponents of each must be willing to make some compromises to make a just peace possible. In the case of Colombia, for example, she argued that uncompromising justice would not be possible, but neither would impunity. Former Chief Prosecutor of the ICC Luis Moreno Ocampo surprised many justice advocates by taking a very different position, arguing for a complete integration of the instruments of justice and diplomacy through the Security Council.

Three years later, a Security Council vote on a resolution that would refer Syria to the ICC pitted 13 members of the Security Council against Russia and China. This division made it easy to portray the vote as divided between those who supported justice, human rights, and liberalism, and those who sought to block it, rather than one that evaluated the specific impacts of a referral on the conflict, or the attainability of justice. But some analysts expressed concern that referring situations to the ICC that the Court would find difficult to execute would ultimately weaken the Court.

Scholars have tried to evaluate debates about sequencing by drawing on careful social science research. Snyder and Vinjamuri argue that when spoilers are powerful, well-designed amnesties can be crucial devices for bargaining with spoilers and securing their removal, thereby making a peace settlement possible. Others have argued that amnesties should be used to secure peace agreements, but then accountability measures can be pursued, possibly even reversing these amnesties over time. In one discussion, Aryeh Neier, former president of the Open Society Foundations, argued that ‘deals’ could be made to secure the exit of leaders like Gaddafi, but that impunity must never be formalized. Others have been more adamantly opposed to placing peace before justice and argued that in fact justice has helped to make peace possible in many cases, or that even if justice preceded peace in the past, there is no reason to assume that this sequence must be continually observed.

Ultimately, an outcomes-based approach should evaluate the effects of sequencing on the short-term goal of peace not only because peace is a core value but also because it is essential for minimizing human rights abuses. It should also evaluate the impact of different sequencing strategies on the long-term goal of justice. Often, justice delayed may mean more and better justice. Trials of the major Nazi war criminals were pursued in the aftermath of military victory and facilitated by occupying powers that sought to stabilize and democratize Germany. Recent pursuits of justice in Chile

32 L Moreno Ocampo, ‘Between Bombing or Doing Nothing’ (Huffington Post, 4 September 2013) <http://www.huffingtonpost.com/luis-moreno-ocampo/between-bombing-or-doing-_b_3869088.html> accessed 7 August 2014.
34 Snyder and Vinjamuri (n 6).
and Argentina build on a platform of stable democratic institutions and run little risk of destabilizing the state. Quite the opposite, the arrest of Augusto Pinochet spurred additional efforts to deal with the past and has helped entrench a culture of democracy and accountability in Chile. Acknowledging past crimes may strengthen prior institutional reforms by setting the historical record straight.

Judicial interventions in ongoing atrocities present a challenge to the fundamental principle that law should be independent of politics. Advocates of the ICC and of international criminal tribunals generally reject the idea that justice can be coordinated with other international policy instruments, such as negotiations, sanctions, or military force, or that it can be sequenced based on domestic factors. But the assumption that justice can be pursued neutrally during conflict is inconsistent with the claim that justice can independently affect the prospects for peace by marginalizing some actors and empowering others.

History suggests that those judicial interventions with the greatest capacity to contribute to peace have depended on their success on prior political and military efforts. In Bosnia, Kosovo, Sierra Leone and elsewhere, diplomatic and military interventions have been highly coordinated. The successful creation of international tribunals has depended on the creation or imposition of a stable domestic balance of power. British military intervention in Sierra Leone helped to defeat the Revolutionary United Front (RUF) and thereby paved the way for the creation of the Special Court for Sierra Leone. Similarly, the ICTY only really made progress once the Serbs began to lose capacity on the ground and NATO intervention, combined with intensive diplomatic efforts, succeeded in producing a political settlement. The indictment of Milošević was built on the back of a prior decision by NATO, highlighted by the bombing of Serbia, that Milošević was on the wrong side of politics. In Uganda, the failure to compel the LRA to capitulate despite the ICC indictments suggests that in the absence of superior military force or a stable negotiated settlement, judicial instruments have little effect.

2.4.2 Displacing the local

Indicting alleged perpetrators during conflict threatens to undermine the complementarity principle central to the ICC that posits that national legal systems are the preferred locus for establishing accountability. In states where institutions are weak, politics are decentralized, and a high degree of instability persists, the prospects for domestic justice are low. Under such conditions, not only is securing arrests and convictions difficult but basic issues concerning who has the legitimacy, as well as the capacity, to govern may not yet have been resolved and admissibility challenges are more likely to fail than succeed.

Even where states have sufficient local capacity, the ability of local actors that are party to conflict to pursue a neutral justice, or to be seen to pursue a neutral justice, will be heavily compromised and is unlikely to be an immediate priority. The international pursuit of justice in this phase may therefore have the unintended consequence

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of creating a situation in which justice is routinely outsourced, thereby disenfranchising national actors and inhibiting efforts to embed accountability norms locally.

The pursuit of international justice during ongoing conflict may be deleterious for post-conflict state building as well. National leaders will be far better placed to make the case for domestic ownership of justice processes once conflict has been resolved. The pre-emptive pursuit of justice by external actors may restrict and inhibit the transnational and international linkages that can facilitate local autonomy, authority, and ownership of justice in post-conflict states. Outsourcing justice and removing options that are deemed to fall short of the gold standard of international justice together risk alienation of the local from the international project of accountability. Over time, this may contribute to a bifurcated system of global justice, with weak states subject to international authority and stronger democratic states answerable only to themselves. Paradoxically, efforts to institutionalize international justice through the ICC may mean abandoning the goal of decentralized justice. Absent this decentralization, the long-term prospects for the globalization of an accountability norm may suffer.

2.4.3 Impairing neutrality and undermining legitimacy

The prospect that international justice will be viewed as taking sides is great during ongoing conflict. In Uganda, the ICC has issued arrest warrants for rebels in the LRA, but has been criticized for failing to investigate government crimes. In Libya, the ICC was seen by many as an instrument that supported an American and European policy of regime change. The tribunal in Iraq was viewed as a means of legitimizing the American intervention that toppled Saddam Hussein’s Sunni regime. And in the former Yugoslavia, Serbs continued to view the Yugoslav Tribunal as anti-Serb.39

Former or sitting heads of state indicted by international courts have challenged the legitimacy and authority of the courts that have indicted them. Milošević argued that the ICTY was both partial and illegitimate. Charles Taylor lodged similar claims against the Special Court for Sierra Leone upon his arrival at The Hague. Saddam Hussein blasted the Iraqi Special Tribunal for being the handmaiden of US imperialism; and al-Bashir and his cohort have accused the ICC of being illegitimate and having no proper authority on which to indict or prosecute them.40

The perception that international justice is neither neutral nor legitimate extends beyond cases where conflict is ongoing. The most sophisticated anti-ICC campaign emerged in Kenya, where Uhuru Kenyatta and William Rutu, both accused before the


40 For one example of the types of claims being made in response to the ICC’s issuing of an arrest warrant against president Omar al-Bashir of Sudan, see ‘Bashir Attacks West over Warrant’, Al Jazeera, 5 March 2009.

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ICC, forged the Jubilee Alliance to capitalize on their different ethnically defined voter bases and maximize their prospects for electoral success in the 2013 general elections. Anti-ICC rhetoric was central to their platform. The ICC was framed as an imperialist institution that constituted a threat to Kenya’s sovereignty.

But the problem of neutrality has been exacerbated by the ICC’s interventions in ongoing conflict. And the Court’s dependence on states has increased its reluctance to alienate state officials. This fact, combined with the reality that during ongoing hostilities local elites have been tempted to press for judicial intervention as a mechanism to undermine or discredit their opponents, increases the difficulties that international criminal tribunals face in maintaining their neutrality.

2.4.4 Raising the stakes for justice

Finally, emphasizing the capacity of justice to deter crimes in situations of ongoing conflict sets a very high bar for success. Sceptics will continue to find failed deterrence an easy basis for attack because, as scholars have long recognized, successful deterrence is notoriously hard to identify. International justice institutions lack the enforcement capabilities that are essential to delivering credible threats. Justifications that stress outcomes also undermine the basic claim that justice is inherently valuable. International criminal justice instead is treated as one among many interchangeable policy tools used to manage conflict, alongside negotiations, economic sanctions, and military force. If justice cannot bring peace and reduce violence as effectively as these other instruments, then logically it follows that it should be replaced.

The new trend towards results-based assessments and effects-based advocacy has not been supported by conclusive evidence. A study by Human Rights Watch claims that the potential of justice to contribute to peace has been ‘sold short’, and that in many cases international justice has helped establish the rule of law, deter further atrocities, and prevent future cycles of violence. In contrast, a study of the ICTY’s effectiveness argues that the evidence ‘did not provide an adequate basis for even provisional conclusions’ to assess the ICTY’s deterrent effect. The report instead pointed to the Tribunal’s role in contributing to the removal of criminals from the former Yugoslavia and its role in promoting local justice. Some recent research identifies the positive effects of international justice on democracy and deterrence.

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43 Orentlicher, ‘Shrinking the Space for Denial’ (n 2).
44 For an excellent review of much of the research that attempts to evaluate the effects of transitional justice, see Thoms et al. (n 6). For a recent study of the factors associated with transitional justice, see L Fletcher et al., ‘Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective’ (2009) 31 Human Rights Quarterly 163.
45 Human Rights Watch, ‘Selling Justice Short’ (n 2).
46 Orentlicher, ‘Shrinking the Space for Denial’ (n 2) 16.
47 Sikkink and Walling (n 19); Kim and Sikkink (n 19); Olsen et al., Transitional Justice in Balance (n 35); T Olsen et al., ‘The Justice Balance: When Transitional Justice Improves Human Rights and Democracy’ (2010) 32 Human Rights Quarterly 980; H Binningsbø et al., ‘Civil War and Transitional Justice, 1946–2003: A Dataset’ (paper presented to the workshop ‘Transitional Justice in the Settlement...
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studies suggest justice has had little independent effect on peace or democracy, or has even catalysed negative unintended consequences.48 A review of the research on the effects of transitional justice argues that there was little evidence of the positive impact of trials on peace, and no sustained support for the claim that justice is necessary for peace or that it brings about peace faster.49

Careful qualitative empirical research may force advocates to qualify their claims and introduce statements that set out the conditions under which international trials will be successful. The claim that pursuing criminal trials is absolutely necessary for lasting peace is undermined by a number of significant and well-researched cases. Negotiated settlements in Mozambique and El Salvador were built on the back of amnesties and more recently, peace negotiators have sometimes simply deferred considerations of accountability, opting instead for a strategic ‘silence’.50 Factors entirely unrelated to international justice appear to be far more significant in explaining the sustainability of peace. For example, some studies of international justice have argued that military factors, especially one-sided victories, are a greater predictor of peace than any effort to bring war criminals to justice.51

Similarly, claims that justice can and should be a central component of democracy promotion may be undermined by empirical research. Successful transitions in Spain, Brazil, and Portugal were built on a buried past. The potential destabilizing effect of recent efforts in Spain to uncover the abuses of the Franco era was cushioned by a consolidated democratic state with robust institutions capable of ensuring respect for rights and the rule of law. Amnesties in Chile and Argentina helped to contain powerful spoilers who might otherwise have obstructed democratic transitions. Challenges to these amnesties in the past decade have been mounted with the support of democratic systems with strong civilian controls over the military. In each of these cases, if justice for the perpetrators of mass atrocities is now being served, it is the handmaiden of peace and not its usher.

Despite the publicity that international justice continues to receive, the uncertainty that surrounds recent indictments is likely to lead to a protracted debate about the effects of ICC arrest warrants in conflict situations. Mediators and local political elites have continued to use amnesties; and as amnesties for certain categories of crimes have been abandoned, those in power have opted for silence on the question of accountability. Writing justice into peace agreements and negotiations continues to...
be rare. In Zimbabwe the costs and benefits of an amnesty programme are debated internally, but the plausibility for international recognition of such a strategy is low. Progress in Uganda has been stalled in part due to the indictment of LRA leaders. Recent efforts to end conflict in Afghanistan have focused on strategies designed to negotiate and reconcile with the Taliban. The continued use of amnesty since the end of the Cold War, and more broadly between 1970 and 2007, suggests that justice may still be considered a luxury good by those actively engaged in fighting and ending wars. Especially in ongoing conflicts, amnesty remains a very popular tool. Of all armed conflicts resolved through a bargained solution, 45% contained amnesty provisions during the period 1946–2006. Indeed only 17% of civil wars during this period (1946–2006) resulted in trials. This underscores a gap between the solutions proffered by the international community and those sought in states emerging from conflict.

What is at stake when the expectations outlined for international justice are set so high that justice is expected not only to spread the rule of law but also to deter crimes and bring peace? Indicting powerful nationals or rebels who are pivotal to the success of peace negotiations places international mediators in a very challenging position, except where they have a viable alternative negotiating partner. In these challenging cases, negotiators face a hard choice. They can ignore an indictment and accept the international moral opprobrium that attends negotiating with an indicted war criminal. Moral opprobrium is a sanction that penalizes not only its targets, but also third parties who fail to respect the spirit of justice. And so, arrest warrants may have the unintended consequence of increasing pressure on the international community to take more singular positions, using harder language and sometimes harder policy instruments, even military force, to force perpetrators to stand down. The prospect of a neutral intervention designed simply to stop atrocities becomes more difficult. In Libya, the perception that the ICC was one part of a broader Western strategy of regime change was intensified when the ICC issued an arrest warrant against Gaddafi.

The potential for a backlash against international justice even from its most likely supporters is stronger in cases where the ICC is set up to fail rather than to succeed. Early judicial interventions are risky because they can provoke humanitarian backsliding (as in Sudan), stall peace talks (as in Uganda), and intensify violent conflict (as in Libya). In this respect, early judicial intervention raises the stakes for the entire project of international justice.

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2.5 Rewriting Justice

International justice has moved squarely into situations where conflict is ongoing. If it is to remain in this treacherous space, it will be politically impracticable not to investigate the effects it is having on events on the ground. This requires some real sense of the actual impact of pursuing justice in different types of states, and at different stages of conflict and peacebuilding. Despite the dilemmas these justice initiatives pose, the emphasis on outcomes has encouraged rigorous research and evaluation.

Does a lack of systematic evidence for the proclaimed effects of international justice mean that there are no grounds on which to defend its centrality in state building? Clearly not, and much important research is in process, or is only now being released, but it does raise a red flag. Arguments on behalf of justice will benefit from modesty. Grandiose statements that attribute to international justice a single-handed ability to deliver peace stand a high chance of backfiring. Nor can the caution of sceptics be ignored by those engaged in post-conflict reconstruction and state building. The lessons of history are often misread. There is reason for a healthy dose of scepticism among sceptics and advocates, if only to encourage debate and to displace dogmatism.

The pursuit of justice as an absolute and non-negotiable value in international politics may sometimes mean that other important goals are jeopardized. Selectively promoting justice in contexts where it is likely to deliver both more peace and more justice offers a more pragmatic and principled way of deploying a highly valuable, but also very limited resource. This also places a premium on systematic and rigorous empirical research, rather than faith, as the basis for promoting justice strategies. International justice is a limited resource that should be deployed both where it can be realized and where it can have the greatest positive effect on other values we hold in great stead, especially saving lives, ending conflicts, and building stable institutions.

As it is, mediators now face increasing pressure to introduce mechanisms for guaranteeing accountability into peace negotiations; their flexibility has been greatly limited. Initiatives designed to bring accountability for mass atrocities have been integrated into the work of foreign aid and development agencies, and those NGOs whose main goal is monitoring human rights violations, negotiating peace, and rebuilding post-conflict states. The claim that these initiatives are necessary for sustained peace and can play a critical role in deterring conflict has been widely articulated, and also broadly embedded as a practice in the mandates and operating guidelines of many

56 For example, see work by Binningsbo et al., ‘Armed Conflict and Post-Conflict Justice, 1946–2006: A Dataset’ (n 54).
58 Vinjamuri and Boesenecker (n 52).

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international organizations.\textsuperscript{60} Even if this new research eventually produces a sustained evidence-based consensus, it is likely to generate debate for a considerable time to come. Evaluating the pursuit of justice during ongoing conflict is crucial. What we may discover is that contrary to the mantra that justice delayed is justice denied, the most promising way to promote justice may be to postpone it.

\textsuperscript{60} On the normalization of accountability, see Teitel (n 1).
4
The ICC and the AU
Ottilia Anna Maunganidze* and Anton du Plessis**

4.1 Introduction

The relationship between the ICC and the AU can be characterized as troubled at present. The primary bone of contention relates to accusations by the AU that the ICC is a neo-imperialistic tool that illegitimately targets Africa. The impact of this troubled relationship is primarily political. However, it has also had a significant impact on the practice of the ICC.

This chapter analyses the legal and political background of the relationship between the ICC and the AU, including the origin and foundation of divergent positions, for instance on head of state immunity and cooperation duties. The AU, following the indictment of Sudanese President Omar Hassan Al Bashir, and later Uhuru Muigai Kenyatta of Kenya,1 has consistently defended the immunity of heads of state as central to state sovereignty. Their primary criticism of the ICC in the indictment of heads of state has been aimed at the Office of the Prosecutor. In respect of cooperation, the AU contends that non-State Parties should not be ‘forced’ to cooperate, even where a situation has been referred by the UNSC. Further, it has been suggested that all African states should withhold cooperation where the ICC has indicted heads of state.2

The chapter, nevertheless, cautions against an oversimplification of ‘African’ views as homogeneous and highlights the progress made by some African countries in investigating, prosecuting, and adjudicating international crimes. It posits that these efforts, albeit riddled with challenges, are in line with the principle of complementarity that is at the heart of the Rome Statute system. It goes further, however, to suggest that these domestic initiatives go beyond merely complementing the ICC and are in effect an effort to promote international criminal justice in general. This is so because under the Rome Statute the traditional notion of complementarity relates to an invocation of the ICC’s jurisdiction when domestic jurisdictions are unwilling or unable

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1 Kenyatta, together with his deputy William Samoei Ruto, was indicted before being elected as President.
to prosecute individuals alleged to have committed international crimes. However, these African efforts suggest that nations are working with the ICC towards achieving a common goal of international criminal justice, thereby reducing any possible impunity gaps. This shall be illustrated by instances where efforts have been made to deal with crimes committed in states that are not party to the Rome Statute or by their nationals, and where the UNSC has not referred the situation therein to the ICC.

The chapter also examines the proposal to expand the jurisdiction of the African Court of Justice and Human and Peoples’ Rights to deal with serious crimes, including international crimes and the implications thereof.

4.2 The Conflation of Politics and Law: Africa and International Criminal Justice

From the trials at Nuremberg to date, international criminal law has sometimes been accused of ‘providing victors in a conflict with an opportunity to demonise their opponents, sanitise their crimes and perpetuate injustice’. Inherent in this accusation is the claim that international criminal law is a political tool of the victors over the vanquished. It suggests an intrinsic uneven landscape. It is this uneven landscape (perceived or otherwise) of international criminal law that the AU argues the ICC perpetuates through its focus on prosecuting situations in Africa while neglecting similar violations of the Rome Statute on other continents. It is worth noting that the criticisms are manifold and relate to, but are not limited to, referrals made by the UNSC, the indictment of sitting heads of states (and the related arguments around immunities of heads of state), and the absence of situations outside of Africa on the ICC’s roll. These concerns are captured in statements to the effect that the ICC is a ‘hegemonic tool of western powers which is targeting or discriminating against Africans’.

Following the AU’s 21st Summit of the Assembly of African Heads of State and Government (AU Summit) in May 2013, the then chairperson of the AU Assembly,

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Ethiopia’s Prime Minister Hailemariam Desalegn, stated that the decision of the AU to lambast the ICC was born from the fact that ‘African leaders came to a consensus that the ICC process conducted in Africa has a flaw... [T]he process has degenerated to some kind of race-hunting rather than the fight against impunity.’ Some African statesmen have made similar statements in the past and after the 21st AU Summit. However, these statements should be taken as individual concerns and not as the concerns of all Africans.

Criticisms of the ICC as a neo-imperialistic tool that targets Africans emerged following the initiation of investigations into Sudanese President Omar Hassan Al Bashir’s alleged role in the commission of international crimes in Darfur. Following the issuance of a warrant for Al Bashir’s arrest by the ICC in March 2009, the AU called on the UNSC to defer the ICC’s investigation into Al Bashir for a period of 12 months by invoking Article 16 of the Rome Statute. In July 2009 the AU heads of state called on its members not to cooperate with the ICC in effecting the arrest of Al Bashir. For African States Parties to the Rome Statute, this decision placed them in the ‘unenviable position of having to choose between their obligations as member states of the AU on the one hand, and their obligations as states party to the Rome Statute, on the other’.

To date, despite the ICC arrest warrant, Al Bashir has been invited to visit, and received by, African States Parties—including Chad, Djibouti, Kenya, and Malawi. It is worth noting that when Al Bashir was received in Kenya in August 2010, the country had already enacted implementing legislation of the Rome Statute that entailed an obligation to cooperate with the ICC and, where relevant, to effect the arrest of known fugitives. Kenya, however, relied on the AU decision not to cooperate with the ICC in respect of Al Bashir as justification. Nevertheless, the Kenyan government’s action in hosting Al Bashir resulted in the first ever decision of the ICC on non-cooperation. Further, through an application by Kenyan civil society, a Kenyan High Court issued

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10 Du Plessis et al. (n 4).
11 Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Al Bashir, Situation in Darfur, Sudan, ICC-02/05-01/09-1, PTC I, ICC, 4 March 2009.
12 AU (Assembly), Decision on the Application by the ICC Prosecutor for the Indictment of the President of the Republic of the Sudan, Twelfth Ordinary Session, 1–3 February 2009 (Addis Ababa, Ehtiopia), Doc Assembly/AU/Dec.221(XII), 1 at para. 3. Art 16 ICC Statute empowers the UN Security Council to defer an investigation or prosecution for one year if it is necessary for the maintenance of international peace and security under Chapter VII of the UN Charter. The UN Security Council would need to make a determination that the continued involvement of the ICC is a greater threat to international peace and security than suspending the ICC’s work.
15 See Kenya’s International Crimes Act 2008, which came into operation on 1 January 2009. The others include South Africa and Uganda.

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a domestic arrest warrant for Al Bashir, thereby preventing future visits for fear of arrest.\textsuperscript{17}

It should be noted that while some African countries have in the past relied on AU decisions on the ICC to justify non-cooperation, one should not conclude that all African states share a common negative position towards the ICC. As shall be illustrated, many African states continue to cooperate with the ICC on various matters, including requests for assistance, and several have publicly confirmed their support for the Court.

The aforementioned notwithstanding, it should be noted that at the time of writing, 34 African states are party to the Rome Statute and none has withdrawn from the treaty. Further, some African countries have put in place mechanisms to investigate and prosecute allegations of international crimes. Also of significance is the fact that four out of eight of the African situations before the ICC were self-referrals, most recently from Mali;\textsuperscript{18} and that over 70 per cent of the requests for cooperation made by the ICC to African states (some of which are not party to the Rome Statute) are met with a positive response.\textsuperscript{19}

\section*{4.3 African Efforts to Close the Impunity Gap}

In Africa there is a great need to promote democracy and good governance, and to strengthen the rule of law, which are all threatened by the existence of impunity and a general lack of criminal justice capacity to respond effectively to international crimes. If the international criminal justice initiative is to succeed, it is imperative to seek means through which to address these issues. Furthermore, it should be noted that in addressing these issues, there should be a buy-in from African governments and civil society. It cannot be denied that without this buy-in the practical implementation of any work aimed at destroying the impunity gap will remain a pipe-dream. This is not to suggest that efforts have not been made across the African continent to end impunity, and indeed some states have recognized the need to address these challenges.

One of the cornerstones of international criminal justice is the principle of complementarity.\textsuperscript{20} Complementarity’s aim is to ensure that national criminal justice systems become legitimate and credible means through which justice for the commission of international crimes is sought. As stated by the Office of the Prosecutor during the early years of the Court in 2003:

\begin{quote}
The [ICC’s] strategy of focusing on those who bear the greatest responsibility for crimes within the jurisdiction of the Court will leave an impunity gap unless national
\end{quote}

\textsuperscript{17} Du Plessis et al. (n 4).
\textsuperscript{20} The Preamble to the Rome Statute emphasizes that ‘the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions’. See also Art 17(1) ICC Statute.
The ICC and the AU

authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used.\textsuperscript{21}

It is clear, therefore, that the prosecutorial strategy has, since the beginning, been to ensure that domestic courts are used as a complementary measure to the ICC to ensure justice.

This principle is important in that it allows countries to retain their independence in dealing with internal matters, but also provides victims with an additional course to take when seeking justice if their national courts cannot do so. It should be noted that complementarity is not a principle limited solely to situation countries before the Court, but rather extends to all countries that have ratified the Rome Statute. It is through a thorough appreciation of this that the international criminal justice system can be strengthened.

In order to give effect to complementarity and ultimately to promote international criminal justice, States Parties to the Rome Statute must adhere to their implementation obligations as outlined in the Statute.\textsuperscript{22} This is so because the ICC’s jurisdiction is not universal. The jurisdiction of the ICC must be triggered first, either by a State Party referral,\textsuperscript{23} the prosecutor initiating independent investigations in a State Party,\textsuperscript{24} or through a UNSC referral of a situation in a non-State Party.\textsuperscript{25} Thus in the absence of referrals, the onus rests on states.

Without the requisite legislative framework to investigate and prosecute international crimes, states parties may be rendered ‘unable’ to prosecute, thereby leaving the ICC as the only avenue through which justice for international crimes may be sought. State parties should therefore ensure that they adapt their legal and justice system in order for them to enjoy a fully complementary relationship with the ICC. This means they must criminalize genocide, crimes against humanity, and war crimes, as contained in the Rome Statute. Even in countries that have not ratified the Rome Statute, international crimes can (and should) be prosecuted. Indeed, the ICC in the case \textit{The Prosecutor v Saif al-Islam Gaddafi and Abdullah al-Senussi}, in its decision on the admissibility of the case against Abdullah Al-Senussi, applied a two-step test to determine whether Libya should have jurisdiction over al-Senussi’s case.\textsuperscript{26} First, the ICC sought to determine whether at the time of the proceedings in respect of the admissibility challenge there was an ongoing investigation of the same case at national level. Second, if the answer to the first question was in the affirmative, whether the state was

\textsuperscript{21} Paper on some policy issues before the Office of the Prosecutor, Office of the Prosecutor, September 2003, 3.
\textsuperscript{23} Art 12 ICC Statute: A state accepts jurisdiction by becoming a State Party, or can do so by declaration if it is a non-State Party. See also Arts 13(a) and 14.
\textsuperscript{24} Arts 13(c) and 15 ICC Statute. These investigations must be authorized by the Pre-Trial Chamber.
\textsuperscript{25} Art 13(b) ICC Statute. The UN Security Council must exercise its Chapter VII powers when making any such referral.
\textsuperscript{26} Decision on the admissibility of the case against Abdullah Al-Senussi, \textit{Gaddafi and Al-Senussi, Situation in Libya}, ICC-01/11/01/11-466-Red, PTC 1, ICC, 11 October 2013, Section III.
willing and able to genuinely carry out such investigation and prosecution. Despite objections from the Defence, the ICC ruled in favour of the Libyan government, as it was both satisfied that the case they intended to pursue against Al-Senussi was the same as that before the ICC and that there was willingness and ability to genuinely proceed. Al-Senussi’s counsel has since appealed.\textsuperscript{27}

In addition to criminalizing international crimes, States Parties must be able to arrest and surrender suspects to the ICC, where requested.\textsuperscript{28} In addition, States Parties must cooperate with the ICC in relation to an investigation and/or prosecution with which the ICC might be seized.\textsuperscript{29}

In order to be able to fully cooperate with the ICC, a State Party is obliged to have a range of powers, facilities, and procedures in place, including the promulgation of laws and regulations. The legal framework for requests for arrest and surrender, and all other forms of cooperation, is set out in Part 9 of the Rome Statute. First, there is a general duty on states to cooperate fully with the ICC in the investigation and prosecution of crimes.\textsuperscript{30} Second, there is provision for requests of cooperation from the ICC.\textsuperscript{31} Failure to cooperate with the ICC following a request can, amongst other things, lead to a referral of the state to the UNSC.\textsuperscript{32} Article 88 obliges states to ensure that national procedures are in place to enable all forms of cooperation contemplated in the Statute. Unlike inter-state cooperation in criminal matters, the Rome Statute prescribes that for States Parties there are no grounds for refusing ICC requests for arrest and surrender.\textsuperscript{33} States are therefore obliged, under the relevant arrest and surrender processes provided in their own national laws, to effect arrests and to surrender persons, where an ICC arrest warrant has been issued. It should be borne in mind that the AU has, since its 2009 Decision on the ICC,\textsuperscript{34} reiterated its position on non-cooperation in respect of the arrest and surrender heads of state and that Al Bashir has, as a result, remained at large. Despite pronouncements of support by various African countries, none has actually arrested Al Bashir. Further, in the absence of a warrant for the arrest of Kenyatta, several African countries have come out in support of the Kenyan President. Interestingly, the ICC in its decisions has considered the views of African heads of state, whether in agreement or otherwise. In his obiter dicta on the relationship between the ICC and African states, Nigerian Judge Eboe-Osuji noted that the ICC should give more credence to the views of African leaders.\textsuperscript{35} This

\textsuperscript{27} See Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi’, and Request for Suspensive Effect, Gaddafi and Al-Senussi, Situation in Libya, ICC-01/11-01/11-468-Red, Defence, ICC, 17 October 2013.

\textsuperscript{28} While this is a duty for States Parties, non-States Parties can and are encouraged to cooperate with the ICC. In March 2013 the United States transferred Bosco Ntaganda to the ICC after he surrendered himself to their embassy in Rwanda.

\textsuperscript{29} The extent of cooperation required of States Parties is evident from the fact that the Office of the Prosecutor has a very wide mandate to ‘extend the investigation to cover all facts’ and investigate circumstances generally ‘in order to discover the truth’: Art 54(1)(a) ICC Statute.

\textsuperscript{30} Art 86 ICC Statute.

\textsuperscript{31} Art 87(1)(a) ICC Statute.

\textsuperscript{32} Art 87(7) ICC Statute.

\textsuperscript{33} See Art 89 ICC Statute. Note that Art 97 provides for consultation where there are certain practical difficulties.

\textsuperscript{34} AU Assembly Decision (n 2).

\textsuperscript{35} Concurring separate opinion of Judge Eboe-Osuji, Order vacating trial date of 5 February 2014, convening a status conference, and addressing other procedure matters, Kenyatta, Situation in the Republic of Kenya, ICC-01/09-02/11-886-Anx, TC V(B), ICC, 23 January 2014, para. 4

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view, however controversial, cannot be entirely dismissed, as it goes to the heart of the ongoing friction that could have an adverse effect on the work of the ICC.

### 4.4 Complementarity in Action

There is a broader understanding of complementarity emerging in Africa. This broader understanding somewhat falls within the notion of ‘positive complementarity’, i.e. that the ICC and states should actively encourage genuine national proceedings where possible, and that national and international networks should be relied upon as part of a system of international cooperation. At the heart of positive complementarity is a strong view that the ICC and domestic jurisdictions share a common responsibility. Thus positive complementarity can be seen as the opposite of ‘passive’ complementarity in that it ‘welcome[s] and encourage[s] efforts by States to investigate and prosecute international crimes and recognize[s] that such national proceedings may be an effective and efficient means of ending impunity’.

Some individual African states have shown their commitment to ending impunity for international crimes despite the impression to the contrary created by the AU’s negative position towards the ICC and statements by some statesmen. The obvious illustration of this is the fact that 34 African countries are party to the Rome Statute, at the time of writing eight had already adopted domestic implementing legislation, a further 16 have some form of draft legislation, four have referred situations to the ICC, and most comply with the Court’s requests for cooperation.

Across the continent, there are many examples of international criminal justice in practice. For example, in the DRC, South Africa and Uganda there is evidence of (broad) complementarity in practice. It should be noted that there are other countries that are investigating and prosecuting international crimes in Africa and that the three countries covered below are simply used to illustrate African complementarity.

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37 Stahn (n 36) 101.


39 The eight countries that have passed implementation legislation are Burkina Faso, the Central African Republic, the Comoros, Kenya, Mauritius, Senegal, South Africa, and Uganda. There are other countries that do not have implementing legislation but have incorporated some (or all) of the Rome Statute crimes into their penal codes, for example the Democratic Republic of Congo, Malawi, and Lesotho.

40 The Coalition for the International Criminal Court (CICC) estimates that 16 of the 34 African States Parties have drafts of domestic ICC legislation that are in various stages of completion; see CICC database on Sub-Saharan Africa, available at <http://www.iccnow.org/?mod=region&idureg=1> accessed 11 September 2014.
4.4.1 DRC

The DRC is a monist state, thus international treaties carry the same weight as constitutional law and can be directly applied. The DRC ratified the Rome Statute in March 2002, and theoretically the Rome Statute has been applicable domestically since then. In April 2004 the government of the DRC referred the situation in the eastern provinces of the country, alleging that crimes within the jurisdiction of the ICC were being committed. The ICC’s Office of the Prosecutor (OTP) launched investigations and as of April 2014, these have resulted in six arrest warrants being issued, half of which were related to the conflicts in Ituri and the other half to the provinces of North and South Kivu. Thus far, the ICC has conducted trials against three of the accused. The first convictions were secured against Thomas Lubanga Dyilo in March 2012, for the recruitment of child soldiers to actively participate in hostilities in Ituri, and Germain Katanga in March 2014, as an accessory to one count of crimes against humanity and four counts of war crimes committed during the attack on the village of Bogoro, Ituri. Mathieu Ngudjolo Chui was acquitted in December 2012 and released from custody, while the charges against Callixte Mbarushimana were not confirmed. The case against Bosco Ntaganda is ongoing, whereas Sylvestre Mudacumura is still at large.

The DRC, in complementing the jurisdiction of the ICC and in an effort to ensure that justice is done not only for those indicted by the ICC but for all perpetrators, adopted a new military code—the Military Penal Code Law 024/2602—that criminalizes war crimes, crimes against humanity, and genocide, and provides for their investigation and prosecution. Pursuant to this law, the military in the eastern provinces of South and North Kivu have undertaken domestic prosecutions of international crimes and continue to pursue additional cases. In addition, in 2006 the government passed a national law on sexual violence, which clearly defines rape and other forms of sexual and gender-based violence, and provides for expedited judicial proceedings and greater protection for victims.

41 Arts 153 and 215 of the 2005 Constitution of the Democratic Republic of Congo provide that civilian and military courts may apply ratified treaties, even in the absence of implementing legislation, so long as they are ‘consistent with law and custom’.
44 Decision on the confirmation of charges, Mbarushimana, Situation in the Democratic Republic of the Congo, ICC-01/04-01/10-465-Red, PTC I, ICC, 16 December 2011; Judgment pursuant to Art 74 of the Statute, Ngudjolo, Situation in the Democratic Republic of the Congo, ICC-01/04-02/12-3-tENG, TC II, ICC, 18 December 2012.
45 Warrant of arrest, Ntaganda, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06-2-Anx-tENG, PTC I, ICC, 22 August 2006; Decision on the Prosecutor’s Application under Art 58, Mudacumura, Situation in the Democratic Republic of the Congo, ICC-01/04-01/12-1-Red, PTC II, ICC, 13 July 2012.
The establishment of mobile gender courts in South Kivu has contributed to the domestic efforts to prosecute international crimes in the DRC. These courts were set up to prosecute rape and other serious crimes and ‘have prosecuted hundreds of mostly direct physical perpetrators of sexual violence’. The work of the mobile gender courts has been described as ‘a promising indication of what can be achieved with targeted national support when domestic courts are both able and willing to prosecute very grave crimes’. Notably, on 21 February 2011 Lieutenant Colonel Mutuare Kibibi became the most senior commander in the Congolese army to be found guilty of crimes against humanity, for ordering the mass rape of at least 49 women in the town of Fizi on New Year’s Day 2011. Eight soldiers under his command were also convicted.

While other international crimes are committed in the DRC, trials conducted to date have focused primarily on sexual and gender-based violence by armed groups and to a lesser extent by civilians. This owes in large part to the fact that the use of sexual violence as a weapon of war has been prevalent in the DRC. However, it is important that the DRC also prosecutes other international crimes.

The DRC government has demonstrated its commitment to international criminal justice both through cooperation with the ICC and instituting proceedings in its domestic courts. This has not been without difficulty. First, the DRC has been embroiled in conflict for over a decade and the areas in which international crimes are being committed are largely out of government control. Second, the prosecution of international crimes in the DRC has been done in the absence of domestic implementing legislation that provides a procedure to enable domestic prosecutions within the civilian justice system. Consequently, the majority of those prosecuted have come from army ranks. Third, amongst other challenges facing the criminal justice system, there is a lack of qualified investigators, lawyers, and judges with the requisite knowledge of international criminal law.

Despite these challenges, the DRC’s efforts manifest a working example of complementarity on the continent through the various domestic prosecutions completed or under way. The case of the military tribunals in the DRC highlights the challenges and opportunities for home-grown initiatives aimed at responding to international crimes.

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4.4.2 South Africa

South Africa incorporated the Rome Statute into its domestic law by means of the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (‘South Africa ICC Act’). Prior to the ICC Act, the core international crimes of war crimes, crimes against humanity, and genocide had not been criminalized in South African law. The ICC Act, like the Rome Statute, has limited temporal jurisdiction in that no action may be brought against a person for crimes committed before 1 July 2002.53 Further, South Africa has implemented the Geneva Conventions and provides for the prosecution of grave breaches in domestic courts.54

The ICC Act provides for a structure for national investigation and prosecution of international crimes in line with the principle of complementarity. Section 3 of the ICC Act provides that one of the objectives is to enable ‘the National Prosecuting Authority to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances’.55 This provision clearly provides South Africa with extra-territorial jurisdiction. In addition to having jurisdiction over people who are South African and/or commit crimes against South Africans, section 4(3) of the ICC Act provides for the prosecution of individuals that are not South African (nor ordinarily resident in South Africa), who after the commission of the crime are present in the territory of South Africa.56

In 2003 South Africa established a Priority Crimes Litigation Unit (PCLU) within the National Prosecution Authority (NPA) tasked with the ‘prosecution of crimes contemplated in the Implementation of the Rome Statute of the International Criminal Court Act’, amongst other serious offences.57 A Special Director of Public Prosecutions (DPP) who manages and directs any such prosecution heads the PCLU. It is important to note that the PCLU’s mandate is extensive, with the unit being responsible for directing investigations and prosecutions relating not only to crimes under the Rome Statute, but also to national and international terrorism, weapons of mass destruction, mercenaries, matters emanating from the post-apartheid Truth and Reconciliation Commission process, and any other priorities as determined by the National DPP. To carry out this broad mandate, the PCLU has just five advocates and one administrator.

The PCLU depends on the cooperation of the South African Police Services (SAPS) when it comes to the investigation of crimes within its mandate. In 2009 a Directorate for Priority Crimes Investigation (DPCI) was established with a mandate to investigate, *inter alia*, international crimes as contained in the Rome Statute.58 Within the DPCI, a 26-member unit—the Crimes Against the State (CATS) unit59—is responsible

53 Section 5(2) of the South Africa ICC Act.
55 Section 3 of the South Africa ICC Act. 56 Section 4(3)(c) of the South Africa ICC Act.
58 Section 17C of the Police Service Act 1995 (South Africa) as amended by the Police Service Amendment Act 57 of 2008 (South Africa).
59 The CATS unit was established in 2005 and pre-dates the establishment of DPCI, but has since been subsumed into the DPCI framework.

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for the actual investigation of international crimes. Like the PCLU, the CATS unit is tasked with investigating a range of other serious offences such as acts of terror, offences related to the unlawful use or transfer of firearms and other deadly weapons, organized crime, and acts which may pose a serious threat to the security of the state such as treason and sedition.

The broad mandates of the PCLU and CATS units have important implications for their ability to devote specific attention to Rome Statute crimes. Nevertheless, the PCLU and CATS units have dealt with a number of cases, most of which were brought to their attention by civil society or advocacy groups. Most notably, the PCLU was approached by the Southern African Litigation Centre and Zimbabwe Exiles Forum to open a case in respect of alleged acts of torture committed by Zimbabwean police against anti-government activists in the run-up to the 2008 presidential election.\(^{60}\)

Further, in 2011 the Media Review Network (MRN) and the Palestinian Solidarity Alliance (PSA) compiled and submitted a lengthy dossier to the PCLU in which they detailed international crimes allegedly committed in the Gaza Strip by Israeli authorities.\(^{61}\) The dossier implicated, amongst others, the then Israeli Foreign Minister Tzipi Livni, and sought arrest warrants.\(^{62}\) The DPCI decided not to investigate further, contending that there was insufficient evidence to proceed.\(^{63}\) Nevertheless, Livni publicly announced that her planned visit to South Africa would not proceed.

In 2012 the PCLU was called upon to seek a warrant for the arrest of the late Prime Minister of Ethiopia Meles Zenawi, ahead of his visit to South Africa, for alleged crimes against humanity and genocide against the Ogadeni people.\(^{64}\) A similar request was made by civil society for former British Prime Minister Tony Blair in August 2012 in respect of crimes committed by British soldiers in Iraq and Afghanistan.\(^{65}\) Both requests were declined. The first international crime case that the NPA has decided to proceed with is that in respect of abuses committed in Madagascar in 2009, with a view to prosecuting the country’s ousted former President Marc Ravalomanana.

Through the domestication of the Rome Statute and the establishment of specialized units tasked with the investigation and prosecution of international crimes, South Africa is taking steps to meet its complementarity obligations. Moreover—to the extent that the ICC Act and the Geneva Conventions Act provide for universal jurisdiction—South African authorities can investigate and prosecute crimes that fall outside the Rome Statute system’s net: namely, those occurring in states that are not ICC members, or by nationals of such states, as in the Ethiopia, Israel–Gaza, and Zimbabwe cases mentioned earlier.

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\(^{60}\) Southern African Litigation Centre and another v National Director of Public Prosecutions and others 2012 (10) BCLR 1089 (GNP). It should be noted that after a refusal to initiate investigations, the NPA and others were taken to court. In May 2012 the North Gauteng High Court ruled that there was an obligation on justice authorities to investigate the alleged crimes against humanity.


\(^{62}\) Ibid.

\(^{63}\) ‘South Africa Rejects Livni Arrest Call’, Al Jazeera, 19 January 2011.


\(^{65}\) R Davis, ‘Call to Arrest Tony Blair during SA Visit Gains Momentum’, Daily Maverick, 27 August 2012.
It should be noted that the NPA or the police initiated none of the above South African examples. However, this is not necessarily an indication of a lack of commitment to international justice on the part of the authorities. One sign that the South African authorities are committed to the principles of the Rome Statute is the ongoing efforts to build capacity among the prosecutors and investigators who work on international crimes. Since 2008 the Institute for Security Studies has provided training to the NPA (and more recently, also the CATS unit in the police) on international criminal justice, the Rome Statute, and the ICC Act. This training has been provided within the context of broader programmes that cover other crimes falling within the mandates of these units as well as technical aspects of international cooperation in criminal matters such as mutual legal assistance and extradition.

In addition to the work of the specialized units, the South African government has been compelled to take a position on international criminal justice by civil society in various instances. The first example is the action taken by civil society in South Africa to seek a court order for the arrest of Al Bashir if he attended President Zuma’s inauguration in Pretoria. After the press reported in early May 2009 that the South African government had invited Al Bashir to attend Jacob Zuma’s inauguration as South Africa’s new President on 9 May 2009, civil society responded swiftly. A number of influential civil society organizations issued a media statement on 7 May 2009 which called on South Africa to take heed of its international and domestic obligations (stemming from the ICC Act) and not welcome Al Bashir. Civil society also threatened court action against the South African government were it to renege on its obligations. In the end, Al Bashir did not attend, and the threatened court application was not necessary.

The second example comes from the mobilization by civil society to lobby for the South African government to reconsider its endorsement of the AU’s 2009 Decision not to cooperate with the ICC in the arrest and surrender of Al Bashir. On 15 July 2009, 17 South African civil society organizations and many concerned individuals issued a statement in which they called upon President Zuma to honour South Africa’s treaty obligations by cooperating with the ICC in relation to the warrant of arrest issued for Al Bashir. The statement included signatures from high-profile South

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66 Du Plessis et al. (n 4).
67 During this time a Pretoria Magistrate issued a domestic warrant for the arrest of Al Bashir.

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African personalities including Judge Richard Goldstone and Archbishop Emeritus Desmond Tutu.

The South African government subsequently clarified South Africa’s position and reiterated its support for international criminal justice. Through a statement by the Department of International Relations and Cooperation, the South African government publicly stated that it was committed to the Rome Statute and would arrest Al Bashir if he arrived in the country.\(^69\) The statement also disclosed that an arrest warrant had been issued for Al Bashir by a senior magistrate.\(^70\)

This conduct by civil society and the government in South Africa—in support of the arrest warrant issued by the ICC for Al Bashir—is a meaningful example of domestic initiatives taken to complement the work of the ICC. It is worth noting that the civil society process in South Africa provided the impetus for a similar Africa-wide initiative that resulted in 165 civil society organizations from across the continent releasing a statement on 30 July 2009 urging all African States Parties to reaffirm their commitment to the ICC, especially with regard to the arrest of Al Bashir.\(^71\) Several ad hoc statements have been issued since.

4.4.3 Uganda

Uganda has domestic implementing legislation for the Rome Statute, namely *The International Criminal Court Act, 2010* (‘Uganda ICC Act’). Consequently, Uganda can investigate and prosecute the international crimes enunciated in the Rome Statute. The legislation allows for limited universal jurisdiction,\(^72\) which is indicative of its commitment to dealing with international crimes beyond its borders. It should be borne in mind that Uganda was the first country to refer crimes committed within its borders to the ICC.\(^73\) The government referred the situation in northern Uganda and investigations were initiated in July 2004.\(^74\) Consequently, the ICC has established a field office in Kampala to support its operation in Uganda.

In 2008, further to the Juba Peace Agreement between the Government of Uganda and the LRA, the government established a War Crimes Division to try perpetrators of international crimes. The division, later rebranded as the International Crimes Division (ICD), is a specialized division of the High Court with the jurisdiction to


\(^{70}\) Ibid.

\(^{71}\) For the statement released on 30 July 2009, see <http://www.issafrica.org/pgcontent.php?UID=18893> accessed 11 September 2014. Both these initiatives subsequently contributed to the formation of an African network of civil society concerned with ending impunity that works actively across the continent on international justice issues. One of the products of this network is the web portal for the African Network on International Criminal Justice operated by the ISS. See <http://www.issafrica.org/anicj/> accessed 11 September 2014.

\(^{72}\) Section 18(d) ICC Act (Uganda).

\(^{73}\) ‘President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC’, *ICC Press Release*, 29 January 2004.

try not only cases relating to war crimes, genocide, and crimes against humanity, but also other serious transnational crimes including terrorism, human trafficking, piracy, and any other international and transnational crimes as provided by the Penal Code Act (Uganda), the Geneva Conventions Act, and any other applicable laws.\(^{75}\) Thus, the mandate of the ICD, like that of the specialized units in South Africa previously outlined, is much broader than just the Rome Statute crimes.

The ICD has a small staff complement with five judges and a registrar, along with a team of 6 prosecutors and five police investigators attached to it. Nevertheless, the designation of officers from the judiciary, prosecution, and police has led to the development of competence and speciality to handle international and transnational crime cases. The ICD has benefited from tailored capacity-building offered by various stakeholders.\(^{76}\) For example, since March 2011 the ISS has provided the ICD with intensive training workshops on international criminal justice, counter-terrorism, and mechanisms for international cooperation. The judges and the registrar of the ICD have also benefited from exchange programmes or study tours to the ICC and the ICTR. The judiciary and various local and international NGOs have facilitated these different projects aimed at building the capacity of the ICD. Similar training has been provided for prosecutors and selected investigators and magistrates through the office of the DPP.

The ICD began its operations in 2011 with the war crimes case against Thomas Kwoyelo, a former commander of the LRA,\(^{77}\) who was charged under Uganda’s Geneva Conventions Act for grave breaches of the Geneva Conventions. Kwoyelo was also charged with 65 counts of war crimes. However, his case was halted after a referral by his defence team to the Constitutional Court.\(^{78}\) The referral relates to the refusal by the Office of the DPP to facilitate the granting of amnesty to Kwoyelo by the Amnesty Commission under the Amnesty Act 2000 (Uganda). The Constitutional Court ruled that Kwoyelo qualified for amnesty.\(^{79}\) In addition to the Kwoyelo case, the ICD has been involved in investigations into crimes committed in Northern Uganda and is currently dealing with a matter against a top commander of the Allied Defence Force whose group burnt 80 students to death in 1998.

Uganda is attempting to address international crimes at the domestic level, but the Amnesty Act has hindered prosecution efforts.\(^{80}\) Part 11 of the Amnesty Act gave a blanket amnesty to all those who renounced the LRA rebellion. According to the head of prosecution at the ICD, Joan Kagezi, many cases were investigated and presented in court only for the accused persons to seek amnesty and subsequently evade justice.\(^{81}\) It

\(^{75}\) The ICD is a special division established under the Constitution 1995 (Uganda).


\(^{78}\) Ibid.

\(^{79}\) After the Constitutional Court ruling, the ICD deferred Kwoyelo’s release to the DPP of Uganda and the Amnesty Commission. Since then, a legal battle has ensued relating to the process of issuing Kwoyelo with an amnesty certificate. Kwoyelo remains in prison and has still not received his amnesty certificate from the authorities.


is worth noting, however, that Part 11 of the Amnesty Act lapsed in 2011 and amnesty certificates can no longer be issued. This, then, presents important opportunities for Uganda in terms of its future complementarity obligations as well as broader efforts to close the impunity gap in cases where the ICC does not have jurisdiction.

As the ICD pursues these opportunities, the challenges encountered thus far in investigating, prosecuting, and adjudicating international crimes will need to be confronted. These include, first, that because the LRA has since migrated out of Uganda, gathering evidence outside the country has proved challenging especially when cooperation from neighbouring states is not forthcoming. Second, the ICD is under-staffed and under-resourced, which makes its work difficult. Third, similar to South Africa’s specialized investigation and prosecution units, the ICD has an expansive mandate that is not limited to international crimes and this requires that all staff develop specialized expertise on a wide range of crimes.

4.5 Expanding the Jurisdiction of the African Court

In 2009 the AU resolved to seek the expansion of the proposed African Court on Justice and Human Rights’ mandate to include jurisdiction over specific criminal matters, including international crimes. The AU Commission began a process in February 2010 to amend the Protocol on the Statute of the African Court to include provisions in this regard. The resulting draft Protocol adds criminal jurisdiction over the international crimes of genocide, war crimes, and crimes against humanity, as well as several transnational crimes such as terrorism, piracy, and corruption. By June 2013 the African government legal experts, Ministers of Justice, and Attorneys General had considered and adopted the draft Protocol. In June 2014, the AU Assembly adopted the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights at the 23rd AU Summit in Equatorial Guinea. It is now open to ratification.

It has been argued that vesting the African Court with international criminal jurisdiction is a worthy development to end impunity. In principle, such expanded jurisdiction would be beneficial, but it remains to be seen whether it is likely in practice. It should be noted that the draft, in its current form, still contains some problematic provisions. This is arguably due to the fact that in coming up with the draft Protocol, the AU Commission gave civil society and external legal experts little opportunity to comment. Further, the draft Protocol was never made available on the AU’s website, or publicly posted for comment in other media. The AU would have benefited from

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82 Ibid.
84 With the exception of Art 28E relating to the crime of unconstitutional change of government, which presents definitional problems that require more attention. See du Plessis et al. (n 4) for an in-depth discussion. See also M du Plessis, ‘Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes’, ISS Africa (2012).
86 African Court Roundtable Report, Institute for Security Studies (24 April 2012) (on file with the authors).
a broader process of consultation relating to jurisdiction, the definition of crimes, immunities, institutional design, the practicalities of administration and enforcement, and the impact on domestic laws and obligations, considering that all of these require careful examination.\textsuperscript{87}

According to the AU Commission, the proposed expansion of the African Court is not motivated by the noted anti-ICC sentiment in decisions of the AU Summit since 2009. The process of expanding the African Court’s jurisdiction originates in the AU’s requirement to deal with three issues. First, the AU alleges that there has been a misuse of the principle of universal jurisdiction by countries. Second, the AU sought to address the challenges brought about by the process of Senegal prosecuting the former President of Chad, Hissène Habré. Last, the need to give effect to Article 25(5) of the African Charter on Democracy, Elections, and Governance that requires that the AU formulate a new international crime to deal with unconstitutional changes of government.\textsuperscript{88} However, it cannot be ignored that the impetus to expand the jurisdiction of the African Court came in the aftermath of the ICC arrest warrant for Al Bashir. It is thus likely that the recent tension between the AU and the ICC in this regard (and more recently in relation to the Kenyan situation before the ICC) influenced the process.

Another concern relates to the African Court’s extensive jurisdictional reach. The proposed expanded material jurisdiction of the Court means that the criminal chamber would be expected to try the established international crimes, and a host of other crimes. The implications of this expansive jurisdiction on the Court’s capacity to fulfil its obligations cannot be overstated. Indeed, the African Court would still be expected to deal with general and human rights cases.

Further, ensuring that justice can be done to the Court’s wide jurisdiction will be an expensive exercise. Financial resources are necessary to ensure that the African Court is staffed with the right people with the relevant expertise and technical capacity to handle international criminal trials. By way of example, the ICC’s budget—currently for investigating just three crimes, and not the range of offences the African Court is expected to tackle—is more than 14 times that of the African Court without a criminal component; and is just about double the entire budget of the AU.\textsuperscript{89}

Finally, given that the African Court would deal with crimes currently under the jurisdiction of the ICC, it is necessary to consider whether there will be a relationship between these two courts. It must be recalled that 34 of the 54 African states are party to the Rome Statute. With this in mind, it is imperative that the relationship between the ICC and the African Court be addressed.\textsuperscript{90} First, the issue of which court will have primacy should be dealt with. Given that the draft Protocol makes no reference to the

\textsuperscript{87} Du Plessis, ‘Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes’ (n 84)

\textsuperscript{88} Deya (n 85).

\textsuperscript{89} Du Plessis, ‘Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes’ (n 84).


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ICC, and membership to the ICC is reserved to states, countries that are already party to the Rome Statute might need to enact domestic legislation to enable a relationship with the expanded African Court that does not undermine the ICC. By contrast, the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, which similarly would establish a new system for the prosecution of such crimes, envisages a complementary relationship to the ICC's Rome Statute.\footnote{L. Sadat, A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, Whitney R. Harris World Law Institute Crimes Against Humanity Initiative (2010).}

The mentioned challenges notwithstanding, it must be noted that pending the establishment of a criminal chamber, there is positive potential for the existing African Court to strengthen or complement the international criminal justice project. Of significance is the evolving work of the African Court (with the support of the African Commission). For example, in 2011 the African Court on Human and Peoples' Rights made a unanimous Order for Provisional Measures in respect of the crisis that was unfolding in Libya.\footnote{Order for Provisional Measures, African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya, 25 March 2011, App No 004/2011.} The Order, issued on 25 March 2011, demanded that Libya 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons' and report back to the African Court within 15 days on the 'measures taken to implement this Order'.\footnote{Ibid., para. 25 (2)} It was made \textit{pro proprio motu} by the Court in the course of its consideration of an application brought urgently against Libya by the African Commission on Human and Peoples’ Rights on 16 March 2011 alleging ‘serious and massive violations of human rights guaranteed under the African Charter on Human and Peoples’ Rights’.\footnote{The African Commission submitted the application pursuant to Art 5(1)(a) of the African Court Protocol. It also submitted the petition in accordance with Rule 118(3), which provides that the Commission may submit a matter to the Court in a situation that in its view constitutes serious and massive human rights violations as provided for under Art 58 of the African Charter.} The Court chose to take up the matter, having made a prima facie determination that it has jurisdiction to hear the case—and it ordered Libya to respond to the application within 60 days.\footnote{The Libyan government never responded and there was no follow-through.}

The African Court’s actions in response to the Commission’s application were both timely and bold. The African Court appreciated the urgency of the matter and made its order without eliciting the views of the parties to the matter, on the basis of the imminent risk to human life and the difficulty in scheduling an appropriate hearing involving Libya.\footnote{J. Oder, 'The African Court on Human and Peoples’ Rights’ Order in Respect of the Situation in Libya: a Watershed in the Regional Protection of Human Rights?' (2011) 11 African Human Rights Law Journal 495.} The Court relied on the information contained in the Commission’s application. Specifically, the African Court referred to statements of the AU, the Arab League, and UNSC Resolution 1970\footnote{See UNSC Resolution 1970 (26 February 2011) UN Doc S/RES/1970 in which the situation in Libya was referred to the ICC.} in support of its finding that the situation was of extreme gravity and urgency and that such measures were necessary to avoid irreparable harm to persons.
The intervention of the Commission first, and then the African Court, signalled that it is wrong to think of a common African position that homogeneously defines the continent’s position on human rights and impunity. The African Court’s decision confirmed that Gaddafi’s violent actions against his people continued in the face of international condemnation. Further, the African Court’s response fits within a deeper understanding of complementarity—that a regional court, cognizant of the role of the ICC in the Libyan context, could act as a complement to the ICC by insisting that Libya stop the ongoing atrocities.

The developments around the African Court and the African Commission should also be viewed within the wider global context of a move towards ‘quasi’ criminal jurisdiction for regional human rights courts and commissions. Further, and by way of emphasis, the prosecution of former Chadian President Hissène Habré in Senegal under the auspices of the AU and with the support of the Economic Community of West African States (ECOWAS) shows some commitment on the part of African states towards promoting international criminal justice.

4.6 Conclusion

Domestic justice is particularly relevant for Africa because of the scale of the atrocities committed on the continent and the need to effectively and efficiently address these. While the ICC provides some form of symbolic justice for the victims of grave crimes, this is limited, and for justice to be figuratively and literally ‘brought home’, domestic action is essential. Countries like the DRC, South Africa, and Uganda have taken this mantle and it is hoped that more efforts to close the impunity gap will emerge across the African continent.

The chapter notes that there is a vital role for civil society to play in this regard, either by bringing cases to the courts or through other forms of advocacy and activism aimed at ensuring governments promote international criminal justice. Further, civil society can serve as an intermediary on behalf of the victims of grave crimes, and can collaborate with governments to help build capacity in requesting African states, whether in the form of training, legal opinions, or expert legal assistance, to prepare and prosecute cases.

Furthermore, there is a role for the African Court to play—even without the proposed expanded jurisdiction. This too, though not contemplated under the Rome Statute system, can be viewed as a form of positive complementarity in the broadest sense. This broad understanding of complementarity emerging in Africa is key to the success of international criminal justice on the continent and beyond.

In conclusion, the words of Judge Goldstone in his memoir resonate:

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100 Goldstone is the former chief prosecutor of the ICTY and ICTR, and a respected champion of international criminal justice.

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The international community is no longer prepared to allow serious war crimes to be committed without the threat of retribution... If [the trend of wars, war crimes, misery and hardship is to end] then the international community will have to take positive steps to arrest it. One effective deterrent would be an international criminal justice system, sufficiently empowered to cause would-be war criminals to reconsider their ambitions, knowing that they might otherwise be hunted for the rest of their days and eventually be brought to justice.¹⁰¹

For Africa, this should not be the remit of the ICC alone. Indeed, there is an important role to be played by domestic justice systems, not least because of the primacy given to them by the Rome Statute. Already, some African states have important experience with domestic efforts. This experience not only aligns itself with the Rome Statute, but significantly with the Constitutive Act of the AU, and the push for 'African solutions to African problems'. Positive developments are welcomed and should be fostered.

10
Admissibility Challenges before the ICC
From Quasi-Primacy to Qualified Deference?

Carsten Stahn*

Magic mirror on the wall, who is the fairest one of all?
You... are fair; it is true.
But [someone else] is even fairer than you
From: Grimm's Fairy Tale, The Story of Snow White and the Seven Dwarves
(trsl. Margaret Hunt)

10.1 Introduction

The principle of complementarity is one the cornerstones of the Rome Statute (‘the Statute’) of the ICC. Admissibility determinations under Article 19 of the Statute have been subject to extensive contestation in the ICC context. Traditionally, they have been primarily viewed as instruments for the settlement of disputes over conflicts of jurisdiction. While open to states and defendants, they were largely conceived as a safeguard for the protection of domestic sovereignty interests. This formal vision stands in contrast to the broader systemic function of complementarity in the Rome system of justice and the environment in which the Court has come to exercise

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3 See Art 17(2).


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Admissibility Challenges before the ICC

jurisdiction. Much of the activity of the Court has focused on situations or countries that are engaged in conflict or post-conflict transitions. In this context, the very essence of sovereignty and the state itself is in flux. This has raised particular challenges for complementarity. In some instances, the Court has been viewed as a legitimate substitute of domestic jurisdiction (e.g. Katanga, Gbabgo). In other cases, it has been perceived as a competing forum (Libya), or even as an obstacle to domestic justice efforts (Kenya). 5

The Appeals Chamber of the ICC has adopted a rather technical and cautious approach towards complementarity. It has interpreted admissibility as a ‘two prong-test’, based on the distinction between inaction and domestic action. 6 It has further developed an ‘incident’-specific definition of the ‘same conduct’/’same case’ test which sets a high threshold for inadmissibility. 7 Through this jurisprudence, the Court has translated many of the complexities and underlying dilemmas of ICC engagement into formal questions of law and procedure. The interpretation of Article 17 has been a port of entry for admissibility challenges and clarification of core concepts, while the concept of ‘interests of justice’ under Article 53 has largely remained a dead letter in practice. 8 In the absence of alternatives, admissibility proceedings under Article 19 have become a channel to adjudicate different types of disputes: (i) disputes over the merits of ICC engagement with domestic consent (e.g. based on self-referrals), and (ii) state challenges to ICC intervention, grounded in transitional justice claims or more categorical objections to the exercise of ICC jurisdiction.

In particular, the methodology of admissibility assessments has come under criticism. It has become standard practice to assess the relevance of domestic action in admissibility proceedings, by virtue of a comparison of national measures with the ‘case’ before the ICC, at the time of the admissibility challenge. The Appeals Chamber introduced the image of the ‘mirror’ in order to explain its approach. It stated,

6 Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo, ICC-01/04-01/07 OA 8, AC, ICC, 25 September 2009, para. 78 (‘Katanga Appeals Judgment’). ([I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability). 7 Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’, Gaddafi and Al-Senussi, Situation in Libya, ICC-01/11-01/11 OA 4, AC, ICC, 21 May 2014, paras 71–3 (‘Gaddafi Appeals Judgment’); Judgment on the Appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October entitled ‘Decision on the admissibility of the case against Addullah Al-Senussi’, Gaddafi and Al-Senussi, Situation in Libya, ICC-01/11-01/11 OA 6, AC, ICC, 24 July (‘Al-Senussi Appeals Judgment’), para. 119. 8 See OTP, ‘Policy Paper on Interests of Justice’, September 2007 <http://www.icc-cpi.int/iccdocs/asp_docs/library/organ/otp/ICC-OTP-InterestsOfJustice.pdf> accessed 3 October 2014; C Stahn, ‘Judicial Review of Prosecutorial Discretion: 5 Years On’ in C Stahn and G Sluiter, The Emerging Practice of the International Criminal Court (Leiden/Boston: Brill 2009) 247–79.

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The Relationship to Domestic Jurisdictions

What is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating. This practice has been subject to challenge, from both states concerned and members of the Bench. In particular, Judge Ušacka has continuously expressed concerns against an overly strict interpretation of the requirement of similarity between ICC proceedings and state action. She argued that

if this test is to be applied in order to compare a case before the Court with a domestic case, the Court will come to wrong and even absurd results, potentially undermining the principle of complementarity and threatening the integrity of the Court.¹⁰

Requiring states to ‘copy’ ICC practice is a ‘double-edged’ sword. It encourages short-term justice response at the domestic level, and is likely to create artificial outcomes that lack sustainability. This contribution argues that it is time to turn the ‘mirror’ around and to reflect critically about the effects of this practice, as suggested by the crux of Grimm’s Snow White tale.

There is a discrepancy between the formal nature and constraints of admissibility procedures and the ongoing dynamics in situation countries. Complementarity is not static, but dynamic. In particular, the role of time and the space for ‘parallel engagement’ of the ICC and domestic jurisdictions has not received sufficient attention in the negotiations of the complementarity regime and existing jurisprudence.

This contribution seeks to re-think the status quo. It examines the existing legal framework and jurisprudence. It then investigates current dilemmas, in particular the required threshold for admissibility challenges, the accommodation of the ‘time factor’ in situations under scrutiny, and the role of the Court after a finding of inadmissibility. It argues that it is unhelpful to construe admissibility proceedings in an ‘all-or nothing’ fashion, i.e. as a binary and definitive choice of the proper forum of jurisdiction. It pleads for a more ‘elastic’ and ‘sustainable’ vision which allows for deference of cases, based on context-sensitive approaches and ongoing interaction between the Court and domestic jurisdictions.¹¹ It suggests giving greater attention to the concept of ‘qualified deference’, initially coined by Mark Drumbl in connection with the relationship between international criminal justice and transitional justice.¹² It proposes some practical ways to operationalize this concept in ICC admissibility practice in

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⁹ Gadaffi Appeals Judgment (n 7) para. 73; in the same vein Al-Senussi Appeals Judgment (n 7) para. 119.
¹⁰ Gadaffi Appeals Judgment (n 7), Dissenting Opinion of Judge Anita Ušacka, para. 48.
¹² See M Drumbl, Atrocity, Punishment and International Law (Cambridge: Cambridge University Press, 2007) 193–4; id., ‘Policy through Complementarity: The Atrocity Trial as Justice’ in Stahn and El Zeidy (n 1) 222–31, at 222 (‘[t]he ICC should accord national accountability mechanisms, broadly categorized, qualified deference in situations of potential jurisdictional overlap and competition. The deference is qualified, and hence rebuttable, which means that the international criminal law institution could assume jurisdiction in certain circumstances’).
order to mitigate existing tensions ('time management' of parallel proceedings, monitoring of deference, and 'conditional admissibility').

10.2 The Status Quo

Admissibility challenges have a particular status in ICC procedure. They are 'proceedings sui generis'. They are formally part of the criminal process (i.e. pre-trial or trial), but involve aspects of inter-state litigation and systemic considerations relating to the objectives of the Court, including the appropriate balance between its role as a 'watchdog' and its function as 'gentle incentivizer' of domestic proceedings. Article 19 challenges have been a testing ground for different conceptions of complementarity. Investigating and prosecuting international crimes is the 'overarching common goal of the Court and the States'. The Court has adopted a strongly ICC-centric vision in its existing case law. It is still in the process of identifying a proper balance between its own role and authority as a judicial body, consensual burden-sharing, and deference to domestic jurisdiction. Core definitions, principles (e.g. burden of proof), and tests are emerging in decisions and becoming 'routine vocabulary' in case law. But many underlying problems remain unresolved or in need of further specification.

In the Katanga case, it has become evident that Defence challenges are likely to remain unsuccessful in cases of self-referrals, which are often based on a tacit agreement between the prosecution and the referring state on the forum of jurisdiction. The Kenyan cases have triggered considerable debate on the 'same conduct' test, and the question to what extent existing interpretations of Article 17 make it unreasonably difficult for states to meet the requirements of the complementarity test. The ICC has been criticized for turning complementarity in effect into primacy of ICC jurisdiction, in light of its approach towards Article 17 and its legalistic justification of ICC authority

13 See Gaddafi Appeals Judgment (n 7), Dissenting Opinion of Judge Anita Usacka, para. 61.
15 Gaddafi Appeals Judgment (n 7), Dissenting Opinion of Judge Anita Usacka, para. 57.
19 See the critique by K J Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53 Harvard International Law Journal 202–49; W Schabas, An Introduction to the International Criminal Court 4th edn (2011) at 193 and Pitts (n 2) at 1339 (‘an approach more akin to the concurrent jurisdiction that was granted to the ICTR and ICTY, rather than the complementary jurisdiction that the Rome Statute drafters intended’). On complementarity and primacy, see M El Zeidy, ‘From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 bis of the ad hoc Tribunals’ (2008) 57 International and Comparative Law Quarterly 403–15.

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and intervention. The Libyan cases have partially reversed this trend. The Appeals Chamber clarified, *inter alia*, that 'there is no requirement in the Statute for a crime to be prosecuted as an international crime domestically'\(^2^0\). This jurisprudence leaves some space to enable the exercise of domestic jurisdiction. It further distinguished circumstances relating to the *Gaddafi* and the *Al-Senussi* cases, and upheld the first successful admissibility challenge in the history of the ICC, namely the inadmissibility decision in the *Al-Senussi* case, dated 11 October 2013.\(^2^1\) The Appeals Chamber specified that challenges relating to the fairness of proceedings and violation of due process rights of defendants in domestic proceedings do not per se constitute grounds for a finding of unwillingness.\(^2^2\) But many ambiguities remain.

### 10.2.1 Article 19 challenges in review

Existing challenges under Article 19(2) can be divided into two major categories: challenges by defendants and challenges by states. Both categories of challenges were originally drafted from the perspective of an antagonistic vision of ICC jurisdiction and domestic jurisdiction. This is clear from the title and wording of Article 19. They are conceived as challenges ‘to’ the jurisdiction of the Court. Article 19(2)(a) speaks of ‘challenges to the admissibility of a case’.\(^2^3\) The inherent assumption was that defendants would challenge admissibility to protect themselves from the exercise of jurisdiction by the ICC. Similarly, it was assumed that states would use Article 19 to prioritize domestic jurisdiction over ICC action. This is reflected in Article 19(2)(b), which ties the ground of challenge to domestic investigations or prosecutions.\(^2^4\)

This bipolar vision has become subject to closer scrutiny. In ICC practice, the defence has intervened on different grounds in admissibility proceedings. In some cases, defendants left it opaque whether they would prefer to be tried domestically. In other cases, they had a pronounced interest in being tried before the ICC, in light of standards of fairness in ICC procedure and potential lower sentencing (*Gaddafi*, *Al-Senussi*). The wording of the Statute remains vague in this respect. The drafters did not necessarily contemplate circumstances in which a defendant would have an interest in challenging the ‘inadmissibility’ of a case, following a successful state challenge.

Similarly, states have voiced conflicting priorities. While Kenya and Libya fall into the classical category of challenges that seek to uphold domestic jurisdiction, states such as the DRC, Côte d’Ivoire, or the CAR have failed to support defence challenges and argued in favour of the exercise of ICC jurisdiction. The fact that a state would support the exercise of ICC jurisdiction, or even encourage it through a voluntary decision to give priority to the ICC, does not fit into this traditional scheme.

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\(^2^0\) See *Al-Senussi* Appeals Judgment (n 7) para. 119.

\(^2^1\) Decision on the admissibility of the case against Abdullah Al-Senussi, *Gaddafi* and *Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11, PTC I, ICC, 11 October 2013 (*Al-Senussi Admissibility Decision’); *Al Senussi* Appeals Judgment (n 7).

\(^2^2\) *Al-Senussi* Appeals Judgment (n 7) paras 230 and 231. See Art 19(2)(a).

\(^2^3\) See wording in Art 19 (2) (b) (‘on the ground that it is investigating or prosecuting the case or has investigated or prosecuted’).

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Admissibility proceedings have brought out novel nuances in the interaction between the ICC and domestic jurisdiction. The Katanga case marked the first instance in which admissibility was challenged under Article 19. In its challenge, the defence argued that the ICC should defer to domestic jurisdiction since Katanga was subject to international crime allegations in the DRC, including a wider range of crimes (genocide, war crimes, crimes against humanity). The defence noted that ‘the “same conduct” test as developed and applied by the ICC Pre-Trial Chamber’ is a ‘wrong test’, since it ‘amounts to primacy’ and ‘could negatively impact on the purposeful design of the Statute—which was meant to encourage domestic proceedings’. It proposed an alternative methodology, namely a ‘comparative gravity-test’, geared at ‘comparing the gravity of the (intended) scope of investigations at the national level and the (intended) scope of investigations by the ICC Prosecutor’. According to this test, the admissibility threshold would only be met if ‘the scope of investigations by the ICC prosecutor would significantly exceed in gravity the scope of national investigations’. The Appeals Chamber discarded this reasoning, based on the wording of Article 17, and confirmed the ‘same conduct test’. It held that ‘in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court’. It added that ‘there may be merit in the argument that the sovereign decision of a state to relinquish its jurisdiction in favor of the Court may well be seen as complying with the “duty to exercise [its] criminal jurisdiction” as envisaged in the […] Preamble’. This justification opened up a new conceptual space for burden-sharing and a potential ‘sharing of labor’ between the ICC and domestic jurisdictions, as suggested in the 2003 OTP expert paper on complementarity and a ‘positive’ conception of complementarity.

This conception was reaffirmed in other contexts. In Bemba, the Defence challenged admissibility on the ground that domestic authorities in the CAR had allegedly taken a decision not to prosecute Bemba, which would require deference to domestic jurisdiction. It argued that domestic decisions entailed findings on the merits of the case which would bar ICC admissibility, since the state had ‘decided not to prosecute the person concerned’ within the meaning of Article 17(l)(b) of the Statute. The CAR

25 Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Art 19 (2) (a) of the Statute, Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo, ICC-01/04-01/07, 11 March 2009, para. 39.
26 Ibid., para. 43.
27 Ibid., para. 46.
28 Ibid., para. 46.
29 Katanga Appeals Judgment (n 6) paras 2, 75–8.
30 Ibid., para. 85.
33 Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’, Bemba, Situation in the Central African Republic, ICC-01/05-01/08OA3, ICC, AC, 19 October 2010, para. 48 (Bemba Appeals Judgment)

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authorities, which had referred the situation to the Court by way of a self-referral,\textsuperscript{34} contested this allegation and ‘clearly expressed’ the ‘wish to see Mr Bemba held accountable for the serious human rights violations committed on the territory of the CAR’.\textsuperscript{35} The Appeals Chamber conceded that a Trial Chamber ‘should accept \textit{prima facie} the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise’ when it determines the status of domestic judicial proceedings.\textsuperscript{36} But it rejected the appeal, noting that domestic proceedings did not amount ‘to a decision not to prosecute within the meaning of article 17 (1) (b) of the Statute’.\textsuperscript{37} It recalled that ‘a “decision not to prosecute” in terms of article 17 (1) (b) of the Statute does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC’.\textsuperscript{38}

In \textit{Laurent Gbagbo}, the Defence invited the Chamber ‘to interpret “conduct” in a flexible manner, focusing on the general conduct of the suspect in relation to the context in which the crimes were committed rather than the conduct related to the direct commission of the crimes’.\textsuperscript{39} It argued that ‘national proceedings for economic crimes constitute the same case as that under prosecution before the Court’.\textsuperscript{40} It submitted that ‘the short-sighted view of complementarity’ adopted by the Court ‘fails to take account of the wider goals of international criminal justice, in particular the need for national jurisdictions to build capacity to try such crimes domestically in order to involve the affected communities as part of the overall process of reconciliation and peace building’.\textsuperscript{41} The state concerned (Côte d’Ivoire) backed ICC admissibility, in line with its encouragement of ICC action through its declaration of acceptance of jurisdiction under Article 12 (3). It stated ‘that, in view of the initiation of proceedings before the Court against Mr Gbagbo, national authorities chose to refrain from opening an investigation into, or proceedings against Mr Gbagbo for violent crimes’.\textsuperscript{42}

Thus, in all three cases, state authorities sided with the ICC, rather than the defence, since they had an interest in seeing the case being tried internationally. They refrained from challenging ICC action, since they had triggered ICC involvement by consent, i.e. a self-referral (DRC, CAR) or a declaration under Article 12(3) (Côte d’Ivoire).\textsuperscript{43}


\textsuperscript{35} \textit{Bemba} Appeals Judgment (n 33) para. 57 (‘there was no decision not to prosecute Mr Bemba in the CAR’).

\textsuperscript{36} Ibid., para. 66.

\textsuperscript{37} Ibid., para. 68.

\textsuperscript{38} Ibid., para. 74, referring to \textit{Katanga} Appeals Judgment (n 6) para. 83.

\textsuperscript{39} Decision on the ‘Requête relative à la recevabilité de l’affaire en vertu des Articles 19 et 17 du Statut’, \textit{Laurent Gbagbo, Situation in the Republic of the Côte d’Ivoire}, ICC-02/11-01/11, PTC I, ICC, 11 June 2013, para. 11.

\textsuperscript{40} Ibid., para. 8.

\textsuperscript{41} Ibid., para. 12

\textsuperscript{42} Ibid., para. 32.


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The coin flipped in those situations in which the ICC engagement lacked consent of domestic authorities, i.e. in the context of Security Council referrals (Libya) or proprio motu action of the prosecutor against a defiant government (Kenya). Sudan could have challenged ICC action against leading suspects (e.g. Omar Al-Bashir, Ahmad Haroun), although it is not a State Party. But it deliberately chose not to engage all at in a judicial manner with the ICC. It therefore refrained from making a challenge under Article 19. The first official state challenge was brought by Kenya on 31 March 2011. Kenya sought to prioritize domestic justice options, following the issuance of summonses to appear for key Kenyan suspects in relation to the post-electoral violence. The second challenge was made by Libya on 1 May 2012. The Libyan government also preferred domestic justice for the trial of members of the former Gaddafi regime. The interests of the defence differed across the situations. While Kenyan defendants joined the 'government' line, Gaddafi and Al-Senussi opposed the government challenge and expressly requested surrender to the Court. The Gaddafi defence supported ICC admissibility, arguing that '[j]ustice will not be served by domestic proceedings', since they are 'so ineliminably tainted by violations of domestic law that either the defendant would have to be released, or, the proceedings will go down in history as a manipulated spectacle of victor’s revenge'. The Al-Senussi defence appealed the 11 October 2013 inadmissibility decision of the Pre-Trial Chamber, arguing that the case that 'should be tried at the ICC in accordance with the principle of complementarity', since Libya is not able to 'carry out genuine proceedings or willing to bring Mr Al-Senussi to justice in an impartial and independent manner, having regard to the recognised standards of due process under international law'. Defence motions were visibly driven by fairness concerns and fears relating to the application of the death penalty in Libyan proceedings.

In its jurisprudence, the ICC set high bars for admissibility challenges under Article 19(2)(b). In its challenge, Kenya questioned whether the admissibility test requires that the same persons be investigated by the national jurisdiction. It argued that the ICC should exercise discretion in the application of the principle of complementarity.

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44 Art 19 (2)(c).
47 Application on behalf of the Government of Libya pursuant to Art 19 of the ICC Statute, Gaddafi and Al-Senussi, Situation in Libya, ICC-01/11-01-11-130, 1 May 2012.
48 Defence Response on behalf of Mr Abdullah Al-Senussi to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’, Gaddafi and Al-Senussi, Situation in Libya, ICC-01/11-01-11-356, 14 June 2013, para. 11.
50 See Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the Admissibility of the Case against Abdullah Al-Senussi’, ICC-01/11-01-11-474, 4 November 2013, para. 3.

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to allow proceedings to progress, since there is a presumption in favour of national jurisdictions. The Pre-Trial Chamber rejected the challenge within eight weeks. The Appeals Chamber upheld the decision. It grounded the ‘same conduct’ test in the Statute. 52 It noted that a ‘case is only inadmissible before the Court if the same suspects are being investigated by Kenya for substantially the same conduct’. 53 It specified that a challenge under Article 19(2)(b) requires concrete investigative ‘steps directed at ascertaining whether…suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses’. 54 “The mere ‘preparedness to take such steps’ or ‘the investigation of other suspects’ would not be sufficient. 55

This requirement is compatible with the wording of Article 19(2)(b) (‘is investigating’), the structure of Article 17(1), and the nexus of Article 19 to the concept of the ‘case’. It strengthens the authority of the ICC to assert or maintain jurisdiction in cases of parallel domestic efforts. But it has been criticized on several grounds. One objection relates to the threshold for domestic action, and the tension between the ‘prong test’ and the ‘unwillingness’/‘inability’ limb of the complementarity test under Article 17(2) and (3). The existing test provides significant emphasis on inaction under Article 17(2). It blurs the boundaries to unwillingness or inability under Article 17(2) and (3) ‘by requiring a state to prove e.g. the existence of a full-fledged investigation or prosecution of a case in order to establish that there is no situation of inactivity’. 56

The second difficulty of the test is that it is based on an ‘either/or’ logic which makes it difficult to accommodate interaction between the Court and domestic jurisdictions or ‘positive complementarity’ approaches in the context of admissibility challenges. The Court formally separated the treatment of requests for ICC cooperation with domestic jurisdictions under Article 93(10) from admissibility challenges. It held that ‘a determination on the inadmissibility of a case pursuant to article 17 of the Statute does not [necessarily] depend on granting or denying a request for assistance under article 93(10) of the Statute’. 57 It then formulated strict conditions for dealing with a request under Article 93(10), arguing that:

the requesting State Party (Kenya) must have, at least, either conducted an investigation, or be doing so with respect to ‘conduct which constitutes a crime within the

52 See Muthaura, Kenyatta and Ali Appeals Judgment (n 18) paras 40, 41–3, 62; Ruto, Kosgey and Sang Appeals Judgment (n 18) para. 40. The same person/same conduct test may be derived from Arts 17(1)(c) and 20(3) which refer to ‘the same conduct’ in relation to the same person. The link between Art 17(1)(c) and the principle of ne bis in idem implies that a case must relate to the same person and the same conduct. A similar inference can be drawn from Art 90(1), which deals with the choice of forum allocation with respect to competing requests for extradition or surrender, and explicitly sets out the same person/same conduct test, relating it back to the tests for admissibility. Ruto, Kosgey and Sang Appeals Judgment (n 18), fn. 81.

53 Muthaura, Kenyatta and Ali Appeals Judgment (n 18) paras 40, 41, and 42.

54 Ibid., para. 41. 55 Ibid.

56 Muthaura, Kenyatta and Ali Appeals Judgment (n 18), Dissenting Opinion of Judge Anita Usacka, ICC-01/09-01/11-336, 20 September 2011, para. 27.

57 Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art 19(2)(b) of the Statute, Ruto, Kosgey and Sang, Situation on Kenya, ICC-01/09-01/11-101, PTC II, ICC, 30 May 2011, para. 34 (“This conclusion finds support in the fact that a State may exercise its national jurisdiction by way of investigating or prosecuting, irrespective of and independent from any investigative activities of the Prosecutor”).

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jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State’. This entails that the requesting State Party must show that it is at a minimum investigating or has already investigated one or more of the crimes referred to in article 5 and defined in articles 6–8 of the Statute. Alternatively, the State Party must demonstrate that it is either doing or has done so with respect to conduct constituting ‘a serious crime under the national law’.

As a result, a domestic state is unlikely to receive cooperation from the Court, unless it has started investigations relating to the ‘same case’. Read in conjunction with the jurisprudence on the ‘same conduct’ test, this approach leaves limited space to take into account emerging justice efforts under domestic jurisdiction. As highlighted by Judge Ušacka, this jurisprudence makes it difficult for states to start ‘taking investigative steps or prosecuting a case’ during admissibility proceedings, and virtually impossible for the Pre-Trial Chamber to adapt the admissibility proceedings to changing circumstances. It might thus be under-inclusive in relation to its accommodation of interests of state in transition. It provides, in particular, limited weight to the idea that ‘the overall goal of the Statute to combat impunity can also be achieved by the Court through means of active cooperation with the domestic authorities’.

In the Libyan cases, the ICC upheld these principles. Libya expanded on the arguments and challenges presented by the Kenyan government. It argued that the ‘same conduct’ test should be defined, ‘taking into account that “the state is to be accorded a margin of appreciation as to the contours of the case to be investigated, and the ongoing exercise of the national authorities’ prosecutorial discretion as to the focus and formulation of the case”’. It submitted that ‘a domestic prosecutor may legitimately hold genuine differences of opinion with the ICC prosecutor regarding the appropriate contours of a particular case and the overall interests of justice’. It claimed that ‘domestic authorities should not be unduly restrained in pursuing a national accountability agenda by being compelled to conduct an investigation and prosecution that mirrors precisely the factual substance of the investigation being conducted from time to time by the [OTP]’.

Libya argued that the notion of ‘conduct’ should be interpreted as referring to ‘criminal transaction’, implying that a case should be inadmissible where ‘domestic proceedings relate to similar and/or related incidents’.

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50 Muthaura, Kenyatta and Ali Appeals Judgment (n 18), Dissenting Opinion of Judge Anita Ušacka, para. 28.
52 Gaddafi Appeals Judgment (n 7), Dissenting Opinion of Judge Anita Ušacka, para. 55. In the Kenyan proceedings, the Court failed to address the question as to whether the investigative functions of the Truth, Justice, and Reconciliation Commission would be a bar to admissibility.
61 Al-Senussi Admissibility Decision (n 21) para. 33. 62 Ibid., para. 65 (adding that ‘[t]he Court, together with other international organisations and other States, is in an ideal position to actively assist domestic authorities in conducting such proceedings, be it by the sharing of materials and information collected or of knowledge and expertise’).
63 Ibid., para. 33.
64 Ibid., para. 33.

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which arise out of substantially the same course of conduct as that being investigated by the Court.\(^{\text{65}}\)

The Pre-Trial Chamber rejected this line of reasoning. It held that

[the principle of complementarity expresses a preference for national investigations and prosecutions but does not relieve a State, in general, from substantiating all requirements set forth by the law when seeking to successfully challenge the admissibility of a case.\(^{\text{66}}\)]

Drawing on previous jurisprudence, the Chamber set out a list of principles that may be said to form the core of existing ICC law on admissibility challenges:

i. a determination of admissibility is case-specific, the constituent elements of a case before the Court being the ‘person’ and the alleged ‘conduct’; accordingly, for the Chamber to be satisfied that the domestic investigation covers the same ‘case’ as that before the Court, it must be demonstrated that: (a) the person subject to the domestic proceedings is the same person against whom the proceedings before the Court are being conducted; and (b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court;

ii. the expression ‘the case is being investigated’ must be understood as requiring the taking of ‘concrete and progressive investigative steps’ to ascertain whether the person is responsible for the conduct alleged against him before the Court;

iii. the determination of what is ‘substantially the same conduct as alleged in the proceedings before the Court’ will vary according to the concrete facts and circumstances of the case and, therefore, requires a case-by-case analysis;

iv. the assessment of the subject matter of the domestic proceedings must focus on the alleged conduct and not on its legal characterisation;

v. a decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance and ‘for [a state] to discharge its burden of proof that currently there is not a situation of “inaction” at the national level, it needs to substantiate that an investigation is in progress at this moment’;

vi. the state must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case;

vii. evidence ‘is not only “evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged Crimes” but extends to “all material capable of proving that an investigation is ongoing”, including, for example, “directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions contained in the file arising from the [domestic] investigation of the case”’.\(^{\text{67}}\)

\(^{\text{65}}\) Ibid., para. 35.

\(^{\text{66}}\) Ibid., para. 27; see also Decision on the admissibility of the case against Saif Al-Islam Gaddafi, Gaddafi and Al-Senussi, Situation in Libya, PTC I, ICC, 31 May 2013, ICC-OI/Il-01/II-344-Red, para. 52.

\(^{\text{67}}\) Al-Senussi Admissibility Decision (n 21) para. 66.
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The Appeals Chamber upheld the existing matrix. It validated existing approaches, and, in particular, the idea that domestic action must ‘mirror’ ICC practice.68

10.2.2 Legal methodology in review

These principles reflect an inherent tension between ICC-centricity and contextualization. Through its reference to ‘case-by-case’ analysis in relation to ‘same conduct’, ICC jurisprudence seeks to take context into account in admissibility assessments. But the methodology adopted by the Court leaves de facto very little space for contextualization. States are judged across a set of uniform considerations that are based on a textual reading of the Statute. Both the timing and the necessity of action at the domestic level are predominantly driven by the investigative and prosecutorial choices of the ICC. This logic provides an incentive to reflect ICC standards in domestic action, which is in line with the idea of complementarity as a catalyst for compliance and the strengthening of accountability on a global scale.69 But it poses challenges in relation to differentiation of conditions, and potential discrepancies between a Hague-driven and a domestic or local vision of justice.

The ‘mirroring’ test carries the risk that states implement international standards primarily to satisfy international audiences: the ICC, international donors, NGOs, etc.70 This is likely to produce artificial results. If states strengthen domestic systems primarily for the sake of adjudicating specific cases domestically, reform efforts are geared towards ICC priorities rather than long-term domestic interests. This may ultimately run counter to the objective of the Rome Statute, which is to create a sustainable ‘system of justice’ with genuine domestic investigations and prosecutions.

A predominantly Hague-centred vision of complementarity also comes with certain potential ‘costs’. It may ‘undermine reasonable national efforts to prosecute by going against the logic of the burden-sharing goals of complementarity’, or ‘hinder the growth of effective national jurisdictions willing and able to prosecute the crimes, especially in Africa’.71

The current application of the admissibility regime of the ICC is not only an articulation of interpretive authority but also a manifestation of the exercise of ‘productive power’.72 Court action creates a social reality through its framing and choice of cases. Domestic states must adjust to this reality, and ‘model’ their own action after ICC proceedings, in order to be able to challenge admissibility successfully. Existing

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68 See (n 9).

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interpretations may be convincingly grounded in the law.\textsuperscript{73} But they have some disturbing side effects. They foster a bifurcation between advanced and less developed states. States with a functioning and efficient legal system may be able to meet the threshold set by the ICC. Less developed states, or states with a temporary dysfunctional judicial system, may lack the necessary resources and human capital to challenge ICC action, in order to give room to domestic processes.\textsuperscript{74}

Existing case law reflects a 'strange balance' between prerogatives of the ICC and deference to domestic jurisdiction. Controversies over the existence and scope of domestic investigations and prosecutions have become the main 'battlefield' of admissibility findings. In this context, jurisprudence has considerably constrained the space of domestic autonomy. By contrast, conditions of inability and unwillingness under Article 17(2) and (3) have been interpreted with greater flexibility and space for deference to domestic action. This vision of complementarity facilitates quick action by the ICC. But it pays limited attention to systemic integration between international and domestic justice, and broader challenges of sustainability.

\textbf{10.2.2.1 Article 17(1)—Too few prospects for deference?}

The existing interpretation of Article 17(1) provides hardly any space for an integrated understanding of complementarity, i.e. interaction between international and domestic justice. Since the very start, admissibility depends on the advancement of the prosecutor’s case.

The Statute contains an early opportunity for states to request deference to domestic proceedings under Article 18, within a period of one month after the notification by the prosecutor that the ICC intends to open an investigation into the relevant situation. At this stage of proceedings, the Statute expressly encourages ‘a dialogue between the state and the prosecutor to ensure that there is no overlap in their respective areas of interest’\textsuperscript{75} This is reflected in Article 18(5).\textsuperscript{76} But this provision has largely remained dead letter, since states supported the exercise of jurisdiction by the ICC, or lacked the means to seek deferral based on their own investigation and prosecutions. Under Article 18, it remains unclear how and by what criteria domestic action should be compared to prosecutorial action.\textsuperscript{77} Moreover, the very invocation of Article 18


\textsuperscript{76} It allows the Prosecutor to request periodic updates from states.

\textsuperscript{77} See also Ruto, Kosgey and Sang Appeals Judgment (n 18) para. 39 (speaking of the ‘relative vagueness of the contours of the likely cases in article 18’).
bears certain risks for a state in relation to a future challenge. Article 18(7) limits the prospects of a subsequent challenge under Article 19 to ‘grounds of additional significant facts or significant change of circumstances’.78

After the ‘Article 18 stage’, the space for dialogue is more limited. Domestic action is assessed against ICC action, which creates an environment of ‘competition’. States must meet ICC conditions to bring a successful challenge. The Appeals Chamber has introduced requirements for the ‘sameness’ of the ‘case’. But the object of comparison has long remained unclear. The Statute contains a paradox in relation to the ‘post-Article 18 stage’. Admissibility is formally tied to the notion of ‘case’. The prosecutor is deemed to take admissibility into account under Article 53 when deciding whether to move from preliminary examination to investigation. But at this stage, no ‘case’ exists formally. The prosecutor and the Pre-Trial Chamber still ‘operate within the parameters of an entire “situation”,’ rather than in relation to a specific “case”79 and it is thus more proper to speak of admissibility in relation to the ‘situation’.80 The Pre-Trial Chamber has solved this dilemma by tying admissibility to a hypothetical assessment ‘of one or more potential cases within the context of a situation’.81 It specified that:

admissibility at the situation phase should be assessed against certain criteria defining a ‘potential case’ such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).82

This ‘incident’-specific definition83 reduces the likelihood of overlap between ICC action and domestic activities, and the prospects of deference to parallel domestic activities at this stage. The Chamber further acknowledged that ‘the Prosecutor’s selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments’.84 In light of this remaining uncertainty, states have to challenge a ‘moving target’ when they seek to call into question admissibility.

In the context of admissibility challenges under Article 19, the adequacy of an ‘incident’-related interpretation of the ‘same conduct’ test has been subject to considerable dispute. Different versions of the test have been formulated. The prosecutor has traditionally defended a ‘pure’ version of the ‘same conduct’ test, based on a literal

78 See Art 18(7).
80 Ibid., para. 45 (‘accordingly, an assessment of admissibility during the article 53(1) stage should in principle be related to a “situation”’).
81 Ibid., para. 48.
82 Ibid., para. 50.
83 In the Gaddafi Appeal Judgment (n 7) para. 62, the Appeals Chamber defined ‘incident’ as ‘referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the court are allegedly committed by one or more direct perpetrators’.
84 Kenya Authorization Decision (n 79) para. 50.
and systematic reading of the Statute. This position has been blurred by the Appeals Chamber in the Kenyan decisions. The Appeals Chamber mysteriously added the word ‘substantially’ to the test, arguing that the domestic case must target the same person for ‘substantially the same conduct’. The Chamber failed to explain the origin, meaning, and legal basis of this differentiation. The formulation bears resemblance to Article 35(2)(b) of the ECHR, which specifies that the ‘Court shall not deal with any application submitted under Article 34 that … is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.’ This reasoning has triggered a vivid debate in the Libyan cases, as to whether ‘conduct’ refers to specific factual incidents or broader events, and which degree of symmetry is required between the two cases to declare a case inadmissible.

The prosecutor claimed that the addition of the word ‘substantially’ was not meant to modify the ‘sameness’ requirement per se, but rather described the ‘nature of the test’, i.e. the need for comparison, based on the ‘identity, symmetry or equivalence’ of national proceedings to the ICC case. The prosecution insisted that ‘conduct’ must always be understood as ‘incident-specific’. Libya defended a broader understanding of the ‘same conduct’ test, claiming that conduct relates essentially to the time, space, and subject matter of the accused’s alleged action. It argued that the domestic process must not necessarily mirror precisely what the ICC would do in the same circumstances. It submitted that an incident-specific interpretation of a ‘case’ would run counter to the object and purpose of the Rome Statute, since it undermines state discretion. It argued that the Statute only requires a state to investigate or prosecute ‘similar and/or related incidents arising out of substantially the same course of conduct as well as other serious allegations of crimes.’ It suggested that conduct relates to a ‘criminal transaction’, i.e. ‘a number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan’. The notion of ‘incident’ would merely serve as an indication as to whether the domestic criminal process addresses the ‘same conduct’.

ICC jurisprudence has diverged on this point. The Pre-Trial Chamber has adopted a flexible reading (‘broad mirror’ approach) that is closer to Libya’s position. It argued that domestic coverage of some or all incidents may constitute a relevant indicator

85 For a full statement, see Prosecution’s Response to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’, Gadafi and Al-Senussi, Situation in Libya, ICC-01/11-01/11, 2 May 2013, paras 33 et seq. (‘OTP Response’).
86 Mutua, Kenyatta and Ali Appeals Judgment (n 18) paras 40, 41–3, 62; Ruto, Kosgey and Sang Appeals Judgment (n 18) para. 40.
87 Emphasis added.
88 See OTP Response (n 85) para. 32 (‘Any other interpretation would render the decision internally inconsistent and manifestly unreasonable’).
89 Ibid., para. 58.
90 Ibid., para. 28.
91 Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Art 19 of the ICC Statute, Gaddafi and Al-Senussi, Situation in Libya, ICC-01/11-01/11-307-Conf-Exp, 2 April 2013, para. 60, as well as paras 72, 78, and 89.
92 Ibid., para. 73.
that the case is indeed the same. But it rejected a firmly incident-based reading of conduct, noting that "[w]hat is... required at every phase of the proceedings before the Court is that the alleged criminal conduct be sufficiently described with reference to precise temporal, geographic and material parameters", but "not that such conduct be invariably composed of one or more "incidents" of a pre-determined breadth."

The Appeals Chamber deviated from the Pre-Trial Chamber on this point on appeal. It defended a 'strict mirror' approach, stressing the key role of incidents in the determination of the 'sameness' of conduct, 'alongside the conduct of the suspect under investigation'. It argued that it is "hard to envisage a situation in which the Prosecutor and a State can be said to be investigating the same case in circumstances in which they are not investigating any of the same underlying incidents".

It related the formulation 'substantially the same' to the degree of overlap with the domestic case, and defended a case-by-case assessment. The explanation remained vague, and is likely to trigger further dispute in future cases. The Appeals Chamber stated:

The real issue is, therefore, the degree of overlap required as between the incidents being investigated by the Prosecutor and those being investigated by a State—with the focus being upon whether the conduct is substantially the same...If there is a large overlap between the incidents under investigation, it may be clear that the State is investigating substantially the same conduct; if the overlap is smaller, depending upon the precise facts, it may be that the State is still investigating substantially the same conduct or that it is investigating only a very small part of the Prosecutor's case. For example, the incidents that it is investigating may, in fact, form the crux of the Prosecutor's case and/or represent the most serious aspects of the case. Alternatively, they may be very minor when compared with the case as a whole.

This jurisprudence is marked by frictions. The Appeals Chamber derives the 'strict mirror' approach from statutory interpretation. But the parameters applied, i.e. 'substantial' sameness, and the incident-based interpretation of 'same conduct' are in essence jurisprudential creations. The case-by-case approach appears to suggest some flexibility in assessment. But the space for deference is in reality thin. The method of comparison promoted by the Appeals Chamber makes it difficult for states to challenge admissibility. It pays little attention to whether and how broader goals of international justice are achieved, since it largely excludes goals and context from the assessment.

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93 Al-Senussi Admissibility Decision (n 21) para. 77.
94 Ibid., para. 75.
95 Al-Senussi Appeals Judgment (n 7) para. 73.
96 Ibid., para. 72.
97 See Gaddafi Appeals Judgment (n 7), Dissenting Opinion of Judge Anita Usacka, para. 51 ("in my opinion, article 17 (1) (a) of the Statute, applied in accordance with the principle of complementarity, does not require domestic authorities to investigate '(substantially) the same' conduct as the conduct that forms the basis of the 'case before the Court').
98 Al-Senussi Appeals Judgment (n 7) para. 72.
99 For a broader focus, see Gaddafi Appeals Judgment (n 7), Dissenting Opinion of Judge Anita Usacka, para. 58 ("While there should be a nexus between the conduct being investigated and prosecuted domestically and that before the Court, this "conduct" and any crimes investigated or prosecuted in relation thereto do not need to cover all of the same material and mental elements of the crimes before the Court and also do not need to include the same acts attributed to an individual under suspicion").

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This might lead to awkward results. For instance, in some cases it might make sense to assess the genuineness of domestic investigations relating to incidents that the Court has not itself investigated, in order to make a proper choice on the appropriate forum. Such considerations are difficult to reconcile with the hard requirements set by the Appeals Chamber. Moreover, the ‘sameness’ test as a whole embraces a specific reading of complementarity. It supports the vision of ICC investigations and prosecutions as a ‘role model’ for domestic cases. Promoting ‘preference’ for national proceedings, and encouraging domestic investigations and prosecutions, becomes a secondary consideration.\(^\text{100}\)

\subsection*{10.2.2.2 Article 17(2) and (3): too much space for deference?}

This approach contrasts with more flexible jurisprudence on conditions of inability and unwillingness, and in particular the role of due process considerations in admissibility assessments which was at the heart of the dispute in the Libyan cases. In this context, there is a strong shift towards the other extreme, namely great latitude towards domestic processes.

The prosecutor pleaded for a relaxed application of admissibility standards. The prosecution submitted that:

\begin{quote}
while Article 17 sets out benchmarks to enable the Court to identify cases that cannot be genuinely heard before national courts, the Statute’s complementarity provisions should not become a tool for overly harsh structural assessments of the judicial machinery in developing countries or in countries in the midst of a post-conflict democratic transition which, as Libya notes, will not possess a sophisticated or developed judicial system.\(^\text{101}\)
\end{quote}

It claimed that fairness towards defendants should only be taken into account where the national investigation or proceedings lack fundamental procedural rights and guarantees to such a degree that the national efforts can no longer be held to be consistent with the object and purpose of the Statute and Article 21(3).\(^\text{102}\)

This understanding was challenged by the defence. The Appeals Chamber adopted a narrow reading of the protection of ‘due process’ considerations under Article 17(2)(c), which leaves considerable leeway for the toleration of ‘flawed’ domestic trials.

It held:

\begin{quote}
the concept of proceedings ‘being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice’ should generally be understood as referring to proceedings which will lead to a suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility, in the equivalent of sham proceedings that are concerned with that person’s protection.\(^\text{103}\)
\end{quote}

\(^{100}\) See OTP Response (n 85) para. 46 (‘the Statute does not seek to guarantee a right of national prosecution at all costs. Rather, it recognizes only a preference for genuine national proceedings where they relate to the specific case before the Court’).

\(^{101}\) Al-Senussi Admissibility Decision (n 21) para. 186.  
\(^{102}\) Al-Senussi Appeals Judgment, (n 7) para. 218.  
\(^{103}\) Ibid., para. 188.
It confined admissibility of ICC cases and non-deference to domestic jurisdiction to circumstances where violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be ‘inconsistent with an intent to bring the person to justice’.  

The Chamber provided some examples. It engaged with minimum standards, with an implicit focus on proceedings resulting in the death penalty. It noted that proceedings which ‘are, in reality, little more than a predetermined prelude to an execution’ and therefore contrary ‘to even the most basic understanding of justice’ would be insufficient to render a case inadmissible.

It then added that there may be no deference to domestic jurisdiction ‘when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice’ since in ‘such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all’.

This reasoning differs from the framework of the ad hoc tribunals which set more stringent conditions for the deferral of cases to domestic jurisdictions under Rule bis. Appeals Chamber jurisprudence grants significant discretion to domestic systems as to the ‘justice process’ and limits ICC scrutiny to ‘travesty of justice’. This approach stands in marked contrast to the ICC-centric approach under Article 17(1). It may be criticized on several grounds. The ‘thin’ interpretation of due process protection might be under-inclusive, since it reduces inadmissibility to cases that are already covered under Article 17(1). If lack of fairness is only relevant in cases which demonstrate a lack of genuine investigation and prosecution (as implied by the Appeals Chamber), then Article 17(2)(c) becomes virtually redundant in relation to fairness. This stands in contrast to the chapeau of Article 17(2) which mandates the Court expressly to ‘have regard to the principles of due process recognized by international law’. As in the context of Article 17(1), the Chamber failed to explore the possibility of adopting a dialogue-based understanding of complementarity which would promote continued interaction with domestic jurisdictions in deference of cases. Although Rule 11 bis deferrals differ formally from ICC admissibility decisions, the Chamber could have drawn inspiration from some features of this practice in order to monitor domestic proceedings after deference. But it failed to seize the opportunity (see further 10.4).

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104 Ibid., para. 230.  
105 Ibid.  
106 Ibid.  
107 See Rule 11 bis B (‘The Referral Bench may order such referral proprio motu or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out’). Emphasis added.  
109 See Art 17(2).

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10.3 Dilemmas

In existing jurisprudence, the ICC has given significant attention to the application of the ‘black letter’ law of the Statute and grounded interpretations in the foundational texts. This approach has a certain appeal and might be plausible at this stage of the Court’s existence. But it has also silenced certain problems that have emerged in practice and may have been less clear when the complementarity regime was drafted, namely: (i) dilemmas of timing, and (ii) approaches towards ‘qualified deference’.

10.3.1 Timing dilemmas

Issues of timing have been contemplated in the admissibility system. But some dimensions have not been fully thought through. Two fundamental challenges have emerged in practice that require further consideration: the interplay between requirements and timelines for challenges, and ‘ex post review’, based on subsequent developments.

10.3.1.1 The ‘race for time’ dilemma

The timing dimensions of Article 19 challenges have been mostly approached from the angle of judicial effectiveness, as seen through the lens of the Court. This is reflected in Article 18(7) and Article 19. Article 19(4) states that

The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial.

Any deviation from this rule is subject to judicial discretion, and additional limitations. This is clarified by the last sentence:

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. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c), i.e. ne bis in idem.

The rationale is obvious. The express intent to limit the number of challenges and to concentrate them on the period before the commencement of the trial is designed to preserve the Court’s judicial resources and mitigate the implications of a finding of inadmissibility. There is thus a certain predetermination to protect the interests of the Court. But the implications of this reasoning for domestic proceedings, and challenges of societies in transition, have not received much attention—partly because

110 Note that the accused is not obliged to make the challenge at the ‘earliest opportunity’ under Art 19(5).
it was less evident that the Court would intervene actively in situations of ongoing conflict.

The existing system encourages states to ‘make a challenge at the earliest opportunity’, and this is made clear by Article 19(5). This incentive stands in tension with the jurisprudence on Article 17(1) which requires the state to carry out investigations or prosecutions that ‘mirror’ the ICC case. If the ICC case is the benchmark, domestic actors are typically placed at a disadvantage since the ICC prosecution is in the ‘pool position’, steering the scope, focus, and pace of proceedings. Due to the high threshold adopted for challenges under Article 19, a state might be best advised to postpone the challenge until the latest possible moment, in order to enhance the scope of investigations or prosecutions and the quality of evidence. This result contrasts with the original logic of Article 19.

If a state postpones a challenge beyond the confirmation of charges, it might have to conduct a ‘quick’ investigation or trial, with a decision on the merits of the case, in order to benefit from ne bis in idem. None of the two implications is necessarily in line with the idea of fostering sustainable domestic justice after conflict, which should be a goal of complementarity.

10.3.1.2 The review dilemma

A second critical aspect of the current admissibility regime relates to the time frame of review. The situations in which the ICC acts are highly dynamic. The ICC system has not yet developed an adequate methodology to accommodate this tension. The Appeals Chamber made it clear in its jurisprudence that admissibility challenges are decided, based ‘on the facts as they exist at the time of the proceedings concerning the admissibility challenge’, i.e. the time of the proceedings on the admissibility challenge before the Pre-Trial Chamber. It specified this principle in Katanga. It noted:

Generally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17(l)(a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction.

It then conceded in the same paragraph that ‘[t]hese activities may change over time’, but failed to draw conclusions from this. In subsequent proceedings, it systematically decided not to consider evidence postdating the appealed decision. An
The admissibility challenge therefore reflects only a snapshot of reality, based on the circumstances at the time of the challenge. Subsequent developments remain largely out of purview in light of the limited option for a state to bring a second challenge (Article 19(4)).

The selective focus of scrutiny poses a problem, since *ex post* review of admissibility decisions is subject to tied conditions. Two ‘post-admissibility’ scenarios must be distinguished.

The first is a situation where a case that has been ruled as admissible is affected by a change of circumstances that might render it inadmissible. In such circumstances, there might be an interest for deference to domestic jurisdiction in order to safeguard the resources of the Court. The Statute seeks to resolve such admissibility conflicts through judicial discretion and time bars. A first option is Article 19(3). If a case that has been deemed admissible becomes inadmissible due to a change of facts and circumstances, the prosecutor might seek ‘a ruling from the Court regarding a question of…admissibility’ under Article 19(3). But typically, such an inadmissibility claim might not coincide with the prosecutor’s interest in pursuing the case. A second option is a *propio motu* determination by a Chamber. Article 19(1) allows a Chamber to take such a change in circumstances into account by virtue of its *propio motu* powers. The wording (‘may’) implies that it is not obliged to do so. Deactivation of ICC activity through subsequent action by states (e.g. a second challenge) is subject to the already mentioned time limits. A state depends on the Court’s grant of ‘leave’ if it seeks to invoke a change of circumstances by way of an additional challenge. After commencement of the trial, the Statute allows for parallel proceedings. Any conflict over jurisdiction is then governed by a ‘race for judgment’, i.e. *ne bis in idem*. Where a defendant has been surrendered to the Court, it will be difficult for the domestic jurisdiction to ‘try’ the person (unless trials *in absentia* are allowed domestically). This framework of ‘post-admissibility’ developments is thus largely dependent on the progress of the ICC case and the interests of the Court.

Second, subsequent events might render a case admissible after it has been found to be inadmissible. A typical example is the *Al-Senussi* case, where circumstances on the ground changed after the successful admissibility challenge. The Statute does not provide much guidance on the legal regime relating to such developments. The prosecutor has the power to seek a reactivation of Court activities, after a successful admissibility challenge, by way of a ‘request for review’. This option is regulated in Article 19(10). This provision allows the prosecutor to submit a request for a review of the
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decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.\textsuperscript{122} Article 19(10) is \textit{lex specialis} to the general power to seek a ruling on admissibility under Article 19(3).\textsuperscript{123} The framing of the provision suggests that the prosecutor is not obliged to react to all subsequent changes. A request for review is optional (‘may’) and tied to a partly ‘subjective’ test (‘is fully satisfied’). This power of the prosecutor is not tied to specific temporal limitations. But it is subject to a high threshold, namely proof of new facts and circumstances. Facts must have arisen or become known after the decision on inadmissibility, and the new evidence must invalidate the basis of inadmissibility.

It is controversial whether a defendant might initiate a review in cases where the prosecutor fails to do so. An incentive might arise in contexts where a defendant prefers to be prosecuted by the ICC than by a domestic court. The wording of Article 19(2)(a) speaks against such an interpretation. It allows ‘challenges to the admissibility of the case’. The request for reactivation of ICC admissibility following a change of circumstances is technically a ‘challenge to inadmissibility’. According to a creative reading, the term ‘admissibility’ might be said to cover challenges to admissibility and inadmissibility.\textsuperscript{124} But such an interpretation seems to go against the express distinction between ‘challenges to admissibility’ and ‘requests for review’ (Article 19(10)). It also conflicts with the division of authority and the role of parties in ICC proceedings. The prosecutor is the driving force behind the case. Article 61(7) makes it clear that a Chamber cannot force the prosecution to investigate or prosecute a case.\textsuperscript{125} Chambers have continuously refrained from asserting such a power. It would thus be strange to award the Defence the authority to challenge ‘inadmissibility’ and reactivate the case in situations where the prosecution does not do so, and there is some logic in limiting this right to the prosecutor. It would also be contradictory to require that the prosecutor has to invoke ‘new facts and circumstances’ while the defence could simply rely on Article 19(2)(a).

10.3.2 Deference and monitoring

The problems relating to \textit{ex post} review are related to a broader structural deficit of the existing complementarity regime: the lack of mechanisms and procedures to deal with deferral to domestic jurisdiction.

\textsuperscript{122} See Art 19(10).
\textsuperscript{123} See also C K Hall, Art 19 in O Triffterer (ed.), \textit{Commentary on the Rome Statute of the International Criminal Court} (München/Oxford/Baden-Baden: C H Beck/Hart/Nomos, 2008), at 665, mn 36 (‘In the absence of paragraph 10, the Prosecutor would have been able to seek a new ruling on the “question of…” admissibility” pursuant to paragraph 3’).
\textsuperscript{124} See Heller (n 121).
\textsuperscript{125} See Art 61(7)(c), granting the Chamber the power to ‘request the Prosecutor to consider: (i) Providing further evidence or conducting further investigation with respect to a particular charge; or (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court’.

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10.3.2.1 The rudimentary ICC framework on deferral of cases

The Statute is based on a binary ‘either/or’ logic. Once an admissibility challenge has been successful, the Court maintains jurisdiction, but must defer to domestic proceedings. The procedural consequences are not spelled out in much detail. The ‘case’ is in limbo. Case-related proceedings at the ICC cannot yet formally come to an end, since the prosecutor retains the right to make a request for review under Article 19(10). But certain procedural decisions such as the arrest warrant or requests for cooperation with the ICC might require adjustment in light of the change of the proper forum for proceedings.

A drastic example is Pre-Trial Chamber I’s follow-up decision to the confirmation of Libya’s successful admissibility challenge. After dismissal of the defence appeal, the Chamber held that:

without prejudice to the Prosecutor’s right to submit a request for review of the Admissibility Decision under the conditions of article 19 (1) of the Statute, the proceedings against Mr Al-Senussi before this Court are concluded, the warrants of arrest against him no longer in effect, and the outstanding requests for cooperation in relation to the case transmitted by the Registrar to a number of States must be withdrawn.

It rather confusingly closed the ‘case’, noting that ‘proceedings against Abdullah Al-Senussi before the Court have come to an end’.

This decision reveals one of the significant weaknesses of the ICC system, namely the absence of a framework to refer cases back to domestic jurisdiction. Rule 11 bis D contains specific instructions relating to referral of cases from the ICTY and the ICTR to domestic jurisdictions. It states:

i. the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the state concerned;
ii. the Referral Bench may order that protective measures for certain witnesses or victims remain in force;
iii. the prosecutor shall provide to the authorities of the state concerned all of the information relating to the case which the prosecutor considers appropriate and, in particular, the material supporting the indictment;
iv. the prosecutor may send observers to monitor the proceedings in the national courts on her behalf.

Rule 11 bis F even encompasses a right to revoke the referral of the case during domestic proceedings, which is grounded in the ‘primacy’ of the ad hoc tribunals. It states:

At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Referral Bench may,...
at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.\textsuperscript{131}

The ICC statutory framework is much more rudimentary, and does not contain a targeted provision on the treatment of deferrals. Guidance must be sought in general provisions. Article 68(1) allows the ordering of protective measures for witnesses and victims. Article 93(10) contains a discretionary norm on ICC cooperation and assistance to states, which might facilitate domestic proceedings. But this ‘reverse’ form of cooperation and assistance is subject to strict conditions. The Statute fails to clarify the conditions and legal consequences of post-(in)admissibility review under Article 93(10).\textsuperscript{132} Moreover, monitoring powers and modalities, which have played a key role in 11\textsuperscript{bis} proceedings at the ad hoc tribunals,\textsuperscript{133} are only addressed in a cursory fashion in the ICC Statute.

10.3.2.2 Post-(in)admissibility monitoring

Monitoring of subsequent domestic criminal proceedings is crucial to deal with changing circumstances in situations and to exercise continued scrutiny over domestic proceedings. It has taken on various forms in international criminal practice, ranging from reporting and trial monitoring to actual verification of standards and fair trial requirements. In the context of Rule 11\textsuperscript{bis} cases, judges have ordered the prosecutor to monitor national proceedings in the former Yugoslavia and Rwanda.\textsuperscript{134} In some cases, monitoring has been outsourced to external actors, such as the OSCE or the African Commission of Human and Peoples' Rights, which have been charged with extensive monitoring powers. In other cases, the Referral Bench has relied on monitoring under judicial scrutiny (i.e. appointment of a monitor by the Registrar) in order to facilitate its decision-making process on the fairness of domestic proceedings.\textsuperscript{135}

The ICC regime is rather underdeveloped in comparison with other international courts and tribunals. Its bare essence is reflected in two provisions: Article 18(5) and Article 19(11).

\textsuperscript{131} Rule 11\textsuperscript{bis} F.

\textsuperscript{132} Rule 62 specifies the procedure applicable to proceedings under Art 19 (10).

\textsuperscript{133} On ‘monitoring’ under Rule 11\textsuperscript{bis}, see O Bekou, ‘Rule 11 Bis: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence’ (2009) 33 \textit{Fordham International Law Journal} 723, 786–9.

\textsuperscript{134} E.g. Decision on Rule 11\textsuperscript{bis} Referral, Stanković, Case No. IT-96-23/2-AR11bis.2, AC, ICTY, 15 November 2005, para. 56 (‘The Appeals Chamber acknowledges that Rule 11\textsuperscript{bis} (D)(iv) and (F) of the Rules confer a substantial amount of discretion on the Prosecutor to send monitors on her behalf and to determine how best to go about that monitoring. However, that discretion cannot derogate from the Referral Bench’s inherent authority under this Rule. Just because the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf does not mean that the Referral Bench lacks the authority to instruct the Prosecutor that she must send observers on the Tribunal’s behalf. The former does not preclude the latter’).

\textsuperscript{135} Bekou (n 133) 786–9.
The Relationship to Domestic Jurisdictions

Article 18(5) addresses monitoring after deference of proceedings under Article 18. It states:

When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.\textsuperscript{136}

Article 19(11) establishes similar ‘monitoring’ powers in relation to admissibility proceedings. It states:

If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential.\textsuperscript{137}

These two specific provisions are complemented by Article 53(4), which provides the prosecutor with the general authority to evaluate national proceedings. It clarifies that the prosecutor ‘may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts and information’.\textsuperscript{138}

In the Al-Senussi case, Libya sought to mitigate the risks of deference to domestic jurisdiction by reference to continuing monitoring powers of the Court after a successful admissibility challenge. It argued that ‘any residual or obdurate concerns…regarding Libya’s domestic proceedings…ought to form the centrepiece of a monitoring and technical assistance program’,\textsuperscript{139} grounded in ‘positive complementarity’. It suggested that monitoring of domestic proceedings in Libya would facilitate the exercise of review powers under Article 19(10) by the prosecutor\textsuperscript{140} and facilitate continued ICC assessment of conditions of unwillingness under Article 17(2) and inability under Article 17(3).\textsuperscript{141} But this proposal was contested by the defence, and not taken up by the Chamber.

The existing ICC system, as it is reflected in the Statute, has several weaknesses. The first downside is that it relies entirely on monitoring by the prosecutor, instead of embracing broader mechanisms of monitoring that have been devised by other international courts of tribunals, including monitoring under judicial scrutiny. The focus on the role of the OTP is in line with its function as ‘master of the case’. But it has inherent limitations that constrain the purpose and functioning of monitoring schemes. Monitoring under the authority of the prosecutor is ‘party-driven’ and potentially ‘confrontational’ rather than cooperation-oriented. It is primarily geared towards prosecutorial decision-making processes and guided by prosecutorial interests, which may conflict with defence interests or state interests. This orientation facilitates vigilance, but is not necessarily suited to strengthening domestic investigations.

\textsuperscript{136} Art 18(5).  \textsuperscript{137} Art 19(11).  \textsuperscript{138} Art 53(4).

\textsuperscript{139} Libyan Government’s consolidated Reply to the Responses by the Prosecution, Defence and OPCV to the Libyan Government’s Application relating to Abdullah Al-Senussi pursuant to Art 19 of the ICC Statute, Gaddafi and Al-Senussi, Situation in Libya, ICC-01/11-01/11, 14 August 2013, para. 173.

\textsuperscript{140} Ibid., para. 173.

\textsuperscript{141} Ibid., para. 183.
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and prosecutions through cooperation and assistance. In addition to capacity concerns, there are limits in relation to verification of compliance with standards. As a party to proceedings, the prosecutor is ill-equipped to set standards or offer advice on their compliance. Such a role might force the OTP to take a legal position on issues that could later be invoked against it. This conflict has been recognized by the Court as one of the impediments to a more ‘proactive’ approach on complementarity, based on ‘reverse cooperation’ under Article 93(10). The Court noted that any form of cooperation from the Court to a national authority for the strengthening of their judicial/legal capacity would not amount to a safeguard from the Chamber finding a case admissible within the scope of article 17 of the Rome Statute.\textsuperscript{142}

The second weakness of the existing framework is its limited scope. Monitoring under an existing statutory provision relies entirely on submission of information by the state, as opposed to broader sources of information. Deeper issues of verification, on-site control, and further ongoing cooperation are left aside. This gap may be explained by reservations of states towards prosecutorial interference in internal affairs and domestic proceedings. But it is an impediment to complex and deeper forms of monitoring that involve trial inspection or technical assistance. This restrictive regime loses its appeal in cases where a state voluntarily accepts monitoring as part of an ongoing admissibility assessment, as evidenced by Libya’s submissions. There is a need to rethink the \textit{status quo}.

\textbf{10.4 Improving ‘Qualified Deference’}

It is artificial to treat admissibility challenges as a binary ‘either/or’ choice, according to which ‘a declaration of admissibility or inadmissibility in accordance with this provision is the end of the matter’.\textsuperscript{143} This approach is appealing from a narrow legal perspective, since it blends out politics and longer-term complementarity considerations. But it disregards the fact that the choice of the proper legal forum is more than an abstract dispute over competencies. It is inherently connected to the framing of domestic justice policies that go beyond the individual ‘case’. There is an urgent need to critically reflect the ‘mirror’ imagery, and to (re-)connect ICC practice more closely to longer-term visions of complementarity.

Complementarity is dynamic, while accountability may require coordination between the ICC and domestic authority. One way to address existing tensions is to provide greater attention to the idea of ‘qualified deference’ to domestic jurisdictions in complementarity assessments, and the conditions under which it might be operationalized. Qualifying ‘deference’ may provide a means to strike a more adequate balance between the strict application of the ‘same conduct’ test, and the more generous granting of deference under Article 17(2) and (3) (see 10.2.2). It may help mitigate some of the existing concerns relating to (i) the high threshold of ICC jurisprudence,

\textsuperscript{142} See Report of the Court on Complementarity, ICC-ASP/10/23, 11 November 2011, para. 6.

\textsuperscript{143} See also Kleffner (n 69), at 190.
(ii) the management of ‘timing’ issues under the admissibility regime, in particular in relation to transitional societies, and (iii) the promotion of a deeper (rather than a thin) vision of complementarity, based on continued monitoring, mutual cooperation, and the development of sustainable domestic justice responses.

The appeal of the concept lies in the fact that it might facilitate a more dialogue and process-based understanding of complementarity, which is better geared at context, while maintaining checks and balances through ongoing ICC scrutiny or control. The idea of qualifying deference has mainly gained ground in the practice of other courts and tribunals after the adoption of the Rome Statute. It is not directly specified in the Statute, but in line with the role of the Court as ‘back-up’ for domestic jurisdictions and the statutory mandate to encourage domestic investigation and prosecution.144

There are three different ways in which the concept can be applied to reconcile conflicting positions. They differ in their degree of vigilance and approach to admissibility:

i. One solution is to award the state reasonable time to investigate and build the case after the notice of an admissibility challenge, and prior to a final decision on admissibility.145 This option would grant the state a window of opportunity to meet ICC standards. Pending the admissibility decision, the ICC case and domestic proceedings co-exist. When deciding on the challenge, the Chamber would be able to take into account facts and circumstances at the time of the decision.

ii. A second way is to allow deference to domestic jurisdiction, but to combine the deferral with continued judicial monitoring after a decision under Article 19. This approach does not alter the decision on admissibility per se, but would improve the follow-up.

iii. Finally, the ICC could make greater use of conditions in admissibility proceedings. In some circumstances, it may be feasible to tie deferral to monitoring of specific conditions that must be satisfied in order to maintain domestic jurisdiction (‘conditional admissibility’). This approach is suitable in cases in which doubts remain in relation to the feasibility of final deference to a domestic jurisdiction. Deference would be conditional, while monitoring and supervision would be used to facilitate a final judicial decision on deference.

All three approaches may be grounded in mandates and powers provided under the Statute.146

144 See preamble Rome Statute, paras 4, 6, and 11; Resolution ICC-ASP/12/Res.4, Complementarity, 27 November 2013, para. 1.
145 See Jalloh (n 2), at 242.
146 They do not seek to abrogate the application of the ‘same conduct’ test. Rather, they seek to adjust its application more closely to the context in which the ICC operates.

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10.4.1 Time-management of admissibility: managing parallel proceedings

At present, states face a ‘race against time’ in admissibility proceedings. These concerns may be addressed by a reconsideration of time management, i.e. additional flexibility to adjust their case after the filing of an admissibility challenge, and prior to the decision on admissibility. During this period, the ICC case remains admissible, but there are parallel proceedings. Legally, the prosecutor is bound to suspend the investigation under Article 19(7), but ICC action is not barred entirely. The Chamber can authorize necessary investigative steps, as ‘referred to in article 18, paragraph 6’. The state would be required to meet ‘the same conduct’ test, but would have an opportunity to adjust its investigations or prosecutions after the filing of the admissibility challenge. Additional monitoring structures could be put in place in order to verify whether state action is geared towards the ‘same case’. The admissibility decision would take into account the developments in the time period granted.

10.4.2 Monitoring of deference

The second approach seeks to minimize the risks associated with deference, i.e. to ensure that a case does not fall off the ‘radar screen’ after an admissibility challenge. Deference to domestic jurisdiction is not made conditional per se. Rather, the challenges connected with a deferral are mitigated through a strengthening of monitoring structures, based on continued judicial supervision.

This approach has merits in situations in which the case is ruled inadmissible by the Chamber, but requires further scrutiny in light of the remaining risks. In such circumstances, it is undesirable to terminate the ‘case’ at the ICC altogether with the decision on admissibility. The decision on admissibility would not end the ‘case’ at the Court, but merely suspend it. This is in line with the function of admissibility proceedings which are designed to inform the choice of the forum, rather than terminate ICC proceedings as such. Continued judicial scrutiny can be used in this period, i.e. after a decision on admissibility, but before the formal ‘ending’ of the ICC case, to verify circumstances through monitoring. Ultimately, this approach has two advantages: (i) It might make it easier to justify the exercise of domestic jurisdiction, while mitigating its risks. It would, in particular, maintain some leverage of the ICC over domestic proceedings and limit the risks of shielding suspects or sham proceedings at the domestic realm, after a successful challenge. It would further (ii) strengthen the weak ‘monitoring’ scheme of the Statute, and address some of the shortcomings of prosecutorial monitoring (which may encounter objections from the defence or suspicion from recalcitrant states).

147 See Art 19(7).
148 See Arts 19(7) and 18(6).
149 See also Jalloh (n 71), at 124 (noting that in Kenya, ‘the government voluntarily offered to provide periodic investigative reports to the chamber and simultaneously requested the transfer of material evidence in the prosecutor’s possession for use in its domestic investigations’).
150 Defence Response on behalf of Mr Abdullah Al-Senussi to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’, Gaddafi and Al-Senussi, Situation in Libya, ICC-01/11-01/11, 14 June 2013, para. 186 (‘Even if effective monitoring
Technically, continuing judicial authority might be justified on the basis of Article 19(1) (‘The Court, may, on its own motion, determine the admissibility of a case in accordance with article 17’), and the function of the chamber as ‘guardian of admissibility’. The power of judges to examine admissibility does not end with a successful challenge under Article 19(2), but continues until the ‘case’ ends. This is made clear by Article 19(10) which mandates the Chamber to carry out a ‘review of the decision’. The term ‘review’ clearly implies that the relevant Chamber makes a decision on the original case in the ‘post-admissibility’ stage.

Critics might argue that the continued exercise of proprio motu powers under Article 19(1) at this stage conflicts with the role of the prosecutor. After all, the prosecutor is charged with continuing ‘monitoring’ responsibilities under Articles 53(4), and 19(10) and (11). But this argument is ultimately not convincing. Several reasons speak against this reading. This objection overstretches the function of Article 19(10). The fact that the prosecutor has the power to trigger a request for review and to monitor does not mean that the Chamber is barred from taking action. Article 19(10) is not necessarily intended to block Chamber action. ‘Monitoring’ initiated through Chamber action differs from the limited ‘monitoring scheme’ under Article 19(11). It is not confined to traditional channels of state reporting, but may encompass wider and more effective forms of scrutiny, such as monitoring by independent experts, NGOs, etc., as in the context of Rule 11 bis. Judicial scrutiny does not necessarily stand in contradiction to the powers of the prosecutor; it might complement or strengthen the exercise of prosecutorial authority under Article 19(10) and (11), as acknowledged in the Al-Senussi case.151

10.4.3 Conditional admissibility: supervising deference

A third option to strengthen ‘qualified deference’ is the use of conditions in admissibility decisions. In many contexts, the ICC is required to render admissibility decisions under uncertain conditions, i.e. in situations where facts and circumstances change in a short period of time. In current decisions, these doubts and uncertainties are often masked and clouded behind legal reasoning, since admissibility is treated as a ‘yes or no’ choice. This makes ICC practice vulnerable to criticism. It would be were possible at the investigation or trial stage, it is not clear how the two parties whose interests are opposed to those of the defence—i.e. the two prosecuting authorities—are in a position to be the guardians of defence rights’ (‘Defence Response Al-Senussi Challenge’).

151 ‘The Office of the Prosecutor has some capacity to examine national proceedings and we do some of that from the seat of the Court in The Hague, but of course the OTP may not be in a position to permanently monitor proceedings in court every day, and the situation may be compared perhaps with the Yugoslavia and Rwanda tribunals in their 11 bis proceedings, whereas your Honours know the Court had requested the Prosecutor to enter into arrangements with other organisations...So the issue we would believe would be also open for this Court to consider, with submissions from the parties and participants, to consider, should that eventuality arise, who would be most appropriately placed to monitor’. See Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, Gaddafi and Al-Senussi, Situation in Libya, ICC-01/11-01/11, 2 April 2013, para. 203 (‘Al-Senussi Admissibility Challenge’).
preferable to recognize uncertainties, and devise techniques that allow them to be managed in a responsible way.

In the Al-Senussi Admissibility challenge, Libya invoked the possibility of using conditions in a decision on deference by the Pre-Trial Chamber in order to alleviate temporal constraints or clarify the circumstances under which deference is acceptable. This technique has several benefits. It might (i) take into account the ‘fluid’ nature of complementarity, and (ii) mitigate risks through the specification of targets, timelines for action, or substantive standards. Judges could, for instance, set certain temporal limits to deference, or make its final allocation dependent on the attainment of certain substantive benchmarks. Instead of making a final ruling on admissibility, judges could grant deference under certain conditions, in case of doubt. The final decision on inadmissibility would only be made when and if the conditions were met. This differentiation might help the Court to adjust its practices to be more closely linked to context.

Neither Article 17 nor Article 19 refers to conditions, and this option is thus more difficult to justify in legal terms. ‘Conditional admissibility’ could be introduced by statutory amendment of Articles 17 and 19, or the Rules of Procedure and Evidence. But such a change might not necessarily be required. The power to tie admissibility to conditions may be inherent in the complementarity regime. The Court is the ultimate arbiter over complementarity, and it is mandated to rule on deference. Article 19(1) and (10) does not identify expressly under which condition a decision to refer a case back to a national criminal jurisdiction can be revoked. The Court can clarify this point through judicial interpretation and practice. A legal justification for the use of conditions may in particular be derived from an a majore ad minus argument. If a Chamber is entitled to make a final finding on inadmissibility, based on the criteria of Article 17, it must have the power to rule on the steps leading to that result. This logic is particularly compelling in light of the nature of the decision on deference. Technically, deference would constitute an interim decision on inadmissibility, which becomes final when conditions are met. The use of conditions is a means by which the Chamber would be assisted in reaching its final assessment.

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152 Al-Senussi Admissibility Challenge (n 149) para. 199 (‘the Libyan Government invites the Court to declare the case inadmissible subject to the fulfilment of express conditions or other ongoing obligations…allowing the Libyan Government time to complete its domestic proceedings relating to Abdullah Al-Senussi subject to monitoring and the acceptance of assistance or the fulfilment of other express initiatives and obligations’).

153 See also Jalloh (n 2), at 242 (suggesting ‘deferral, perhaps on condition that the ICC Prosecutor monitors the trials and reports back to the Pre-Trial Chamber every six months’).

154 The implementation of ‘conditional admissibility’ would require cooperation and monitoring. Cooperation can be sought under Arts 54, 86, 87, 88, and 93.

155 See also Al-Senussi Admissibility Challenge (n 151) para. 201.

156 Kleffner calls for the elaboration of an express procedural mechanism to refer cases back to national jurisdictions’. Kleffner (n 69), at 194.

157 Ibid.

158 For such an argument in the ICTY context, see ‘Decision on Rule 11 bis Referral’, Stanković, IT-96-23/2-AR11bis, ICTY, AC, 11 September 2005, para. 50 (‘whatever information the Referral Bench reasonably feels it needs, and whatever orders it reasonably finds necessary, are within the Referral Bench’s authority so long as they assist the Bench in determining whether the proceedings following the transfer will be fair’).
The Relationship to Domestic Jurisdictions

It is evident that such an approach must be applied with caution. As rightly argued by the defence in *Al-Senussi*, deference cannot serve as ‘short cut’ to justify domestic jurisdiction in circumstances where Article 17 does not allow for it. Conditional deference can only be used to guide final decision-making in cases where the exercise of domestic jurisdiction might be legitimately defended on the basis of Article 17. But such an approach is not precluded by the existing structure of Article 17 or a presumption in favour of admissibility. While Article 17(1) indeed contains an initial presumption in favour of ICC admissibility (the ‘Court shall determine that a case is inadmissible where…’), this presumption ceases once the case is being investigated or prosecuted by a state which has jurisdiction over it. In case of state action, the use of conditions would thus not conflict with a presumption relating to admissibility.

10.5 Conclusions

ICC admissibility jurisprudence has been faithful to the text of the Statute and the structure of Article 17. There is growing objection to the ‘same conduct’ test, and its interpretation by the Appeals Chamber. Most criticism has focused on the under-inclusiveness of ICC admissibility approaches. States facing admissibility challenges perceive ICC admissibility as a ‘straitjacket’, which carries the risk of judging domestic investigations and prosecution by a ‘one-size-fits-all’ formula. In particular, the ‘incident’-specific interpretation remains subject to contestation, since it is not directly grounded in statutory text. The defence has criticized the limited weight given to due process considerations.

Some critics have suggested abolishing the ‘same conduct’ test altogether. This would require a radical departure from the framing of admissibility structures, which might be unrealistic and encounter objection. Rather than abandoning the structure as a whole, it might be more feasible to develop the concept of ‘qualified deference’. This concept mitigates some of the critical side effects of the ‘mirror’ image used in jurisprudence. It might address risks in relation to both the under-inclusiveness and over-inclusiveness of ICC procedures. Three techniques might allow the Court to give sufficient space to domestic investigations and prosecutions, while retaining checks and balances inherent in the complementarity regime: (i) flexibility towards domestic jurisdictions to investigate and build the case after the filing of an admissibility challenge; (ii) greater monitoring after deference; and (iii) consideration of conditions to admissibility. Individual fragments of these approaches have been invoked in the *Al-Senussi* case. They can be pursued individually or collectively.

Greater attention to these techniques would not absolve the ICC from criticisms—some tensions are inherent in the mandate of the Court. But they might

159 Defence Response *Al-Senussi* Challenge (n 150) para. 183 (arguing that where national proceedings are ‘inadequate’, the ICC should not ‘allow those proceedings to continue… until an undefined point at which their manifest inadequacy requires them to be declared inadmissible’).


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adjust the application of the complementarity regime better to context and transformative processes in transitional societies. Ultimately, they might shift the focus from mimicry-based and short-term approaches to complementarity to the overarching goal of the Statute, namely to strengthen domestic investigation and prosecution, and to ‘guarantee lasting respect for and enforcement of international justice’.  

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161 See preamble, para. 4.  
162 See preamble, para. 11 (emphasis added).

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The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders

Nick Grono* and Anna de Courcy Wheeler**

47.1 Introduction

The first decade of the ICC’s work saw a number of significant milestones—on 14 March 2012 it secured its first conviction in the trial of Thomas Lubanga for war crimes. It also arrested its first former head of state, former president of Côte d’Ivoire Laurent Gbagbo. But for many the ICC’s proceedings have been marred by disappointments—over prosecutorial strategy,1 Trial Chamber decisions that have seen the release of criminal suspects, and notably a growing sense that a permanent court set up to try the worst abuses of humanity has, despite its stated goal, failed to deter the commission of such crimes.

The hope that the ICC could deter the commission of the crimes it was established to try is part of a wider and growing commitment to early warning and prevention of atrocities and other human rights abuses. UN Secretary General Ban Ki-Moon declared that 2012 would be ‘the year of prevention’2 and the preventive possibilities of the Responsibility to Protect doctrine have been widely discussed.3 The possibility of a preventive or deterrent effect has repeatedly been proffered as a rationale for the establishment of international criminal tribunals, not least the ICC, where the aim of prevention is specifically stated in the preamble to the Rome Statute.4 Individual criminal prosecutions, it is posited, set a precedent, establishing international norms and deterring those who would commit egregious international crimes by demonstrating an end to impunity. This assumed deterrent function has been widely criticized by those who argue that the very nature of the crimes prosecuted by the ICC—war crimes, crimes against humanity, and genocide—make them resistant to deterrence

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1 Strategic Plan June 2012–15, OTP, 11 October 2013.
2 Address by Ban Ki-moon, Secretary-General of the United Nations, to the Stanley Foundation Conference on the Responsibility to Protect (18 January 2012).
4 Preamble of the Rome Statute of the ICC (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (‘ICC Statute’), ‘Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.’

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through prosecution, and that the record of international prosecutions thus far suggests that not only do international prosecutions offer little hope of preventing future atrocities, but risk prolonging conflicts. Such crimes, it is suggested, often require significant mass participation and a degree of moral inversion that suggests the possibility of criminal prosecution would not significantly alter any cost-benefit analysis undertaken by perpetrators, nor would international justice reach to sanction members of the ordinary population whose participation enlivens such crimes. Critics of the ICC in particular point to the slow pace of prosecutions, difficulties in fulfilling arrest warrants—notably in the case of President Al Bashir of Sudan—and allegations of selectivity to argue that the Court as it currently operates cannot hope to have any real deterrent effect.

There is, however, a much-overlooked middle ground. While supporters of the ICC regularly offer prevention of future crimes as a primary benefit and *raison d’être* for the Court, and its detractors point to the lack of evidence that domestic, let alone international, prosecutions have a deterrent effect on the commission of crimes, there is arguably reason to be hopeful. The possibility of ICC prosecution may be one of a range of calculations made by government leaders in determining, for example, the best way to put down a nascent rebellion, prevent secession, or deal with an increasingly challenging domestic opposition. This is not to suggest a mechanical cause and effect, or that the possibility of prosecution would be determinative. Rather, the prospect of prosecution by the ICC may be one of a range of domestic and international factors—such as the possibility of internal opposition, financial consequences, likelihood of military success, international disapproval short of prosecutions, and the possibility of sanctions and other coercive measures—that, in cases where a regime still perceives room for manoeuvre, could impact upon its strategic calculus.

This chapter explores a growing body of evidence that suggests national leaders are aware of the possibility of ICC prosecution, and that this can influence their decision-making, for better or worse. If there is reason to believe that fear of ICC prosecution factors into a regime or leader’s determination to cling to power, it is not unreasonable to posit that such a fear may also, in certain circumstances, act to curtail action and shift the calculus in favour of avoiding war crimes or crimes against humanity.

### 47.2 The Effect of Prosecutions on Political Calculations

A central difficulty for those seeking to establish a deterrent effect for criminal prosecutions is that ‘while we can readily point to those who are not deterred, it is nearly
impossible to identify those who are',⁸ a difficulty magnified in an international setting. There are plenty of examples in which the threat of criminal prosecution has failed to deter perpetrators of crimes against humanity or atrocities. Since the establishment of the ICC in July 2002, wars or civil conflict in, inter alia, the DRC, Côte d’Ivoire, Sudan, Syria, and Libya have seen the commission of horrific atrocities that appear to provide ample evidence of the ICC’s failure to deter.

This, however, does not mean that deterrence does not work. Those who argue that prosecutions do not deter future violations often focus on what Payam Akhavan has termed ‘specific deterrence’, that is, the possibility that prosecutions can deter leaders who have already committed war crimes or crimes against humanity from committing them in the future.⁹ In fact, this is likely where prosecutions will have the least deterrent effect—in cases where a leader has already committed atrocity crimes, prosecution by the ICC will instead represent an existential threat to power and is thus more likely to cause leaders to dig in or further entrench an abusive or criminal campaign. We have seen this in Sudan, where President Bashir’s indictment by the ICC has done little to halt attacks on civilians in both Darfur and, more recently, South Kordofan. Instead our focus should be on the longer-term legal deterrence and the entrenchment of human rights norms. Where prosecutions are unlikely to deter individuals who have already committed war crimes or crimes against humanity, over the longer term they can act to dissuade future generations of leaders from the commission of such crimes.¹⁰

As with conflict prevention efforts more broadly, the lack of substantive evidence in support of the deterrence theory may simply mean that we cannot concretely establish something that has not happened. There is, despite such evidentiary difficulties, significant anecdotal evidence to suggest that the danger of prosecution by the ICC—which today is one of the few credible threats faced by leaders of warring parties¹¹—may influence the calculations and policy choices of national leaders.

47.2.1 Northern Uganda and the LRA

For 20 years the LRA targeted government officials and civilians alike with terror tactics that wreaked havoc and destruction across Northern Uganda. Headed by Joseph

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¹⁰ See e.g. H Kim and K Sikkink, ‘Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries’ (2010) 54 International Studies Quarterly 939: ‘Once violence has erupted, threats of punishment can do little to achieve immediate deterrence. However, the outbreak of such violence can be inhibited, and its resumption in post-conflict situations prevented, because it often results from an elite’s deliberate political choices.’
¹¹ For example, in Sudan the threat of prosecution by the ICC was practically the only credible threat applied to the Khartoum government in relation to the Darfur conflict in the face of a Security Council unwilling or unable to make tough decisions. The international community’s response was limited to the deployment of a small peacekeeping force that has repeatedly been challenged by government and rebel actors. The threat of prosecution itself has thus far not proved credible—the OTP has been unable to secure the arrest of President al-Bashir and other senior indictees.
Kony, who claimed to be on a spiritual mission to cleanse Northern Uganda and to rule according to the Ten Commandments, the LRA abducted tens of thousands of children and adults, putting them to work as porters or sex slaves, or turning them into rebel fighters. The group became notorious not only for their use of child soldiers, who were frequently forced to commit some of the worst atrocities of the conflict as a way of barring their return to civilian life and binding them to the LRA, but also for their willingness to kill and mutilate indiscriminately. The Ugandan government’s response—herding over a million of the North’s predominantly Acholi inhabitants into squalid, insecure IDP camps—only served to compound the suffering of civilians in the region.

In January 2004 the ICC announced that the Ugandan government had made the first State Party referral to the ICC. The opening of an investigation was controversial from the start. A wide range of international NGOs, mediators, academics, and Northern Ugandans argued that the threat of ICC prosecutions would undermine fragile local peace initiatives, would prolong the conflict by removing the LRA’s incentive to negotiate, and would make displaced Northern Ugandans even more vulnerable to LRA attacks. Three years later, however, others claimed that the ICC had played an important role in transforming the conflict in Northern Uganda. A landmark cessation of hostilities agreement in August 2006 removed most LRA combatants from Uganda, allowing civilian resettlement and redevelopment in the region. The LRA has now largely abandoned Northern Uganda as a field of operation, though it continues sporadic attacks in neighbouring countries, most notably the DRC and the CAR.

To what extent the peace process, never completed, can be attributed to the initiation of ICC prosecutions is difficult to determine. Some have argued that the failure of states and other stakeholders to ‘consistently and reliably support the international justice mechanisms’ undermined their possible preventive or deterrent effect, and instead allowed Kony and the LRA to ‘[take] advantage of peace talks to regroup and re-arm his forces in order to perpetuate crimes’. Apart from the peace process itself,
certainly various political and military developments in the region—in particular, the signing of Sudan’s Comprehensive Peace Agreement in 2005—reduced the LRA’s tactical and strategic options, which in turn compelled the leadership to approach negotiations for a peace settlement with more commitment than in the past.

The ICC process does, however, appear to have had some impact, both through isolating the LRA leadership to the degree that they approached the negotiating table, and in giving them an incentive to reach a deal. The peace process subsequently developed a momentum of its own, and the LRA has effectively withdrawn from Uganda, its ranks depleted by the departure of those who have re-joined civilian life under the auspices of the Amnesties Act enacted in 2000. Some have also suggested that the ICC indictments served to sever the LRA from crucial financial support from the Ugandan diaspora. By raising awareness and focusing the attention of the international community, which in turn created a crucial broad base of regional and international support for the fledgling peace process, the ICC’s efforts to hold the LRA leadership criminally responsible for its atrocities in Northern Uganda not only helped create that momentum, but embedded accountability and victims’ interests in the structure and vocabulary of the peace process.

The LRA’s refusal to negotiate, ostensibly for fear of arrest and prosecution, should of course temper some of the enthusiasm of those who support the ICC prosecutions in Uganda. The LRA leadership has notably cited the ICC indictments as the ultimate barrier to a final peace deal, with the media reporting that the Ugandan government had considered withdrawing Uganda’s self-referral to the ICC in order to tempt the LRA towards peace negotiations.

17 The Comprehensive Peace Agreement (CPA) included a provision that all foreign rebel groups be forced out of Sudan. From the mid-1990s, Sudan had collaborated with and offered support to the LRA, including providing a safe haven to LRA rebels and supplying weapons and training. LRA bases were primarily located in the South, but once the Sudan People’s Liberation Movement (SPLM) took over the government of the South, the LRA’s activities were increasingly curtailed. Nevertheless, accusations that the government of Sudan has resumed its support for the group continue to surface. See e.g. P Ronan et al., ‘Hidden in Plain Sight: Sudan’s Harbouring of the LRA in the Kafia Kingi Enclave 2009–13’, The Resolve LRA Crisis Initiative with The Enough Project and Invisible Children (2013).

18 The January 2000 Amnesty Act offered amnesty to ‘Ugandans involved in acts of a war-like nature’ since 26 January 1986. In the decade following its adoption almost 13,000 LRA members received amnesty, securing immunity from prosecution.

19 See ‘The Impact of the Rome Statute System on Victims and Affected Communities’, Victims’ Rights Working Group (2010) (‘VRWG Report’) 23: ‘In Uganda some community members state that the ICC has had a deterrent effect on people financing and supporting war criminals Ugandan civil society members point out: “[t]here were individuals and institutions both internally within Uganda and in the Diaspora who may have been aiding, promoting and collaborating with the LRA by giving financial, material or technical support to the LRA rebels. The issue of arrest warrants for the top LRA leaders scared this category of collaborators and promoters who eventually gave up with the acts, for fear of being indicted by the ICC […]”.

20 The ICC has had little success with securing custody of the LRA defendants: of five suspects, two are believed to be dead, and the other three, including Joseph Kony, have not yet been apprehended.

21 Joseph Kony has himself directly addressed the issue of ICC warrants: ‘We seem to have built our own deathbed by committing to this peace process… The international justice system is that if you are weak, the justice is on you… If you want to remain safe from ICC, you must fight and be strong.’ Quoted in M Schomerus, ‘International involvement and incentives for peace-making in northern Uganda’ (2008) 19 Accord 92, 95.

22 From early January 2005 the media reported that LRA leader Joseph Kony and his top commanders feared ICC prosecution if they came out of the bush and that this was an obstacle to the progress
Even with some temporal distance, it remains difficult to separate the influence of the ICC indictments from a host of political and strategic pressures on the LRA. What does appear clear, however, is that both critics and supporters of these indictments agree that they had some effect on the LRA leadership—that the threat of prosecution by the ICC is something that the LRA has taken into account when making strategic decisions on negotiations, surrender, or continued rebel activities. This effect is inter alia reflected in the 2015 transfer of Dominic Ongwen to the Court. This fact in itself is often, understandably, passed over in the rush to determine whether such influence was for the overall good or bad of the conflict and long-suffering victims. Nevertheless, it indicates the ICC’s potential to act as a point of leverage, and thus a possible, if not proven, deterrent in the commission of atrocities.

47.2.2 DRC

The situation in the DRC—scene of a devastating civil war since 1998 that, despite a 2003 peace accords, continues in the east—is by some measures the most successful ICC intervention so far. On 14 March 2012 the ICC secured its first conviction, finding Congolese warlord Thomas Lubanga Dyilo, leader of the Union of Congolese Patriots (UPC), guilty of enlisting and using child soldiers in his home district of Ituri in Orientale province. Of the four other indictees whose arrest the ICC has secured, two former defendants—Ituri-based rebel leaders Germain Katanga and Mathieu Ngudjolo Chui—are Congolese. A third, on trial for alleged war crimes and crimes against humanity in the CAR, is the former Vice-President of the DRC, Jean-Pierre Bemba.

The ICC’s activities in the DRC have not been without critics—some have argued that ‘in Ituri, the prosecutor’s strategy is seen more as fulfilling his own need to get fast judicial results than reflecting the magnitude of Lubanga’s crimes’.23 The ICC’s long inability to secure the arrest of Bosco ‘the Terminator’ Ntaganda, leader of Congrès National pour la Défense du Peuple (National Congress for the Defence of the People, CNDP) rebel group accused of atrocities in the Kivus, who in January 2005 was integrated into the DRC armed forces despite the ICC arrest warrant, prompted fears that a perception of impunity could empower those targeting civilians.24 These fears were compounded in December 2011 when Callixte Mbarushimana, alleged executive secretary of the FDLR and accused of war crimes and crimes against humanity in the Kivus, was released by the ICC, and the charges against him dismissed.25 Though of the peace talks. According to press reports the government provided the LRA with assurances that the ICC investigation could be withdrawn, or an amnesty given, if the LRA agreed to peace talks. One report suggested that the government’s reassurances were contained in a draft Memorandum of Understanding (MoU) given to the LRA on 4 January, but this could not be confirmed as the MoU had not been made public by the end of January. There appeared to be confusion about the legal basis (if any) for formally withdrawing a complaint which had already been submitted to the ICC.’ CRC Country Briefing: Uganda—Update April 2004 to January 2005, Coalition to Stop the Use of Child Soldiers (2005).


Ntaganda eventually surrendered and was transferred to ICC custody, his case serves as a reminder to many of the ICC’s impotency in the absence of state cooperation. Others have criticized the ICC for concentrating on small-time rebel leaders, particularly those in Ituri, rather than focusing efforts on establishing charges against government members or high-ranking officials who are perceived as leading drivers of the DRC’s civil conflict.

There are, nevertheless, indications that the ICC prosecutions are having some impact on the strategic decisions of troop commanders in the DRC. Media reports suggest that a number of ex-combatants have noticed a modification in the behaviour of rebel commanders designed to avoid the possibility of ICC prosecution. In April 2010 the Victims’ Rights Working Group reported the perceived positive impact of the ICC arrests on the national peace process, including demobilisation, noting the belief among some victim communities in South Kivu that ‘the ICC […] deters, dissuades’.

As always, concrete evidence of the impact of ICC prosecutions is hard to come by. But, again, anecdotal evidence suggests that ICC indictments can act as a point of leverage to influence the calculations of certain leaders.

### 47.2.3 Colombia

The situation in Colombia has been under preliminary examination by the ICC Prosecutor since 2006. For over 40 years Colombia has been devastated by civil conflict, with approximately one-tenth of the population suffering displacement. Two years later, the OTP declared that it would not open an official investigation, since the Colombian courts were undertaking war crimes and crimes against humanity trial proceedings, but that the situation remains under analysis. In December 2011 and November 2013 the Prosecutor published a report presenting preliminary research findings, including those that indicate the commission of crimes against humanity and war crimes. Notably, the reports also indicated that crimes attributed to the Colombian army—including the use of ‘false positives’, or the killing of civilians and the disguising of their bodies as guerrillas in order to artificially inflate the body count of guerrillas killed in combat—had come under analysis or pre-investigation.

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26 J Stearns, *Dancing in the Glory of Monsters* (New York: Public Affairs 2011), 334: ‘It is precisely because many former warlords are still in power that diplomats have been wary of launching prosecutions. This has resulted in an army and government replete with criminals who have little deterrent to keep them from resorting to violence again.’


28 VRWG Report (n 19).


31 In a report on Colombia in March 2010 the UN Special Rapporteur on extrajudicial executions noted that ‘while there are examples of such [false positives] going back to the 1980s, the evidence indicates that they began occurring with disturbing frequency across Colombia from 2004’. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to Colombia, Human Rights Council, Fourteenth Session, UN Doc A/HRC/14/24/Add.2, (2010).


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Despite the possibility of prosecutions remaining relatively remote, there is nevertheless anecdotal evidence to suggest that the initiation of a pre-investigation and the possibility of prosecution before the ICC held significant sway over actors in the armed conflict. Since the OTP announced its interest in the country, the government has taken a number of measures—most notably promulgating Peace and Justice Law—arguably designed to avoid the spectacle of high-ranking government officials and army officers appearing at The Hague. The improvement of Colombia’s judicial workings has been attributed to the ICC’s pre-investigation activities, with the Prosecutor’s exertion of pressure on the government through visits and statements being credited with ‘boosting Colombia’s historically ineffective justice system’. The efforts of the Supreme Court in tackling impunity for human rights violations has similarly been partially credited to the threat of ICC-driven prosecutions and the desire to keep the accountability process in Colombia.

The threat of ICC prosecution appears to not only have influenced the calculations of the Colombian government—including former President Pastrana who, according to the Wikileaks cables, expressed (unwarranted) concern that he may be prosecuted.

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33 See e.g. P Engstrom, ‘In the Shadow of the ICC: Colombia and International Criminal Justice’, Report of the Expert Conference Examining the Nature and Dynamics of the Role of the International Criminal Court in the Ongoing Investigation and Prosecution of Atrocious Crimes Committed in Colombia (2011): ‘Colombia’s ratification of the Rome Statute and the OTP’s ongoing interest in the country has already had an important impact in Colombia that goes far beyond merely influencing domestic criminal law. The prospect of prosecutions before the ICC has played directly into the dynamics of the armed confrontation, including the recent demobilisations of right-wing paramilitary groups. Various high-level initiatives are being undertaken by the government to avoid Colombian military officials and their civilian counterparts being brought before the ICC, and the left-wing guerrilla groups equally appear to be engaged in damage-limitation measures. In tandem, heightened sensitivity around issues of justice and peace has developed across Colombian society, as different sectors re-evaluate their positions or build new forms of alliances, both in elite political circles and among the diverse victims of the armed conflict.’

34 The law came into force in 2005 and provides for reduced sentences for demobilized guerrillas and paramilitaries, but notably by August 2012 only two people had been sentenced despite the participation of over 4,000 demobilized guerrillas and paramilitaries. Despite these disheartening figures, the OTP in 2011 reported that ‘there is no basis at this stage to conclude that the existing [national investigations and proceedings] are not genuine. The Office will continue to monitor the commission of new crimes and the judicial developments.’ Report on Preliminary Examination Activities, ICC OTP (2011), para. 87.

35 It is worth noting that this Law has been extensively criticized as being used as a shield to ICC prosecution, rather than representing a true attempt to secure justice of the victims. See e.g. K Ambos and F Huber, ‘The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there Sufficient Willingness and Ability on the Part of the Colombian Authorities or Should the Prosecutor Open an Investigation Now?’, Extended version of the Statement in the ‘Thematic Session: Colombia’ ICC OTP–NGO roundtable (2010) 7: ‘In the Colombian case, special attention must be given to the extradition of paramilitary leaders to the US, the pressure exercised by the former Uribe government against judicial sectors and the fact that Law 915 of 2005 is only being applied on a voluntary basis to a very reduced number of members of illegal armed groups who accept to be prosecuted under the special criminal procedure. Therefore, the great majority of members of illegal armed groups and all state officials are excluded from the application of Law 975 of 2005, which poses the question if there is a real willingness to investigate and prosecute effectively these persons under the subsidiary ordinary criminal system.’ See also Easterday (n 29).

36 The ICC’s Colombia Investigation: Recent Developments and Domestic Proceedings, American Non-Governmental Organizations Coalition for the International Criminal Court (2009) 8.

37 Id.
by the ICC for his actions while in power from 1998–2002—but also those of paramilitary leaders operating under the umbrella of the United Self-defence Forces of Colombia (Autodefensas Unidas de Colombia, AUC). Carlos Castaño, a paramilitary commander at one time believed to have been a leading figure in the AUC, was apparently sharply aware and fearful of the possibility of ICC prosecution, a fear that reportedly directly contributed to his demobilization.

Though the degree to which the fear of prosecution by the ICC motivated Castaño's relinquishing of arms was arguably exceptional, what is clear is that, though other political or strategic motivations may have exerted a stronger influence on decision-making processes, following Colombia's ratification of the Rome Statute in 2002 and the expiration in November 2009 of the seven-year grace period contained in its Article 124 reservations to the Statute, paramilitary commanders in Colombia were aware of the risk of ICC prosecution and took this risk into account. This does not mean that they were immediately deterred—in 2012 Avocats Sans Frontières reported the continued existence of paramilitaries, neo-paramilitaries, and accompanying human rights violations. Rather, it indicated that, as in the DRC and Uganda, in certain situations there may be space to use the possibility of ICC prosecutions as leverage not only against government leaders, but also against rebel groups.

47.2.4 Sudan and the case of Darfur

The case of Sudan represents the strongest challenge to those seeking to argue that the ICC provides a deterrent to the commission of war crimes and crimes against humanity. The government has proven immune not only to ICC pressures, but also those of the Security Council whose repeated resolutions calling a halt to violence in Darfur were routinely ignored. For some, Sudan therefore provides clear evidence that ICC's prosecutions do not, and cannot, have a deterrent effect.

The war in Darfur truly began in February 2003 when rebels took up arms against a centralized government in Khartoum. The response was unequivocal—the government of Omar Al Bashir launched a military campaign, relying heavily on paramilitary

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38 A cable from then-US Ambassador William Brownfield to Washington dated 14 November 2007 revealed that Pastrana had voiced concern that the ICC could attempt to prosecute him for allegedly creating a safe haven for narcoterrorists through the Caguan process.

39 See e.g. C Sriram, ‘The ICC Africa Experiment: The Central African Republic, Darfur, Northern Uganda, and the Democratic Republic of the Congo’, Annual Convention of the International Studies Association (2008): ‘there is anecdotal evidence both that fear of ICC prosecution motivated paramilitary fighters (or at least their leaders) in Colombia to strike a deal, and that fear of prosecutions may lead them to return to fighting or deter the two main guerrilla groups from negotiating.’


42 UN Security Council Resolution 1564 called on the Government of Sudan to ‘end the climate of impunity in Darfur by identifying and bringing to justice all those responsible […] and insists that the Government of Sudan take all appropriate steps to stop all violence and atrocities’, UNSC Res 1564 (18 September 2004) UN Doc S/RES/1564, para. 7; UN Security Council Resolution 1556 called on the Government of Sudan to disarm Janjaweed militias, allow humanitarian access, and investigate violations of human rights and international humanitarian law. See UNSC Res 1556 (30 July 2004) UN Doc S/RES/1556.
militias and Janjaweed, displaced over 2.5 million people, and killed an estimated 300,000 in the first five years. In 2007 the ICC issued arrest warrants for the Sudanese Minister of State for Humanitarian Affairs, Ahmad Harun, and for alleged Janjaweed leader Ali Kushayb issues in 2007. These arrests were eclipsed in March 2009 by the Court’s indictment of President Bashir for war crimes and crimes against humanity in Darfur in a landmark decision to try a sitting head of state.

The Prosecutor was almost immediately pilloried for what some, including the Assistant-General for Peacekeeping, saw as not only judicial overreach, but a step that could endanger the fragile peace processes in both Darfur and South Sudan. The government reacted to Bashir’s indictment by expelling 13 international aid agencies, including Médecins Sans Frontières (MSF) and Oxfam, and shutting down Sudanese human rights groups. Kidnappings of aid workers increased following the issuance of the warrant for Bashir—on 11 March, a week after the warrant was issued, five MSF aid workers were kidnapped. For many, these actions acted to bolster the belief that the government of Sudan would not be swayed, let alone deterred, by the threat of ICC prosecution. The government continues to obstruct any ICC attempts at investigation and the prosecution has, thus far, relied exclusively on evidence gathered outside Darfur.

Though the leading inner circle of Bashir’s ruling National Congress Party (NCP) proved unresponsive to the threat of prosecution by the ICC and to Security Council ultimatums, there are signs that the government was not entirely immune or indifferent to the international stigmatization associated with such measures. Following the Prosecutor’s July 2008 application for an arrest warrant for Bashir, there was a flurry of announcements of renewed peace initiatives and yet another ceasefire declaration. With regard to more concrete measures, the ICC indictment appears to have had little impact, though this could arguably be attributed more to the fact that the regime, confident most of the condemnation from the Security Council and wider international community would amount to nothing more than empty threats, calculated that continued warfare held the promise of best results—the reticence of the United States, for fear of upsetting the hard-won North–South peace deal, China’s continued oil interests, and the lack of decisive sanctioning action by the Security Council, arguably fostered conditions where the regime had more to gain by continuing down a path that involved war crimes and crimes against humanity than it did by dialling back and committing to a genuine peace process.

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47.2.5 Newer cases—Kenya and Mali

The ICC has more recently brought a raft of newer charges and cases in Africa, in Mali, Kenya, and Libya. Each case is unique, with only Mali inviting ICC intervention, and each has received dramatically differing levels of domestic support. In Kenya, political leaders who had initially argued that only the ICC could provide the requisite independence and impartiality to ensure a fair trial quickly backtracked. Kenyan politicians repeatedly attempted to block the ICC prosecutions, lobbying to have the case suspended. These attempts to block accountability processes, though primarily rooted in the need to secure domestic support, particularly among certain ethnic groups, could also hint at a tendency among senior politicians to see prosecution, whether international or domestic, as a threat to their traditional ability to use violence to retain power during elections. The cases, once under way, received further blows—one of the judges on the case withdrew in April 2013 citing a heavy workload but amid criticisms of the prosecution’s behaviour, and a key indictee, Uhuru Kenyatta, was elected President while fellow indictee William Ruto took the post of Vice-President. Kenyatta’s trial has been repeatedly delayed at the request of the prosecution, and the ICC’s ASP agreed that Kenyatta did not always need to be present at trial. But at the same time, widely feared election violence did not manifest—the peaceful holding of elections may be attributable, to some degree, to a fear of prosecution outweighing any possible political gains from violence.

In July 2012 the government of Mali, following a coup and the re-emergence of a powerful secessionist movement in the North, referred its case to the ICC. After conducting a preliminary examination the OTP in January 2013 opened an investigation into alleged crimes including murder and rape since January 2012. Though the case was originally referred by the Malian government, ICC Prosecutor Bensouda’s repeated and firm assertions that the ICC will be watching all sides to the conflict, rather than only the rebels, raises the possibility that the ICC intervention in Mali could act to constrain the commission of abuses by government forces, particularly as military action in the north came at a time when the government was also struggling to establish international legitimacy.

47.2.6 Other international criminal prosecutions

Of course the ICC prosecutions are just the latest manifestation of a growing international trend towards individual criminal responsibility in the international sphere. Any possible deterrent effect of ICC prosecutions will naturally build on prosecutions that have come before, or that occur alongside the ICC’s activities. The ad hoc ICTR and ICTY solidified the concept of individual international criminal responsibility, and the Yugoslav Tribunal in particular, having been established during an ongoing conflict, indicates the way in which potential or actual perpetrators can be influenced by the threat of prosecution. Many have noted that atrocities continued to be committed well after the establishment of the ICTY—such as the Srebrenica massacre, the most

46 See e.g. M Drumbl, Atrocity, Punishment and International Law (Cambridge: Cambridge University Press 2007) 149.
infamous atrocity in the Yugoslav wars, occurred after the Tribunal was established. There were, however, patterns of behaviour modification that could be attributed to the establishment of the Tribunal and a fear of prosecution—examples such as the moving of mass graves to better disguise crimes and the perceived restraint of the Kosovo Liberation Army. In Sierra Leone, the Special Court’s conviction of Charles Taylor, which marks the first time an international tribunal has convicted a former head of state, has been widely applauded. There are also indications that the threat of prosecution had an impact on perpetrator behaviour—some argue that the Court may have further fuelled the conflict in Liberia by driving combatants to join the Liberians United for Reconciliation and Democracy rebel group in an attempt to avoid possible indictments in Sierra Leone.47

47.2.7 Assessment of practice

Unfortunately, concrete evidence of immediate or short-term deterrence resulting from ICC prosecutions will by its nature remain scant, and it is currently too early to trace any longer-term deterrent effect. Nevertheless, anecdotal evidence from states subject to ICC investigations, indictments, or prosecutions indicates cause to be hopeful.48 As the ICC becomes more widely known, its norms deeper entrenched, there appears to be a growing realization amongst governments, and perhaps more surprisingly rebel leaders, that they too could find themselves in the dock. Though there is evidence to suggest that in some situations, particularly those where conflict is ongoing and where war crimes or crimes against humanity have already occurred, the possibility of international individual criminal prosecution may act to prolong conflict, thereby facilitating the further commission of atrocities, there are equally certain situations, notably where a leader is not facing an existential threat, where the possibility of an ICC prosecution could tip the cost-benefit scale away from a criminal course of action. If there is reason to believe that fear of ICC prosecution factors into a leader’s determination to cling onto power, it is not unreasonable to suggest that such a fear may also, in certain circumstances, factor into the cost-benefit analysis of a despot intent on crushing a secessionist or revolutionary movement, ethnic group, or the opposition.

47.3 The Wider Context, Public Policymaking

The debate over the role of prosecutions in deterring international crimes forms part of a larger debate on how, if at all, international pressure can encourage the development of rule of law and democracy, and reduce human rights abuses and repression in sovereign states. There are techniques we are all familiar with—the ‘naming


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and shaming’ approach taken by much of the human rights community, the imposition of sanctions, the offering of development aid or lucrative financial and business arrangements to those states that engage with the international community, and the threat of military intervention. Nevertheless, one of the main challenges for international policymakers in their efforts to resolve conflicts or reduce human rights abuses is that they often lack effective incentives or sanctions (diplomatic, legal, military, or economic) of sufficient credibility to influence the calculations of the warring parties.

Taking as a starting point the assumption that leaders—of governments or of rebel groups—wish to either maintain or attain access to domestic power, and that these leaders take rational and goal-oriented decisions, it is possible to establish a framework for elite decision-making that can elucidate how international pressure, including in the form of ICC prosecution, could influence the decision-making process of domestic leaders. Prosecution of government leaders attaches personal culpability to those who act as ‘conflict entrepreneurs’, that is to say, those who strategically foment and normalize hatred and their accompanying crimes. This personal culpability can have both direct (imprisonment) and indirect (bolstering opposition movements, reducing aid flows) deleterious effects on a leader’s personal power. Furthermore, not only are government leaders more likely to have knowledge of the international legal system and the concept of international individual criminal responsibility than an average citizen, but they are also arguably more likely to be motivated by rational considerations that allow for the kind of cost-benefit analysis central to any model of deterrence. Thus when evaluating the possibility of deterring such leaders, it may be that a practical approach that emphasizes the need to extend prosecution and dissemination of the work of the ICC can have some impact.

49 Several human rights organisations, including Human Rights Watch and Amnesty, frequently adopt a ‘name-and-shame’ approach. For example, in 2000 Amnesty published two-dozen reports on Israel’s activities and abuses in the Occupied Palestinian Territories. Myanmar was similarly targeted following the Junta’s seizure of power in the late 1980s, with Amnesty, Avaas, and others leading an annual Global Day of Action for Burma. Atrocities in Sudan’s Darfur have garnered much high-profile, sometimes celebrity, attention.

50 A range of sanctions were imposed by the UN Security Council, the US, and the EU on Iraq, for example, after the invasion of Kuwait in 1990, and then later tied to the removal of WMDs; sanctions were also imposed on Yugoslavia in 1992 over the expulsion of non-Serb civilians and other human rights abuses. Similarly Muammar Gaddafi’s regime was sanctioned following the Lockerbie bombing in 1992. Long-standing sanctions on Burma have been slowly lifted since 2013 in response to positive developments in the country.

51 Since the early 1990s the EU has tied respect for human rights to specific agreements, including human rights conditionality clauses in its association agreements and other international trade and cooperation agreements. Several states, including Sri Lanka, Nicaragua, and India, have refused to sign a GSP+ agreement with the EU, allowing them preferential access to the EU market, in part due to the human rights and democracy requirements attached to these agreements.

52 Several states have been threatened with military intervention on the basis of human rights abuses or atrocities, including Yugoslavia (ahead of the NATO bombing), Libya, and more recently Syria.

53 David Keen has broken elite goals in situations where atrocity crimes are committed into four overlapping aims: (i) to establish or extend state power; (ii) to shore up elites against a threat; (iii) to legitimize or facilitate exploitation; (iv) to resolve insecurities. D Keen, Complex Emergencies (Cambridge: Polity Press 2008).

54 Drumbl (n 46).

55 Robinson and Darley have suggested three prerequisites for deterrence: (i) potential offenders must be aware of the law and punishments, and understand what constitutes criminal behaviour; (ii) they must feel that the law is applicable to them, understanding that the law as applied at a different time, to
Rebel groups, however, are less likely to be vulnerable to international pressure. Most rebellions fail, and most rebels embarking on their challenge to the central government are unlikely to be concerned that they may later be sanctioned for their atrocities. For these individuals, survival and success are probably much more immediate concerns. When it comes to the calculations of government officials, however, sanctions—including prosecution—present a threat to power they have already attained, and thus may have greater influence or deterrent impact. If the threat of prosecution for future atrocities is a credible threat, then a government leader will arguably weigh that risk when deciding how to respond to a challenge to their authority, assuming a rational decision-making process.

Following this rationalist policymaking school of thought, the form international pressure takes and the degree to which it is successful will to a large extent be dependent upon complex domestic political contexts. Folch and Wright have set out a useful taxonomy of authoritarian regimes, and how different structures of repression and resource distribution affect sensitivity to economic sanctions, which can be of use in predicting how such regimes might react to legal sanctions. Of particular interest is their finding that certain regimes—those which are heavily reliant on patronage networks and pay-offs to a small ruling elite—are particularly vulnerable to economic sanctions, which they argue ‘may actually increase the perception of threat on the part of the members of the small supporting coalition of a personalist ruler, while at the same time the benefits of such support are likely to shrink’. Like economic sanctions, by increasing the costs of supporting an indicted leader, ICC prosecutions can corrode the power base of leaders who rely on highly centralized systems of government. The degree to which the ICC can hope to deter through a pattern of prosecutions will always be hostage to the immediate domestic context. Autocratic leaders who face an existential threat are unlikely to be swayed by the possibility of prosecution, but those with hope of retaining power through non-criminal means are more likely to view the threat of indictment as a disincentive to criminal action.

47.3.1 The normative value of ICC prosecutions

When combined with a rationalist theory of domestic policy decision-making, the theory of incrementalism gives a more nuanced understanding of how and why national leaders make certain policy decisions with implications for foreign relations, particularly in the context of human rights. Incrementalism posits that public policy is structurally biased towards incremental changes to a largely stable status quo. Thus the uncertainty of the costs and consequences of radical change acts to limit leaders to

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57 Id.
changes that fall within the parameters of existing policy consensus. This incrementality has been observed on a much larger, and longer, scale by philosopher Steven Pinker. Writing on the decline in violence over the arch of human history, he has emphasized the growing intolerance of human society towards war, torture, and other forms of brutality, reflecting a normative shift in what is viewed as acceptable and part of the status quo.\textsuperscript{58} A similar, more narrowly focused shift can be seen in international politics and the human rights movement, where concern for the conduct of hostilities between states set out in the Hague Conventions at the turn of the twentieth century has given way to increasing concerns over the internal conduct of state leaders, a development that would have been unthinkable in the previous millennia where state sovereignty precluded outside interference in the internal affairs of another state. As part of a growing normative value attached to human rights, prosecutions for war crimes or crimes against humanity are arguably progressively narrowing the space for criminal courses of action that as recently as 60 years ago were deemed to be beyond the concern of the international community.

Over the past two decades, human rights trials have gathered pace as part of a growing focus of individual criminal accountability in human rights law. The establishment of the ICTR and ICTY as well as a number of hybrid tribunals, including those in Sierra Leone and Cambodia, and the increasing number of domestic human rights trials for previous leaders, seen particularly in Latin America, are all part of what has been termed a ‘justice cascade’.\textsuperscript{59} In particular, the recent conviction of Charles Taylor, and the prosecutions of Bashir, Gbagbo, and Milošević, evidence a growing norm that posits that even national leaders who would have once been able to claim state immunity are no longer viewed as immune from international criminal prosecution for war crimes or crimes against humanity. The ICC—the world’s first permanent international court established to try war crimes and crimes against humanity—marks for many a high point in the project of international justice, and has itself indicted two of these government leaders. As the norms of international law and individual criminal accountability become increasingly entrenched, the ICC has the opportunity, through its prosecutions, to contribute to emerging culpability norms that act to limit future atrocity crimes both by making them more costly in terms of a rational public policy choice analysis, and by establishing such crimes as firmly outside the status quo of behaviour accepted on the international scale.

Kathryn Sikkink and Hoon Kim have argued that an examination of data on human rights prosecutions suggests that ‘both normative pressures and material punishment are at work in deterrence’.\textsuperscript{60} Legal norms and expanding human rights discourse are increasingly acting to shape the decisions and even identity of political actors. As these human rights norms—which include the increasing legalization of


Impact, 'Legacy', and Lessons Learned

human rights—move towards global institutionalization, non-compliant regimes risk increasingly heavy costs to legitimacy and reputation.

47.3.2 Strengthening the ICC

If we accept that, in certain cases, the possibility of prosecution by the ICC may have some limited influence on the policy decisions of leaders, either through increasing the costs to ‘conflict entrepreneurs’ of criminal courses of action, or by incrementally narrowing the policy options to exclude the most egregious crimes, the question then turns to how the ICC and international community can best leverage this influence to deterrent effect. The impact of ICC prosecutions rests on the credibility and consistency of the Court, as well as the willingness of the international community to accept such prosecutions as a signal of pariah status—only if national or international institutions establish a credible and consistent pattern of accountability replacing impunity, it will be possible over time to impose a high cost on the use of atrocities to further political goals.\footnote{P Castillo, ‘Rethinking Deterrence: The International Criminal Court in Sudan’, UNISCI Discussion Papers, 13 (2007).}

Key to the ICC’s deterrent success will be its ability to secure arrests and convictions. The ICC took ten years to secure its first conviction, meaning that for the first decade of its operation its deterrent value was more theoretical than actual. The Lubanga trial, though criticized for its slow pace and its focus only on the recruitment of child soldiers, marked the first successful prosecution of a defendant under the Rome Statute and hopefully marks a turning point. By securing a conviction, the OTP, and the Court as a whole, demonstrated its effectiveness for the first time.

But the Court’s reliance on political will in order to secure both arrests and convictions remains problematic. Without any standing police or military force to execute arrest warrants, the ICC depends wholly on international cooperation and in particular the acquiescence of the UN Security Council’s permanent five members who can exert the necessary pressure on intransigent national governments.

Unfortunately, international cooperation in the execution of arrest warrants has been inconsistent at best. On 25 May 2010 Pre-Trial Chamber I issued a complaint to the Security Council over the non-compliance, or lack of cooperation, of Sudan in the cases of Ahmad Harun and Ali Kushayb, and suggested the Security Council take any action it deemed appropriate.\footnote{Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan, Harun and Kushayb, Situation in Darfur, Sudan, ICC-02/05-10/07-57, PTC I, ICC, 25 May 2010, 7.} The Security Council has so far not addressed this matter—it has not sanctioned Sudan in any way, and there appears to have been no renewed effort to secure the arrest of the two indictees despite repeated reminders by the ICC (among others) that the matter is in the Council’s hands. Similarly a number of African States Parties to the Rome Statute have declined to arrest President Bashir during state visits, and the African Union has argued that as a rule, heads of state should not be tried by the Court while in office. Yet even where there is a degree of

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political will, the Court still struggles to apprehend suspects. In Uganda, the national
army has repeatedly failed to secure the arrest of LRA indictees despite improvements
to their capabilities, and a lack of coordinated response by regional governments has
allowed the LRA to retreat across borders and to continue its attacks.

Securing the arrest of suspects, when it happens, is only the first step in a pro-
cess that hopes to provide an end to impunity. The threat of prosecution will only be
credible if it is carried out both consistently and successfully, but securing convic-
tions is by no means a foregone conclusion. The Lubanga case came close to collapse
a number of times on procedural grounds, and despite his successful arrest, Callixte
Mbarushimana’s case did not come to trial after Pre-Trial Chamber I declined to con-
firm charges against him that included both war crimes and crimes against humanity
due to a lack of substantial incriminating evidence against him.63

There is also the danger that, due to political concerns, a case may not even get so
far as an evaluation of evidence and procedure: though the Rome Statute provides
no mechanism for the withdrawal of warrants, a number of UN members have sug-
gested that cooperation in peace processes could lead to the suspension or deferral of
an ICC investigation or prosecution.64 In both Sudan and Uganda, the Prosecutor has
faced calls to abandon investigations or withdraw warrants to enable a peace deal to be
made. Such calls do little to bolster the potential deterrent effect of ICC prosecutions.
If the ICC is unable to convict perpetrators of atrocities because its prosecutions are
consistently trumped by peace processes that explicitly or implicitly offer immunity,
then its value as a deterrent will inevitably be compromised. Would-be perpetrators
will not be deterred from the commission of war crimes or crimes against humanity
by the threat of future prosecution if they are confident that a later agreement to par-
ticipate in peace processes will secure them de jure or de facto immunity.

Calls to halt justice for the purposes of peace and an evident reliance on the P-5
for support have also exacerbated allegations and perceptions that the OTP has been
politicized. Perceptions of a politicized office have damaged the legitimacy of the
Prosecutor in the eyes of signatory states, most notably in Africa, and of civil society
observers. As Kirstin Ainley has noted, ‘the circumstances of [the ICC’s] establish-
ment and the first years of its operation have shown how bound-up the Court is with
political power and political processes’.65

To limit such perceptions, it is vital that the Prosecutor’s decisions are seen to be
based on legal merit rather than political expediency. If political decisions must be
made, they should be made by the UN Security Council which, under Article 16,
has the power to defer an ICC investigation or prosecution for a renewable period of
12 months. For example, in cases where the Prosecutor is called on to halt investiga-
tions or withdraw warrants in the interests of peace, such decisions should rightly be

63 Decision on the Confirmation of Charges, Mbarushimana, Situation in the Democratic Republic of
64 The AU has widely campaigned for the deferral of ICC cases against Sudan’s President al-Bashir and
Kenya’s President and Vice-Presidents Uhuru Kenyatta and William Ruto, and has received at various
points backing from P-5 members Russia and China among others.
65 K Ainley, ‘The International Criminal Court on Trial’ (2011) 24 Cambridge Review of International
Affairs 309, 320.
seen as falling within the peace and security mandate of the Security Council. Though Article 53 of the Rome Statutes allows for the Prosecutor to decide to halt an investigation or prosecution if it is ‘in the interests of justice’, the same option is not provided for in the interests of peace. The Rome Statute instead evinces a strong presumption that the kind of crimes under the Court’s jurisdiction require effective criminal punishment, and the fact that negotiations are under way would not in itself be sufficient for the Prosecutor to halt proceedings.

The Court’s legitimacy has also been harmed by its focus on African states. Of 21 cases and eight country situations brought before the Court in its first 12 years of operation, all are African. This has partly been a by-product of the UNSC’s referral power—both Sudan and Libya, who were not signatories to the Rome Statute and therefore did not fall under the automatic jurisdiction of the Court, were referred by the Security Council. This power, though it expands the Court’s jurisdictional reach, is a political, rather than legal one, and thus risks tainting the Court itself with allegations of political selectivity. The Court’s focus on African states to the detriment of others where egregious atrocities have been reported, such as in Afghanistan and Sri Lanka, has eroded much of the initial support received from African governments by playing into critiques that paint the ICC as a tool of the West, used by powerful states to sanction weaker nations. The OTP is currently conducting preliminary examinations of a number of non-African states, including Afghanistan, Georgia, Honduras, Korea, and the Ukraine. The launch of a full investigation and the initiation of prosecutions in any of these states should substantial evidence of war crimes or crimes against humanity be found, would hopefully work to contradict such allegations.

Just as the Court is, through Security Council referrals and its need for support, rendered at least partially dependent on the political will of the P-5 and other powerful states, it is also dependent upon the cooperation of states under investigation. This has arguably led to a situation in which, in order to maintain the cooperation of governments, the Court has shied away from targeting government leaders and instead focused on rebel groups. These accusations have been levelled at the Court in the situations of Uganda and the DRC, where government actors have played a significant role in provoking or exacerbating conflict. If the Court is to have the hoped for deterrent impact, it must not allow government leaders to use it as a tool against political opponents or to shield themselves from rigorous scrutiny. The potential deterrent impact of ICC prosecutions, which could be expected to have a greater impact on government leaders than on rebel groups, is lost if government leaders who themselves abuse human rights can escape conviction.

Finally, but perhaps most crucially, it is essential that the Court and international community act in unison in their response to war crimes and crimes against humanity. The Court, where necessary, should cajole or shame the international community, particularly those states who spearheaded its creation and who profess to be strong supporters of the Court, into taking concrete action to support

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The Deterrent Effect of the ICC

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the Court’s arrest warrants, investigations, and prosecutions. One of the most powerful deterrent effects of ICC prosecutions may be those that are indirect—other sanctioning measures initiated as a result of the Court’s finding that there is preliminary evidence to suggest a leader is guilty of committing, sanctioning, or aiding and abetting atrocities. Leaders may fear ICC prosecution not so much because they foresee a real possibility that they might themselves end up in the ICC dock, but because prosecution by the ICC is the strongest international signaller of pariah status, with all the political, economic, and strategic punishment that entails. As Richard Falk has noted, ‘the maximum impact of human rights pressures, absent enforcement mechanisms, is to isolate a target government, perhaps denying it some of the benefits of trade and aid’. Though ICC prosecutions are only one of a number of policy instruments that can be used to influence national governments, they should arguably act as a strong signaller to the international community of the need for the application of other policy measures in concert. Such measures could range from diplomatic pressure and incentives for cooperation to cutting off financial support, suspension of diplomatic relations, and targeted sanctions, particularly those targeting indicted individuals.

The Court itself faces both structural and operational challenges in maximizing its potential to not only influence government leaders, but to use that influence to deter future crimes. The Court, particularly in cases of a UNSC referral, needs to ensure that it operates independently of the political processes that trigger its involvement, gathering its own momentum in prosecutions. Allegations of selectivity and politicization should be tackled through exhibiting more consistency and transparency in the selection of cases, and through finding a better balance between seeking cooperation from target countries and prosecuting government members. Crucially, the decisions of the Court need the full backing of those members of the international community that profess to be its supporters but who have too often undermined the work of the Court through silence or political bargaining.

47.4 Conclusions

The success or failure of the ICC in deterring the commission of atrocity crimes rests to a large degree on its ability to pursue successful prosecutions. Only when national and international institutions establish a credible and consistent pattern of accountability will it be possible to impose a high enough cost on the use of atrocities to advance political goals. At present, this remains a key challenge for the Court and its supporters. If the Court can replace impunity with accountability, it will be able to capitalize on its potential to deter those contemplating future atrocities; not in all cases, and probably not in the midst of conflict, but in those situations where the commission of crimes is one of a series of police options available to a leader facing a challenge to his or her authority. The hope is that future leaders, cognizant of the


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prosecutions of Taylor and Milošević and Gbabgo and Bashir, may factor the possibility of his or her own prosecution into policy choices, such as whether to crush a growing opposition with violence, or negotiate, or address the underlying grievances. It will not be a determinative factor, but it will hopefully carry significant and increasing weight. To ensure that this potential deterrent impact becomes more actual than theoretical, the Court through its actions, and States Parties through their support need to enhance the consistency and credibility of ICC prosecution. Only then will the Court begin living up to its founders’ expectations that it will contribute to the prevention of international crimes.
Completion, Legacy, and Complementarity at the ICC

Elizabeth Evenson* and Alison Smith**

49.1 Introduction

Ten years after the ICC opened its doors, the tribunals which preceded it in the modern era of international criminal justice have had to wrestle with how they will finish up their work and close their doors. Although addressing this question was left until relatively late in the game, the SCSL and the ad hoc ICTY and ICTR developed ‘completion strategies’ to guide the winding down of their activities.¹ These strategies address not only the immediate issue of completing case work and trials, but also how so-called residual issues will be addressed. That is, how any ongoing obligations such as the protection of witnesses or the revision of sentences will be handled. Importantly, they also address how the legacy of the tribunals will be consolidated in the communities affected by the crimes within their jurisdiction.²

As a permanent court, the ICC may seem at first to be immune to questions about its own completion strategies. Indeed, the Rome Statute³, while offering detailed guidance as to the criteria governing the opening of investigations, does not prescribe a legal mechanism for closing an investigation. That is, there is no apparent limit on the number of cases that can be brought in an ICC situation, usually understood as the specific set of incidents in a given country.⁴ This is not to say that the prosecutor's

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² See K Heller, ‘Completion’ in L Reydams et al. (eds), International Prosecutors (Oxford: Oxford University Press 2012) 887 (identifying completion issues, residual mechanisms, and legacy projects as three distinct components of completion strategies).
⁴ The Prosecutor may take a decision not to prosecute under Art 53 ICC Statute once an investigation is open, but this is a decision that may be revisited by the Prosecutor at any point and appears to relate primarily to a decision regarding the prosecution of a specific case, that is, a specific charge or charges against a specific individual or individuals. As the Court affirmed in a 2013 report: ‘the ICC’s legal framework does not foresee any limit on the number of cases that the OTP may bring before the Court—this is a matter of prosecutorial discretion…. [The absence of a statute of limitations for the crimes under the Court’s jurisdiction] is a distinct strength of the ICC in the sense that individuals subject to outstanding arrest warrants cannot expect their cases to lapse and disappear.’ Report of the Court on Complementarity: Completion of ICC Activities in a Situation Country, ICC-ASP/12/32, 15 October 2013 (Twelfth Session of the ASP), paras 11, 12, and 15.

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ability to open new cases in a situation country is entirely without its limits. New cases will need to fall within the temporal and territorial limits of the situation, defined either by the scope of the referral to the Court or by the decision of the ICC Pre-Trial Chamber authorizing investigations.\(^5\) Jurisprudence from the Court’s Pre-Trial Chamber in the Mburashimana case suggests that even where a State Party referral is, on the face of it, open-ended, additional cases in that country may require the opening of a new situation if there is an insufficient link with the referral initially triggering the Court’s jurisdiction.\(^6\)

Even with these limits, however, the Court’s jurisdiction is more open-ended than that of its predecessor tribunals, particularly given that with regard to States Parties, the ICC prosecutor can seek to open a new situation *proprio motu* in an existing situation country without relying on a mandate from either that state or the United Nations Security Council.\(^7\) This is an important advantage when it comes to completion strategies. As discussed later in the chapter, completion strategies at other tribunals have been developed in the shadow of prospective and sometimes premature closure. Deficits in these strategies, or in their implementation, can undermine a tribunal’s delivery of justice and its legacy, a topic Kevin Jon Heller has explored comprehensively in his study of completion.\(^8\)

In practice, however, the ICC’s work will, at some point, come to a conclusion as existing judicial proceedings are completed and additional cases are not pursued by the prosecutor. The ICC cannot stay in a particular situation in perpetuity.\(^9\) While avoiding arbitrarily imposed timelines, there are several reasons that Court officials and States Parties need to enter new situations with their eyes already firmly trained on how the ICC will responsibly complete its work when the time comes.

First, ignoring that there will eventually be a closure to ICC situations would dilute the need for the ICC and its States Parties to think clearly and responsibly about the ICC’s legacy, that is, to consider the overall impact of the Court on affected populations in terms of ending impunity, ensuring accountability and redress, strengthening the rule of law, and contributing to sustainable peace. These are elements that make the most sense only when contemplated in the

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\(^5\) Arts 1, 15, and 17 ICC Statute.


\(^7\) See Art 15(1) ICC Statute; see also Arts 1, 18, and 19 Statute of the ICTY, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex (‘ICTY Statute’) and Arts 1, 18, and 19 Statute of the ICTR, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex (‘ICTR Statute’).

\(^8\) See Heller (n 2). Heller’s analysis of completion strategies includes a range of other international or internationalized tribunals beyond the ICTY, the ICTR, and the SCSL, namely the Nuremberg Military Tribunals, the Bosnian War Crimes Chamber, the STL, the IMT, the IMT for the Far East, the Special Panels for Serious Crimes in East Timor, and Regulation 64 panels in Kosovo.

\(^9\) Cf. S Bibas and W Burke-White, ‘International Idealism Meets Domestic-Criminal-Procedure Realism’ (2010) 59 Duke Law Journal 637, 680. According to Bibas and Burke-White, ‘[t]he idealistic desire to do justice collides with the reality of limited time and money’. As a result, international criminal justice has just recently begun to heed to systematic issues of case management. Because of limited resources, these authors argue, the system must do a better job at screening cases including through “proactive complementarity”.

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context of the ICC’s eventual conclusion of work and departure from any particular country.

Avoiding the inevitable because it may be unpredictable would risk missing real opportunities to consolidate this legacy in existing ICC situation countries. For example, focusing on the Court’s eventual completion of its activities from the outset is likely to highlight the desirability of the Court’s ability to transfer some responsibilities to national authorities. This, in turn, could engender an orientation in the Court’s activities towards ensuring there is capacity domestically to take up those responsibilities after the ICC has completed its work. While this will assist the Court in concluding its activities, enhancing national capacity would also benefit the Court’s contributions to national jurisdictions. It would help put in place some of the elements necessary for national authorities to conduct additional investigations and prosecutions in order to bring fuller accountability than the ICC is likely to yield acting on its own. This could have real benefits for the ICC’s legacy and contribution to national jurisdictions.\(^{10}\)

Second, there are also opportunity costs for the ICC in terms of prospective new ICC situation countries. If the ICC’s permanence and potential global reach are among its greatest strengths and innovations, they also create a real dilemma regarding how many situations and cases the Court, as a single institution with finite resources, can be expected to handle simultaneously.\(^{11}\) States Parties should be willing to ensure the Court has the resources needed to increase the depth and reach of its work, but a clear sense of how to define the Court’s mission in a given situation country and a strategy for completing that mission will enable the Court to increase its ability to respond to the high demand for justice.

Third, having one eye on the ‘end game’ is also important from the perspective of the populations affected by conflict. While justice cannot be rushed, there should come a time when the bulk of the accountability work can be considered to be done, so that it does not drag on forever. If the ICC is clear and up-front about when it considers its contribution to accountability has concluded, this will enable local populations to identify what still needs to be done by the national system and also enable them to feel a sense of closure of at least part of the accountability process. Great care should be taken to ensure that the ICC is not asked to move on prematurely before its work is completed in a given situation—a risk the Court has already encountered, as discussed later. But defining what that ‘end’ should look like and how the Court should arrive there responsibly so as to ensure its ongoing obligations are met and its legacy is consolidated, are key questions that the ICC, like its predecessor tribunals, needs to face.


\(^{11}\) See generally Bibas and Burke-White (n 9) discussing potential methods for better case management systems.
The need for real attention to completion strategies of international tribunals, and, in particular, to ensure that these strategies are legacy-sensitive, has been a matter of consensus for some time. As early as 2004, the UN Secretary-General reported that ‘it is essential that, from the moment any future international or hybrid tribunal is established, consideration be given, as a priority, to the ultimate exit strategy and intended legacy in the country concerned’.12 In spite of this, the ICC’s first decade passed largely without any real forward momentum in a strategic consideration of these issues. There are positive signs that this is now changing and that a real discussion is finally emerging at the Court and among States Parties regarding the need for completion strategies.

Since the Kampala Review Conference in 2010, the ICC’s ASP has had a dedicated ‘facilitation’ on ‘complementarity’ within its Bureau.13 The facilitation has focused on so-called positive complementarity, that is, how international assistance to national jurisdictions can be enhanced in order to strengthen the willingness and ability of those jurisdictions to conduct the investigation and prosecution of ICC crimes.14 In 2012 the ASP’s Resolution on complementarity explicitly recognized that ‘greater consideration should be given to how the Court will complete its activities in a situation country and that such exit strategies could provide guidance on how a situation country can be assisted in carrying on national proceedings when the Court completes its activities in a given situation’.15 In its 2013 report to the ASP on complementarity, referenced earlier, the Court, in turn, set out initial observations on completion within the context of the ICC, lessons learned from other international or internationalized tribunals, and the role of the Court’s field operations in completion strategies.16

Several of the issues raised here overlap with those identified by the Court in this 2013 report and this chapter seeks to make a contribution to pushing forward this important work. This chapter will first examine some of the key questions the Court and its States Parties will need to address to adapt and define the concept of ‘completion’ for the ICC. While recognizing that completion in the ICC context will have a number of unique features, this chapter will then go on to describe some of the lessons learned from the completion strategies of other international or internationalized tribunals in three key areas: capacity building, outreach, and archive management. Finally, as indicated, at the heart of a successful completion strategy will be an overriding concern to consolidate the Court’s legacy in its situation countries. For this reason, this chapter will argue that realizing a connection between completion and positive complementarity, while not without

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12 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, UN Doc S/2011/634 (24 August 2004), para. 46; see also Heller (n 2) 887, 917–20 (noting that the OTPs of tribunals which have pursued a ‘global’ completion strategy, that is, a strategy developed prior to the creation of a tribunal, have been largely more successful than those which have adopted a ‘situational’ strategy, adopted after the tribunal is already established and operational).
13 ASP Report of the Court on Complementarity (n 10) para. 47.
14 Ibid., paras 13–14.
15 Preamble of the Complementarity Resolution, ICC-ASP/11/Res.6, 21 November 2012 (Eighth Plenary Meeting of the ASP).
16 ASP Report of the Court on Complementarity (n 10).
its challenges, could focus States Parties’ discussions, including on the role of the Court, and achieving a correct understanding of the role of the Court, when it comes to complementarity.

49.2 Adapting the Concept of ‘Completion’ to the ICC

The ICC can benefit from the experience of the SCSL, ICTY, and the ICTR in the development of completion strategies. These experiences, however, cannot be borrowed nor the solutions adopted wholesale, given the differences between these institutions and the ICC, including in its length of operations, its mandate, and its structure. We identify here some of the key questions the ICC may face in contemplating its completion strategies.

49.2.1 Avoiding restrictions on the ICC’s mandate

It is important to understand that the development of completion strategies for the ICTY, ICTR, and SCSL did not take place *sua sponte*, nor were they initially motivated by a primary concern for safeguarding legacy. Instead, completion strategies were developed as a direct by-product of the pressure on these tribunals—largely budgetary—to accelerate their conclusion. Completion strategies went hand in hand with other measures to wrap up work, including, at the ICTY and ICTR, greater selectivity in the choice of cases, forced by the requirement in United Nations Security Council Resolution 1534 that the ICTY and ICTR focus on ‘the most senior leaders’.

Indeed, as Heller notes, even beyond Resolution 1534, completion deadlines and corresponding changes in procedures had a direct impact on prosecutorial decisions and, he argues, impaired prosecutorial independence as well as opened up impunity gaps and limited the effectiveness of legacy projects. These include ICTY rule changes permitting Trial Chambers to direct the prosecutor to select on which counts to proceed and to limit the prosecution’s presentation of its case in chief, as well as giving the decision to refer a case to national jurisdictions under Rule 11bis to the Trial Chamber at both the ICTY and the ICTR. Additionally, Rule 28 of the

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18 Heller (n 2) 908; UNSC Res 1534 (26 March 2004) UN Doc S/RES/1534.

ICTY Rules of Procedure and Evidence was amended to allow for additional review and scrutiny of indictments.\textsuperscript{20} Anticipated closure created pressures that led to a reduction in the number of cases and increased the use of plea bargaining to expedite proceedings, leading to more lenient sentencing.\textsuperscript{21} Closure also meant insufficient time to invest in domestic capacity building to close remaining impunity gaps at the national level.\textsuperscript{22}

The ICC, as a permanent institution, can avoid some of the pitfalls associated with ‘closure’ in that it should be able to define for itself ‘completion’, permitting a fuller execution of its mandate. It is important that discussions of completion within the ICC context avoid imposing similar restrictions on the mandate of the Court’s OTP or the Court as a whole. As discussed, given the more open-ended nature of the Court’s jurisdiction and the permanence of the institution, the ICC prosecutor has a freer hand to stay longer and do more. Importantly, where possible within the defined limits of the situation open before the Court, the ICC prosecutor can also intervene again where there may be renewed violence without seeking a new mandate. This flexibility can be essential for responding to crisis situations, where early interventions can save lives and limit damage to property, making post-conflict or post-violence reconstruction quicker. Preparation for the point at which investigations and prosecutions will be complete should not be permitted to devolve into pressure to bring these possibilities to a premature end.\textsuperscript{23}

Planning ahead will increase the likelihood that the Office and the Court as a whole will find ways to wind down activities in a manner that contributes to—rather than detracts from—its legacy. Indeed, an increased institutional focus on completion could have a positive effect. It could encourage the Office to undertake a much-needed


\textsuperscript{21} See Raab (n 17) at 89–91. According to Raab, the use of plea bargains have significantly facilitated to the accomplishment of the ICTY’s mandate, and should be regarded as ‘a sound development at the ICTY’. However, case management developments at the ICTY have not come without criticism. As Raab explains, Complaints of lenient sentencing were heard in the \textit{Banović} case. In \textit{Banović}, a prison guard pleaded guilty to killing five inmates and beating many more, and was sentenced to eight years in prison. Presiding Judge Robinson dissented, believing that the sentence was too lenient. Raab notes that the sentences handed down in Darko Mrdja and Biljana Plavšić were criticized for the same reason; Sentencing Judgment, Predrag Banović, IT-02-65/1-S, TC, ICTY, 28 October 2003.

\textsuperscript{22} Heller (n 2) at 900–6; see also A Chehtman, ‘Developing Local Capacity for War Crimes Trials: Insights from BiH, Sierra Leone, and Colombia’ (2013) 49 \textit{Stanford Journal of International Law} 297, 300–4, noting the weaknesses of national legal systems in post-conflict situations.

\textsuperscript{23} It is important to note that ‘completion’ will not be a straightforward progression in most situations. Cases are likely to face a number of stumbling blocks and delays, particularly given the real challenges the ICC has faced so far in securing the assistance necessary for investigations and arrests in several situations. Investigations in situations where crimes are ongoing or where impunity is deep and pervasive—again a majority of ICC situations, given its role as a court of last resort—mean that the Court will need to conduct more than just a handful of cases. For this reason, it is important to underscore once again that no artificial timelines should be imposed on the Court’s work in a given situation once it opens investigations.

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evaluation of its existing situations, and, going forward, from the outset in any new situations to assess just what will be needed—whether there are additional cases, or clearly communicated and reasoned decisions not to prosecute—in order to complete its work.\textsuperscript{24}

49.2.2 Timeliness of devising and implementing completion strategies

The argument that the OTP is under no obligation to ‘complete’ its work in any strict sense—nor should it be—has been offered as a reason it is premature to develop completion strategies at the ICC, as compared to the closures squarely faced by the SCSL and ad hoc tribunals. Here, however, the ICC has more, rather than less in common with the SCSL and ad hoc tribunals, and cannot afford to wait.

First, this is clear from the experiences of the ad hocs and, to a lesser extent, the SCSL. The ICTY began discussions on its exit strategy in 2000.\textsuperscript{25} This came about because of the desire to transfer cases to national jurisdictions in states that had made up the former Yugoslavia. Previously, this was not considered possible because those states had been neither willing nor able to conduct investigations and prosecutions themselves.\textsuperscript{26} The lack of a clear mandate and development of the completion strategy meant that there were uncertainties regarding the ICTY’s mandate and how it would operate, challenges with respect to witness protection especially in domestic jurisdictions, and difficulties planning for maximizing the ICTY’s legacy, which likewise had received little attention during the first ten years of the ICTY’s existence.\textsuperscript{27} While the end date for the ICTY’s closure was pushed back many times, the focus in the early 2000s on issues of completion and legacy undoubtedly had a strong and positive impact on how the ICTY carried out its work, both in terms of case selection (and case referral) and on how it viewed itself vis-à-vis the populations in the States making up the former Yugoslavia.\textsuperscript{28} The completion strategy of the SCSL was first presented to the Management Committee in 2005, less than three years after the SCSL opened its doors.\textsuperscript{29} Issues of legacy were built into

\textsuperscript{24} Heller (n 2) 918: ‘A global [completion] strategy facilitates the creation of a coherent prosecutorial programme. It is almost impossible for an OTP to develop such a programme if it has no idea how long it will operate, particularly when its mandate extends to a large number of suspects.’

\textsuperscript{25} T Pittman, ‘The Road to Establishment of the International Residual Mechanisms for Criminal Tribunals, From Completion to Continuation’ (2011) 9 Journal of International Criminal Justice 797, 799. The first formal mention of closure of the ICTY or ICTR was in 2000, in a letter from the ICTY President, Judge Claude Jorda, to the UN Secretary-General. Raab (n 17) at 84.

\textsuperscript{26} Letter dated 10 June 2002 from the President of the ICTY addressed to the Secretary-General, Annex to the Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2002/678 (19 June 2002).


\textsuperscript{28} For example, outreach efforts intensified during this period, as the ICTY had a greater focus on legacy, which by definition requires the engagement of local communities. See also ‘Conclusions and the Way Ahead’, First Annual Report of the President of the SCSL for the Period 2 December 2002–1 December 2003, 31.

\textsuperscript{29} Completion Strategy, SCSL (2009), para. 2.
the fabric of the SCSL from the start and constituted the vision that informed how the SCSL built itself as an institution and carried out its work. This, alongside the limitations on the SCSL’s jurisdiction to ‘those who bear the greatest responsibility’ and the limited budget with which the SCSL had to operate, has undoubtedly contributed to the extremely positive impact of the SCSL in the country and the region. It is the first of the international courts and tribunals to have closed its doors at the end of 2013.

Second, even within the ICC context, there is already some pressure from States Parties on the ICC to develop ‘exit’ or ‘completion strategies’. While discussions have taken on increasing substance over the past year, this initially stemmed from what appeared to be at least primarily, if not exclusively budgetary interests, that is, an interest in managing the Court’s expanding workload within ‘existing resources’ by seeking to shuffle around resources.

In fact, a kind of ‘exit’ or at least a ‘transition’ is already happening. The ICC may have eight open situations, but there has been a transfer of resources out of the Darfur and Uganda situations, for example, in redeploying outreach staff and scaling back on field presences. This transfer of resources can be justified with reference to a lack of judicial activities given the failure to arrest suspects in cases arising out of these situations, and the need, in the absence of significant new resources from ICC States Parties, to stretch to new situations. Although arrests in cases in these situations will require a scaling back up of court activities, what to do about situations where proceedings have stalled due to non-cooperation could be an important feature in any discussion about completion or transition strategies, a challenge the Court already faces. A desire to get out ahead of these pressures and address them in a responsible fashion should argue in favour of developing appropriate strategies now.

Third, and most fundamentally, completion is not just about activities that need to take place before the ICC can wrap up its work and move on. It is equally about the spirit with which the Court carries out all of its work in a situation country, which is a lesson that should be well learned from the SCSL. In addition, the timeline necessary

30 See generally Donlon (n 17). Art 23 of the SCSL Agreement states that upon completion of judicial activities of the Special Court, the agreement shall be terminated. As Donlon explains, The SCSL agreement did not set down residual factors, nor indicate how completion would be managed in the future. Officials began to tackle completion and closure issues at the 2008 Freetown Conference. The SCSL recruited Donlon as adviser to prepare a report to analyse various residual institutional options for the Special Court. The Report noted several obligations that would survive on completion of all trials and appeals. See also Art 23 Agreement between the United Nations and the Government for Sierra Leone on the Establishment of a Special Court for Sierra Leone, UN Doc S/2002/246 (16 January 2002), Appendix II; F. Donlon, Consultant, Report on the Residual Functions and Residual Institution Options for the Special Court of Sierra Leone, December 2008.

31 As an indication of the link between budgetary Pressure on the court to hold down growth and a push to develop completion strategies, see Report of the Committee on Budget and Finance on the Work of its Seventeenth Session, ICC-ASP/10/15, 18 November 2011 (Tenth Session of the ASP), para. 18 (warning that there are limits to the degree to which new court activities can be absorbed within existing resources, and suggesting the need to give further consideration to how the court will complete its activities in a situation country, including as one measure to permit the redeployment of existing resources).

32 ASP Report of the Court on Complementarity (n 10) para. 42.
to lay the groundwork for responsible completion is so extensive that completion activities can be started as soon as an investigation is opened, without fear of jeopardizing the Court’s independent exercise of its own mandate. This is particularly true of activities aimed at enhancing domestic capacity to take over certain responsibilities and to conduct additional investigations and prosecutions as part of consolidating the ICC’s legacy, as discussed in section 49.3, which are likely to encounter challenges with regard to the willingness of authorities to put measures in place at the national level.\footnote{Heller (n 2) 901 (‘Flawed strategies have often undermined the efforts of hybrid and internationalized tribunals to build domestic judicial capacity, limiting the ability of national jurisdictions to prosecute international crimes after the tribunals close’).}

49.2.3 Defining completion at the ICC

In defining ‘completion’, the ICC should benefit from wide consultation in affected communities and with national authorities. This is a lesson learned both by the ad hocs and the Special Court, the experiences of which stress the importance of broad national consultation to embed completion work in local populations and ensure the sustainability of completion plans.\footnote{Ibid., 911 (terming the failure to consult with victims regarding the ICTR’s closure as ‘a critical oversight, even if the victim’s desires would not have affected the completion strategy: although victim satisfaction may not be a sufficient condition of a tribunal’s legitimacy, it is certainly one of its necessary conditions. A tribunal that is not seen as legitimate by the victims of a conflict is unlikely to be seen as legitimate by anyone else’).}

How do these core constituents understand the completion of the ICC’s work? How can strategies be devised to match or inform expectations about completion? How can completion strategies be developed to ensure they will be sustainable and carried on by the local populations, which is particularly important for ensuring the ICC’s lasting legacy? How can the political willingness of national authorities to take over responsibilities or to conduct additional investigations and prosecutions be gauged and bolstered, and with what consequence for the timeline for implementation of completion strategies? Throughout the various activities that can be undertaken to consolidate legacy and ensure a smooth completion, it is critical that the ICC engage with local communities and authorities to make sure that whatever their strategy, it is one that actually can work.

A clear and unique challenge for the ICC, then, is that its same officials will be required to devise and implement completion strategies that may vary markedly from situation to situation. The Court is likely to need a working definition and model of completion, to be adapted to the specifics of a given situation based on the wide consultation suggested here. In our view, completion should be defined with respect to whether the Court has achieved its mandate and under what conditions the Court will be able to say it has done so. This will primarily relate to whether the Court has delivered impartial, independent, and meaningful justice. However, a definition of completion should also consider fulfilment of the Court’s mandate as turning also on whether the domestic jurisdiction is ready to take over the Court’s ongoing responsibilities in
the situation and resume their primary responsibilities to investigate and prosecute ICC crimes.

This is likely to be a controversial definition of what it means to complete the ICC’s mandate. The ICC is a court of last resort and not a development agency. By definition this means it is stepping in where there is either a lack of capacity to try serious crimes under international law, or a lack of political will to do so, or both. Shifting the landscape to a point where national authorities are able and willing to assume the responsibility, for example, of protecting ICC witnesses, let alone carrying out investigations and prosecutions that may continue to run counter to politically powerful interests, will often be an uphill battle. It may even be an unwinnable battle. Indeed, in the broader context of ‘positive complementarity’, actors have been slow to come to terms with the degree to which political will is far more dispositive—and far more difficult to generate—than technical assistance.

Insisting on this as a dimension of the Court’s mandate, however, is the approach most consistent with a sense of completion that is alive to consolidating the Court’s legacy. That is, as defined earlier, its long-term contribution to ending impunity and reasserting the rule of law in the countries in which it acts. It is also most consistent with recognizing that the ICC is likely to have sustained engagement with situation countries over significant periods of time in challenging and transitional circumstances, and the potential impact on national jurisdictions that its work can bring about should not be underestimated. It is not to suggest that this is a role exclusively for the ICC alone; rather, it makes particularly relevant States Parties’ discussions on ‘positive complementarity,’ as examined later in the chapter. Nor is it meant to suggest that the ICC and States Parties should be held hostage where it proves, in spite of concerted effort and sustained attention, impossible to fully realize this goal. In those cases, it may be necessary to recognize that more modest measurements of completion will be necessary. However, it should be considered as a feature of completion at the outset.

It is also worth emphasizing that while the completion strategy timelines and benchmarks will have to be driven by the OTP, there is a need for the entire Court to be involved, since the entire Court will be required to implement the strategy. In addition, it will be imperative to involve not only local populations and authorities but also the ICC’s States Parties, international organizations, civil society, and others who may be called upon at different times to play a part in implementing the completion strategy along the way.

35 See Chehtman (n 22) 300, noting the unreliability of witness support and protection mechanisms in national post-conflict jurisdictions. Post-conflict areas tend to have great difficulty in providing support for victims, a lack of institutional framework, know-how, and resources.
36 See F Pocar, ‘Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY’ (2008) 6 Journal of International Criminal Justice 655. Pocar notes the rich heritage of the ICTY and its impact on the region as well as other international criminal tribunals.
37 See section 49.4.
49.3 Lessons Learned for Capacity Building, Outreach, and Archive Management

As indicated in the previous section, the completion strategies of international tribunals are generally understood to have three components: completion issues, residual functions, and legacy issues. The ICC has set out the following definitions:

i. Completion issues: core judicial and administrative work performed before completion or closing dates, including planning for residual issues;

ii. Residual functions: a range of core judicial and administrative tasks that must be performed post-completion, since a criminal court’s mandate is not complete with the final rendering of decisions; and

iii. Legacy issues (long-term post-completion projects, which begin prior to the institution’s closure, such as outreach and institutional and capacity-building efforts, aimed at leaving a lasting positive impact on affected communities and their criminal justice systems).  

Unlike the SCSL and ad hocs, all of which required the setting-up of special mechanisms to deal with this second category—residual issues—the ICC as a permanent institution will have capacity to address enforcement of sentences, revisions of convictions or sentences, protection of witnesses, management of archives, and other similar activities. These activities still remain relevant to the development of ICC completion strategies, in that planning and resources will be needed for the ICC to carry out what would otherwise have been issues delegated to the residual mechanisms of the SCSL and ad hocs. Such functions include assistance with implementation of reparations awards and oversight of the enforcement of sentences, both of which are critical functions that will need to be budgeted for, both financially and in terms of human resources, as part of a situation-specific ICC completion strategy. Perhaps even more critically, a focus in completion strategies on bolstering national capacity to take over residual functions is likely to benefit ‘legacy issues’, in that enhanced national capacity is likely to promote additional investigations and prosecutions and leave ‘a lasting positive impact on affected communities and their criminal justice systems’.

This section focuses on aspects of completion where there is greater potential for overlap between the strategies of the SCSL and ad hocs, and those of the ICC, and therefore for drawing on lessons learned. Some of the key elements that should feature in ICC completion strategies in this respect are outlined here: capacity building, outreach, and archive management. All the various courts and tribunals, including the ICC, could benefit from cooperation with one another, to reduce the need for any of them to reinvent the wheel.

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38 ASP Report of the Court on Complementarity (n 10) para. 17.
39 Id.; see also Pocar (n 36) 661–2. As Pocar explains, One of the underlying principles in the ICTY completion strategy is building the region more generally. The ICTY has paved the way for domestic adjudication of international crimes. Judge Pocar argues that the Tribunal’s legacy will not just be about its efficiency, but reinforcing the principles of its establishment.
Again, it is worth highlighting that completion and legacy are not just about specific activities that can usefully be carried out to prepare for the time when the ICC will depart, and to enhance the impact the ICC can have on local populations and on the rule of law and human rights in its situation countries. In many ways, the preparations for completion lie in how things are done, which should be informed by the difference it is foreseen the Court will make in its situation countries once its work is completed. The SCSL’s legacy, for example, first had its own discrete section in the very first Annual Report of the Court, speaking about the development of the Court complex, including the buildings, as a legacy of the Court’s presence; the development of skills of Sierra Leonean staff also as a means to have a lasting impact on the country’s development; and a process of information and education being carried out across the country, led by the Outreach Section. All of this work, from the very early days of the Court, was done as a means to build the foundations for leaving a legacy of accountability and contributing to legal reform in Sierra Leone. The ICTY, with the assistance of the Organization for Security and Co-operation in Europe (OSCE), has conducted assessments in its outreach activities, training, and identification of best practices in order to ensure a lasting impact in the former Yugoslavia. This is the kind of vision that the ICC and its States Parties need to develop prior to the ICC’s entry into a situation country if it is to work most effectively and efficiently to achieve its goals. For those countries where the ICC is already carrying out activities, it is critical that this vision be identified as soon as possible.

49.3.1 Capacity building

Technical assistance and transfer of knowledge should be pillars of a completion strategy to facilitate the transfer of responsibilities to national authorities. Responsibilities that can be appropriately transferred to situation countries are likely to include investigation and prosecution of outstanding cases, whether arrest warrants or summons to appear have been sought by the ICC or not, and witness protection.

In the case of the SCSL, its Rules of Procedure and Evidence were amended in 2008 to allow for the possibility of referral of its cases to a national jurisdiction, much as the ICTY and ICTR’s Rules were amended to facilitate implementation of its completion strategy. While there is only one fugitive remaining at the SCSL, Johnny Paul Koroma, it is possible that there will be contempt cases. The SCSL has made it abundantly clear that any interference with witnesses will be dealt with swiftly and severely by the Residual Special Court. Such cases could be dealt with either by the Residual Special Court or by national courts.

40 For an overview of legacy activities of the SCSL see <http://scsl-legacy.ictj.org/> accessed 29 October 2013.

41 Ibid.

42 Pocar (n 38) 663.

43 Rule 11bis SCSL RPE; Rule 11bis ICTY RPE; Rule 11bis ICTR RPE; Rule 28 ICTY RPE (as amended 12 November 1997). See nn 20–1.


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In terms of witness protection, ongoing responsibilities will include arranging protection and support in residual trials, appeals, and review proceedings; providing a contact point for protected victims and witnesses to inform them of the release of relevant convicted persons; monitoring and assessing threats to ensure that protective measures are effective and respected; and revising protective measures if necessary, as well as assisting victims and witnesses in their relocation to another State if required. This is a wide array of responsibilities that will remain on the shoulders of the ICC, as it remains on the shoulders of the residual mechanisms for the ad hocs and the SCSL. The ICC has asked witnesses to testify and invited victims to participate; the responsibility for ensuring their safety and security will remain with the ICC long after the trials have concluded.

That said, witness protection is one area where it makes sense to have the tasks and duties carried out by the national authorities, where it is appropriate to do so and under the overall oversight of the ICC itself. This, for example, is what will happen with the Residual Special Court: its obligation towards the protection of victims and witnesses is continuing, in collaboration with the Sierra Leonean Police, through its support in the creation of a special Witnesses Protection and Assistance Unit whose work will be overseen by witness protection officers of the Residual Special Court. This kind of cooperation, without abdicating responsibility, is a way in which the ICC could work in the future, which would both ensure a positive legacy through strengthening national witness protection programmes while at the same time reducing the financial burden on the ICC, which would need to oversee the national witness protection scheme but not need to have a fully functional witness protection unit working on a situation that has already closed.

49.3.2 Outreach

Outreach activities are needed to raise understanding about the institution, its mechanisms, and procedures. A survey conducted in 2012 by No Peace without Justice and its partners on the impact and the legacy of the SCSL both in Sierra Leone and in Liberia showed that a high awareness of the SCSL, its purposes, and work is evident in both countries. In general, perceptions in Sierra Leone were

Koroma is not referred to a competent national jurisdiction, the Residual Special Court shall have authority to try him.


more positive than in Liberia and more people had heard of the SCSL in Sierra Leone than in Liberia. This comes down to two things: first, the SCSL was based in Sierra Leone and not in Liberia. Second, outreach began much earlier in Sierra Leone than in Liberia and was able to have a broader reach, in part due to the establishment of outreach offices in every district of Sierra Leone from an early stage. There can be no doubt that there is a direct correlation between the outreach activities of the SCSL and strengthening its legacy and the positive contributions it has made to peace and justice. In the later years of the Court’s life, SCSL outreach also began to focus on its closure and the establishment of the Residual Special Court, which is an important way to consolidate the SCSL’s early gains and to promote acceptance by the populations both of the SCSL’s closure and of the work of the Residual Special Court.

Similarly, the ICC will need to do outreach around its completion and closure in any given situation. For this reason, it will be critical that the ICC has a clear vision of what completion will mean, particularly in terms of the conditions that need to be realized in order to say the Court has completed its mandate. In part, this will—or should—also be dependent on what the local population has to say about this issue: while the OTP has to be independent in determining when it can say it has completed its work, as discussed earlier, there is a need to be responsive to what local populations think on the matter, otherwise irrespective of the excellent work the ICC may do, its departure risks leaving a bitter taste in too many mouths. This is one reason it is critical to undertake wide-ranging consultations, encompassing a variety of sectors of society and ensuring broad geographic reach, to minimize the risk of that happening. Involvement that was missing in the case of the ICTY was that of Serbian civil society actors as opposed to civil society from Croatia and Bosnia. The effects are evident: the situation now is that Bosnia is fully going ahead with national prosecutions; Croatia is moving forward but on a regional level; and Serbia has not shown any interest in national trials.

49.3.3 Archives

There are two aspects to the archives of the ICC. On the one hand, there is a residual function—that of management of the ICC’s archives—that clearly belongs with and can be carried out by the ICC itself. Indeed, there is an argument that the material produced by the ICC belongs to the ICC and should be retained by it and shared pursuant to the rules established in its archival policy. However, there is also an argument to be made that the archives of the ICC, at least insofar as they are not confidential, ‘belong’ in a non-technical and non-legal sense to the populations where the crimes that were investigated and prosecuted were actually carried out. While of course the ICC cannot write the country’s history, and nor should it attempt to do so, it can make an important contribution at least to filling in parts of that history through the adjudication of contested facts and the attribution of individual criminal responsibility. As

49. Id. 50 See Raab (n 17) at 92–5.
such, the archives of the ICC form, or should form, part of the history of its situation countries.\textsuperscript{51} For the ICTY, for example, 90% of the ICTY’s public archives are co-held with the Humanitarian Law Centre, which makes those records available for research and perusal by people from the region.\textsuperscript{52} The public archives of the SCSL will likewise be available in Sierra Leone.\textsuperscript{53}

Indeed, the issuance of judgments could be a milestone or a starting point for a population, which could lead to national reconciliation. It is important that local actors have access to materials. The success of the Peace Museum project in Sierra Leone, which involved a national body and trained local actors to deal with the Special Court’s expertise, materials, and proceedings, is an example of this.\textsuperscript{54} It will be important for the ICC to build into its completion plans how it will share its archives with the situation country and which original items, such as exhibits whose owner cannot be found, should be provided to the situation country, for example for use in a museum or other memorial.\textsuperscript{55} This is also important to avoid charges of the ICC ‘stealing’ both memories and property from its situation countries, which is a useful lesson learned from the ad hocs and the SCSL.\textsuperscript{56}

### 49.4 A Role for the Court and the ASP

At the Kampala review conference, the ICC’s ASP succeeded in putting the discussion of ‘complementarity’ on the map. More specifically, as indicated above, the ASP and individual States Parties have attempted to push forward discussion of ‘positive complementarity’, that is, how international assistance can be directed towards the strengthening of national jurisdictions in the investigation and

\textsuperscript{51} See observations regarding the SCSL archives in Donlon (n 17) at 867–9.
\textsuperscript{52} See Fond za Humanitarne Pravo (‘Humanitarian Law Centre’) <http://www.hlc-rdc.org/?page_id=17468&lang=de> accessed 6 November 2013.
\textsuperscript{53} Art 7 RSCSL Statute; see also Donlon (n 17) at 867–9.
\textsuperscript{54} Donlon (n 17). As Donlon explains, The SCSL in cooperation with national stakeholders developed the Sierra Leone Peace Museum with the objective of establishing a memorial in Freetown which will include archives, a memorial, and exhibitions of war-related material. The Sierra Leone Human Rights Commission decided to house the archives of the Truth and Reconciliation Commission alongside the copy of the SCSL public records in the Peace Museum. Greater public education on the end of impunity and responses to grave human rights abuses will result as public records from various transitional justice institutions and will be available in one location.
\textsuperscript{55} See generally G Frisso, ‘Winding Down the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims’ (2011) 3 Goettingen Journal of International Law 1093, 1118, 1119. Frisso argues that Archives are particularly important, as they offer a historical record and information about the circumstances in which atrocities were committed. It becomes part of a people’s national heritage and should be preserved. It offers victims a collective right to know and may help contextualize victims’ experiences, thereby facilitating the healing of wounds.
\textsuperscript{56} See generally P Manning, ‘Governing Memory: Justice, Reconciliation and Outreach at the Extraordinary Chambers in the Courts of Cambodia’ (2012) 5 Memory Studies 165, 166. Manning brings to light criticisms of the ECCC’s contributions to reconciliation. He argues that the ECCC’s mandate provides a ‘selective memory’ of events: particular events are recalled through narrow factual and legal lenses rather than a broader historical context, placing memory in neat positions between guilt and innocence.
prosecution of ICC crimes. Since the review conference, the ASP, which has mandated annually facilitators and now ad hoc country focal points, to lead its work in this area, has sought out a strong role in pushing forward discussion with other important actors, particularly in the development and rule-of-law communities.

Experience since has shown that capacity building on investigation and prosecution of ICC crimes is no easy task, topped perhaps only by the challenge of securing the willingness of authorities to permit independent judicial activities to go forward without interference. Nonetheless, the ASP’s efforts to keep this issue front-and-centre for States Parties and to serve as an ambassador for complementarity with the development community hold potential for real contributions to seeing the principle of complementarity put increasingly into practice. The Court, however, has largely been sidelined by States Parties in discussions on complementarity. Particularly as discussions on positive complementarity were first undertaken within the ASP, some States Parties argued strenuously that the ICC has no role to play on positive complementarity. For some of these states, this was a mandate issue—they did not see positive complementarity in the Rome Statute. For other states, it has clearly been driven by a concern to keep the Court’s budget down, fearing that complementarity efforts on the part of the Court would require additional resources.

Given that ICC completion strategies will, as outlined, have a significant component related to capacity building, a consequence of State Party pressure on the Court to avoid its own role in complementarity may have contributed to stymied progress on discussion of such strategies. Court officials and staff will have specific expertise when it comes to identifying needs for capacity building in situations under investigation, and this expertise could be very useful to catalyse necessary complementarity efforts by other actors in these situation countries. While capacity building directed to activities that support the transfer of ICC responsibilities represents a smaller basket than the long list of possible assistance that can support complementarity, it nonetheless includes a number of functions that are also essential to national investigations and prosecutions, including—perhaps most clearly of all—witness protection and support.

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58 Id. Chehtman (n 22) 300–4.
59 Authors’ observations of State Party consultations on complementarity.

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Resurgent interest at the Court and among States Parties on completion strategies could midwife this kind of meaningful collaboration between court officials and States Parties on complementarity. Once completion strategies are conceived and given the time it will take to build capacity in these areas, it would be preferable for these strategies to be developed almost from the outset of the opening of a situation. It could become a clear roadmap for the Assembly, as part of its role and the role of its secretariat to facilitate information exchanges on complementarity, to then broker international assistance towards these ends. Focusing on delivering the national capacity to support the Court’s completion would provide a useful clarity of purpose to the efforts of the ASP, which otherwise would have seemed to cast about quite broadly for appropriate inroads on complementarity. States may want to resist a role for the Court—or even for themselves—in complementarity, but bringing complementarity discussions closer to emerging discussions on completion, as indeed reports produced for the twelfth ASP session have done, will contribute to a vision of the Court at the core of which there is a concern for legacy and impact.  

49.5 Conclusion

As the ICC enters its second decade, focused discussion on how the ICC will responsibly complete its activities in situations under investigation is long overdue. While there remains substantial work for the ICC to do in each of its current situations, a clear lesson learned from other international tribunals is that it is never early enough to begin preparing for eventual completion. This is important not only to ensure proper planning and implementation of completion strategies, but also because a focus on the ‘end game’ is likely to influence significantly how the ICC carries out its activities from the outset, increasing the Court’s orientation, and that of its States Parties, towards its legacy and impact.

Recent progress made in directing Court and State Party attention towards completion should be capitalized upon, and urgently. In devising completion strategies, the ICC will need a working model of what ‘completion’ will look like, and to develop methods, including consultation with affected communities and national authorities, to adapt that model to a given situation country.

It is clear, however, that a second lesson learned is that capacity building of national jurisdictions should be a pillar of completion strategies across the Court’s situations. Strengthened national jurisdictions can facilitate the Court’s completion of its activities in that responsibilities can be turned over to local authorities. It will also help to put in place the building blocks necessary to promote additional investigations and prosecutions nationally, provided it goes hand in hand with efforts to promote the willingness of those authorities to permit independent judicial activities to go

63 ASP Report of the Court on Complementarity (n 10); ASP Report of the Bureau on Complementarity (n 57).

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forward. This will afford broader accountability than the ICC acting alone and con-
tribute to the Court’s legacy: it should be considered a key dimension of any defini-
tion of the Court’s completion of its mandate. Indeed, the ICC is uniquely positioned
as compared to the other tribunals to harness the existing discussions of its member
states on ‘positive complementarity’ to this end. It is an opportunity that should not
be squandered.