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A catalyst for justice? The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo

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A Catalyst for Justice?

The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo

Christian Michael De Vos

A Catalyst for Justice?

The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo

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Christian Michael De Vos

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For J.D.

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LIST OF ABBREVIATIONS

A&R	Accountability and Reconciliation Agreement (Uganda)
ASP	Assembly of States Parties
CICC	Coalition for the International Criminal Court
CIPEV	Commission of Inquiry on Post-Election Violence (Kenya)
CMJ	*Comité Mixte de Justice* (DRC)
DPP	Director of Public Prosecutions
DRC	Democratic Republic of Congo
FPA	Final Peace Agreement (Uganda)
HRW	Human Rights Watch
ICA	International Crimes Act (Kenya 2008)
ICC	International Criminal Court
ICC Act	International Criminal Court Act (Uganda 2010)
ICD	International Crimes Division (Uganda and Kenya)
I-CD	Inter-Congolese Dialogue
ICL	International Criminal Law
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
JCCD	Jurisdiction, Complementarity and Cooperation Division
JLOS	Justice Law and Order Sector (Uganda)
JSC	Judicial Services Commission (Kenya)
KNHRC	Kenya National Human Rights Commission
KPTJ	Kenyans for Peace with Truth and Justice
LRA	Lord's Resistance Army
NILD	National Implementing Legislation Database
ODM	Orange Democratic Movement
OTP	Office of the Prosecutor
PAJ	Political, Administrative and Judicial Committee (DRC)
PE	Preliminary Examination
PEV	Post-Election Violence
PGA	Parliamentarians for Global Action
PTC	Pre-Trial Chamber (ICC)
STK	Special Tribunal for Kenya
TC	Trial Chamber (ICC)
UPDF	Uganda People's Defense Force
UVF	Uganda Victims Foundation
VRWG	Victims Rights Working Group
WCD	War Crimes Division (Uganda)

PROLOGUE

In the two and a half years I spent preparing to write this dissertation, I found myself living in The Hague or as it proudly refers to itself, the "International City of Peace and Justice." Host city to an array of international courts and tribunals, including the International Criminal Court (ICC), working in The Hague allowed me to regularly engage with an array of academics, jurists, and human rights activists, many of whom have made the creation and sustenance of the field of international criminal law their life's work. Their focus on the ICC in particular was remarkable in its sophistication and ambition. Not only was it rooted in the vision of a global institution that could competently and fairly try those accused of international crimes (a formidable task in itself) but one that could also spark the domestic pursuit of accountability in countries around the world.

This dissertation seeks to explore the belief in this spark—its origins, capacities, and permutations—as well as the ICC's ability to deliver upon it. As the Court enters its second decade, debates about its potential impact on domestic criminal jurisdictions, and the legal systems of states more broadly, loom ever larger. At the center of much of this discussion lies the principle of complementarity: the idea that the ICC is designed to supplement, not supplant, national courts. This appealing idea is at once both straightforward and deeply complex. Beginning as a technical admissibility rule for determining when the ICC can pursue a case within its jurisdiction, complementarity has since become the cornerstone for what is now commonly referred to as the "Rome Statute System," one in which "States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction."[1] A core aspiration is that complementarity will spur domestic jurisdictions to action. As put by two commentators, "The [ICC] is intended to not only investigate and prosecute crimes under its jurisdiction but to act as a catalyst for genuine national justice by applying the principle of complementarity."[2]

During my time in The Hague, I also traveled to three of the ICC's "situation countries" to interrogate this idea of the ICC-as-catalyst further: Uganda, the first country to come before the Court, and referred there by the government itself in 2004; the Democratic Republic of Congo, the second situation so referred; and Kenya, a country that became the source of the Prosecutor's first *proprio motu* investigation following the post-election violence of late 2007. These trips were field research, an attempt to explore the expectations that have attended the Court's establishment through interviews with international and domestic NGOs, ICC staff, judges, human rights advocates, and diplomatic representatives. In the course of those months, I conducted over 50 interviews with these individuals. Three are described below.

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[1] "Paper on some policy issues before the Office of the Prosecutor," September 2003, 5, at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf.

[2] Jonathan O'Donohue and Sophie Rigney, "The ICC Must Consider Fair Trial Concerns in Determining Libya's Application to Prosecute Saif al-Islam Gaddafi Nationally," EJIL: Talk! (8 June 2012).

1. Uganda: "We Have to Look Like We Are Doing Something"

The International Crimes Division—a special division of the Ugandan High Court's eight divisions—sits mid-way up a tall hill in the already hilly city of Kampala, Uganda's capital. The Division is not easy to reach. The easiest way, if you are without a car and unwilling to walk, is to grab one of the ubiquitous *matatus* that populate the city. I made three trips to the ICD in the course of my visits to Uganda but on this day we were to meet with one of the judges of the Division who was part of the bench then overseeing early proceedings in the trial of former LRA commander, Thomas Kwoyelo.[3]

As it happened, that morning we had also met with the legal counsel for Uganda's Amnesty Commission. The Commission had certified Kwoyelo's amnesty petition in January 2010 but was now engaged in a protracted battle with the Director of Public Prosecutions over its validity. Established by the Amnesty Act in 2000 as a way to incentivize defections from the Lord's Resistance Army, the Commission was the Division's institutional opposite: it granted ex-combatants protection from prosecution, while the ICD was meant to be the putative forum for prosecuting them. Curious, I asked the counsel what kind of impact he thought the ICC had had in Uganda. "A big one," he said. "The ICC has a lot of powers; it says some of these Africans need to behave." What about the ICD, I asked? "It has increased international pressure," he replied. "The donors have invested some money in that court so we have to look like we are doing something."

One long walk later, I sat before the judge who, over the course of an hour, answered a string of questions. How many judges sit on the Division? (Four, at that time.) When did it change from the War Crimes Division—its name when first established in 2008—to the International Crimes Division? (In 2010.) What rules of procedure would they use? (The rules had to be originated by the Division, but they would have to "reflect the best practices in the world.") The judge indicated that ICD colleagues had received multiple trainings in subjects ranging from substantive international criminal law and procedure, to organized crime and the laws of war. On the subject of the ICC, the judge expressed disappointment that the ICD itself did not have any interactions with the Court, and stressed the need for more "positive complementarity"—a proper witness protection program, judicial trainings, even perhaps "attaching" the Division to other "courts of complementarity" in countries like Australia or Canada. "I wish they [the ICC] could help with that, but I think they prefer to keep safe," the judge said.

2. Democratic Republic of Congo: *la poursuite de la pérennité*

Kinshasa, the DRC's dense and sprawling capital, is known as "Kin la belle," although the description is at times difficult to appreciate. We arrived in Kinshasa after two weeks in Kampala and Nairobi, and it was quickly apparent—even in this capital city, which sits far from the violence that grips the east of the country—what a daunting challenge the DRC, with its dense, complex histories of conflict, must be for a young institution like the ICC. Our arrival preceded the DRC's second presidential elections by several months, although it was clear that their imminence was already consuming most of the diplomatic community's energies.

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[3] Interviews with legal counsel to the Amnesty Commission and ICD judge, Kampala, 13 December 2011. "We" refers to Sara Kendall, with whom I conducted most interviews jointly.

On the first day, an interview that had been scheduled with the European Union delegation provided us, fortuitously, with an opportunity to meet two Congolese human rights advocates whose NGO had been engaged around the ICC's intervention for several years.[4] Much of their work focused on facilitating the participation of victims in Court proceedings, as well as advocating for the passage of Rome Statute implementing legislation. As they explained, their mandate was to "simplify" the Statute and make it understandable to people—in French, *la vulgarisation* ("popularizing work"). The advocates were there to brief the EU delegation's Working Group on Human Rights, a monthly gathering of donor states, but with elections looming the long table they were meant to address was almost empty. Except for one representative, no one had shown up.

The Working Group's loss was our gain: over coffee, we seized the opportunity for a conversation. It quickly became apparent that despite our interlocutors' support for the ICC's work in the DRC, they were deeply critical of its performance. They spoke of the poor quality of investigations and of the investigator one of them met who had never even been to the DRC before. How were they selected? How were they vetted? They recalled that the best years for contact with the Court were probably between 2002 and 2005—the early years of its intervention—and expressed frustration with the many ICC staff changes since then. "People leave, and you don't know where they go," one remarked. *Il faut que le peu qui est fait, soit bien fait* ("the little that is done must be done well") said the other but, in her view, too much had not been done well. Although there was "a lot of hope" amongst victims in the beginning, it was not as strong now, and people could not understand why the first trial in The Hague (that of Thomas Lubanga, for the recruitment of child soldiers) had gone on for so long.

Towards the end, the discussion turned to the prospects for domestic accountability in the DRC. What about the prospect of a mixed chamber for these serious crimes, of the sort that was then being proposed? They were skeptical. "It is not just about the judges—it is about the prisons, the personnel, the system at large," one replied. It was the need for long-term sustainability within the criminal justice system that concerned them—*la poursuite de la pérennité*. A special chamber would only deal with one category of crimes; it would be an "itinerant" court unconnected to the domestic judiciary. What, they asked, about the rest of the country?

3. Kenya: "One Long Game"

On my third trip to Nairobi, I met again with the director of the Kenyan country office for a prominent international NGO, someone I had first interviewed 18 months prior, shortly after the OTP announced its summons for the defendants that would become known as the "Ocampo Six." From my first visit to Nairobi, the sophistication of Kenyan civil society was quickly apparent,[5] as was the jolt that the ICC's intervention had brought to the human rights community there. As the same director said at our first meeting, Kenya had a long history of impunity for political violence such that, when the ICC first arrived, many Kenyans embraced it. "They were so used to seeing people get away with things," he said.[6]

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[4] Interview with Congolese human rights advocates, Kinshasa, 20 June 2011.
[5] On the emergence and accomplishments of modern civil society in East Africa, see Makau Mutua, ed., *Human Rights NGOs in East Africa: Political and Normative Tensions* (Kampala: Fountain Publishers, 2009).
[6] Interview with Kenyan NGO director, Nairobi, 17 June 2011.

Indeed, the Court's arrival brought with it, for a time, great hope. Members of Kenyan civil society set about supporting the ICC's work in a variety of ways: registering and interviewing victims, supporting an "underground" witness protection system, conducting outreach in conflict-affected communities, gathering evidence, and continuing to push for the establishment of a special domestic tribunal.[7] In Kenya, as elsewhere, national NGOs came to serve as a kind of shadow network for the Court.

By the time of our second meeting, however, that hope had dimmed considerably.[8] Two of the "Ocampo Six" had not had their charges confirmed and there was fear—well founded, as it would soon turn out—that other cases might collapse.[9] I asked my interlocutor what kind of impact he thought the Court had had, despite its missteps. What had it catalyzed? The answer came in two parts. On the one hand, "the only time you hear about something being set up [in Kenya] is when the ICC moves." That was what led Parliament to attempt to set up a domestic tribunal in 2009, and later to the creation of a special "task force" within the Director of Public Prosecutions to investigate the post-election violence cases. But none of that, apparently, mattered. "All that has supposedly been done for complementarity," he said with a sigh, "It has just been one long game."

[7] These examples were offered through interviews with Kenyan civil society advocates, Nairobi, June 2011 and January 2012.
[8] Second interview with Kenyan NGO director, Nairobi, 3 December 2012.
[9] Following the confirmation of charges decisions, the ICC Prosecutor announced in March 2013 that her Office was withdrawing the charges against Francis Muthaura. The charges against Kenyan President Uhuru Kenyatta were subsequently withdrawn in March 2015.

CHAPTER ONE
Introduction

Since its inception, a central preoccupation of and for the International Criminal Court has been the nature of its relationship to national jurisdictions. A permanent body intended to investigate and adjudicate crimes conceivably without geographical restriction, the ICC is structurally designed to work at the intersection of the international and the domestic. Complementarity—the idea that the Court is intended to supplement, not supplant, national jurisdictions—has been the dominant juridical logic through which this relationship has been expressed but, as the prologue's three narratives suggest, the principle occupies a charged space in the political imaginary, replete with tensions and ambiguity. To a Ugandan judge it suggests that the ICC might serve as a kind of "big brother" court to its domestic counterpart, while to a Kenyan human rights advocate it represents little more than a "long game" by a government determined to evade The Hague.

Meanwhile, for many of the Court's supporters, complementarity is the "cornerstone of the Rome Statute": it represents the very future of international criminal justice. In the words of the International Center for Transitional Justice, "How the complementarity principle is put into practice will be the key to the fight against impunity and thus the future of international justice will largely turn on these efforts."[10] So understood, complementarity is no longer a legal concept confined to the courtroom—an organizing principle for the regulation of concurrent jurisdiction—but a policy tool for catalyzing progressive change in post-conflict countries' legal frameworks and institutions.[11]

1. Research Aim, Problem Statement, and Research Questions

This dissertation aims to examine what effects framing the ICC as a "catalyst" for domestic investigations and prosecutions has had in three distinct situation-country contexts. Pursuant to this research aim, it examines how both state and non-state actors in Uganda, Kenya, and the Democratic Republic of Congo have relied upon the principle of complementarity as the logic through which the Court's catalytic potential can be best

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[10] International Center for Transitional Justice, "The Future of International Justice: National Courts Supported by International Expertise," at https://www.ictj.org/news/future-international-justice-national-courts-supported-international-expertise

[11] As detailed further in the dissertation, there has been a rapidly proliferating literature that frames its inquiries around the ICC's catalytic potential through the principle of complementarity. One of the earliest articles to employ the phrase was Jonathan Charney, "Editorial Comments: International Criminal Law and the Role of Domestic Courts," *American Journal of International Law* (2001), 120 (viewing the effective success of the ICC as "having first served as a catalyst, and then as a monitoring and supporting institution"). See further Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Leiden: Martinus Nijhoff Publishers, 2008); Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press, 2008); Géraldine Mattioli and Anneke van Woudenberg, "Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo," in Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, March 2008); Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (UK: Ashgate, 2011). See also Janine Natalya Clark, "Peace, Justice and the International Criminal Court: Limitations and Possibilities," *Journal of International Criminal Justice* 9 (2011), 521-545; Clark argues that, "through the implementation and practice of complementarity, the Court can potentially have a significant catalytic effect," 538. The most recent, and best, work to date is Sarah M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013).

realized, as well as a transnational site and adaptive strategy for entrenching the norm of international criminal accountability domestically. In so doing, it asks three principal research questions. First, how has the understanding of complementarity evolved since the ICC's inception and what role have non-state actors, in particular, played in this evolution? Second, how have ICC judges understood and interpreted complementarity's requirements in the courtroom, and how has the Office of the Prosecutor sought to implement it as a matter of policy? Finally, to what extent and how have the ICC's interventions in Uganda, Kenya and the DRC affected these countries' institutional and normative frameworks for carrying out domestic criminal proceedings?

2. Framing the ICC as a Catalyst

Framing international legal institutions as catalysts dominates much of a growing literature on their effects and impact at the national level. While the ICC may represent a more recent iteration, the presumption that other institutions—from regional human rights courts to UN human rights mechanisms—would have or have had a salutary effect on state behavior has drawn the interest of legal scholars and political scientists alike.[12] The political scientist Kathryn Sikkink writes that, "Well before the creation of the ICC, the Inter-American Commission on Human Rights and the Inter-American Court of Rights … played a catalytic role in pushing for individual criminal accountability."[13] Sikkink contends that these courts were part of an array of actors and norm entrepreneurs, "including NGOs, regional human rights organizations, and members of transnational governments,"[14] who collectively contributed to the rise and legitimation of individual criminal accountability as a new international norm.

Describing this new norm as part of a "justice cascade," Sikkink argues that "states and non-state actors worked to build a firm streambed of international human rights law and international humanitarian law that fortified the legal underpinnings of the cascade, culminating in the Rome Statute of the ICC in 1998."[15] The prosecutions of several high-level political figures, which drew legal scholars to examine the domestic effects that such efforts might augur, illustrate the fortification of this cascade.[16] These developments continued with the establishment and evolution of the *ad hoc* tribunals for Rwanda and the former Yugoslavia, both of which preceded the ICC. Here, too, the trope of the "catalyst" has been summoned: William Burke-White argues that, "the ICTY has encouraged the development of domestic courts in [Bosnia and Herzegovina] and catalyzed the activation of domestic judicial institutions," while Diane Orentlicher concludes that, "[T]he ICTY became a key catalyst for ramping up Bosnia's domestic

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[12] See, e.g., Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton & Company, 2011); Ted Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights* (Washington, D.C.: Brookings Institution Press, 2012). 269.

[13] Sikkink, *The Justice Cascade*, 105.

[14] Ibid., 245.

[15] Ibid., 97

[16] See, e.g., Ellen L. Lutz and Caitlin Reiger (eds.), *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009). See also Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in The Age of Human Rights* (University of Pennsylvania Press, 2005). Roht-Arriaza, noting the "burgeoning field of transnational prosecutions" that followed the attempted extradition of former Chilean General Augusto Pinochet from the United Kingdom in 1998 (the same year as the Rome Statute's adoption), argues that the case "played a catalytic role in stimulating and accelerating judicial investigations" in countries like Chile and Argentina. See Naomi Roht-Arriaza, "Of catalysts and cases: transnational prosecutions and impunity in Latin America," in Madeleine Davis (ed.), *The Pinochet Case: Origins, Progress and Implications* (London: Institute of Latin American Studies, 2003), 210.

capacity to prosecute wartime atrocities."[17] Similarly, Yuval Shany observes that the "practical importance of international criminal proceedings is mainly symbolic and catalytic," insofar as they "may trigger or nurture domestic and international legal and political processes."[18]

Interest in the capacity of international courts and prosecutions to serve as "catalysts" at the national level has strong affinities with a growing literature on the socializing power of international law and legal institutions, and their role in shaping state behavior.[19] Seminal texts like the *Power of Human Rights*[20] and the early work of such scholars as Abram and Antonia Handler Chayes[21] opened up a new literature amongst social scientists on compliance with international norms and institutions, one that has proliferated rapidly in the last two decades. Interest in the ICC as a catalyst for domestic criminal proceedings thus reflects a converging interest of two distinct, though interconnected, disciplines—international relations and international law—in how legal institutions can influence state behavior and, more particularly, how they can encourage "rule-consistent" behavior.[22] In this sense, interest in complementarity is part of a larger

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[17] William W. Burke-White, "The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina," *Columbia Journal of Transnational Law* 46 (2008), 282; Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Justice Initiative/International Center for Transitional Justice, 2010), 108. Orentlicher advances a similar argument in the context of the Serbian experience, arguing that "one of the ICTY's most acknowledged, if nonetheless limited, achievements in Serbia has been its role in spurring the creation of a local war crimes court and helping to empower that court to function professionally." See Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (Open Society Justice Initiative, 2008), 45. More recent scholarship has focused on the Special Court for Sierra Leone's contributions to domestic justice advancements as well. See, e.g., Sigall Horovitz, "How International Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone," *Israel Law Review* 46(3) (2013), 339-367.

[18] Yuval Shany, "The Legitimacy Deficit of Exceptional International Criminal Jurisdiction," in Fionnuala Ni Aolain and Oren Gross (eds.), *Guantanamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge: Cambridge University Press, 2013), 370.

[19] See, e.g., Karen Alter, *The New Terrain of International Law: Courts, Politics, and Rights* (Princeton University Press, 2014); Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford: Oxford University Press, 2013); Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009). Goodman and Jinks, in particular, have advanced a theory of "acculturation as a distinct mode of social influence," arguing that this model best accounts for changes in state behavior, in part, "because 'conforming' and 'belonging' themselves confer substantial affective returns," 30-31.

[20] Drawing on quantitative and qualitative case studies, *The Power of Human Rights* suggested that a five-phase "spiral model" explains the socialization process of states with human right norms; the model links interactions among governments, domestic opposition groups, and transnational human rights networks. See Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999); see also Risse, Ropp, and Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013).

[21] The Chayes' scholarship forms part of an important strand in compliance literature focusing on "managerial" compliance, suggesting that limitations on the capacity of states and the absence of domestic regulatory apparatuses, rather than the ability to sanction, better explains why states comply with international law. See Abram Chayes and Antonia Handler Chayes, "On Compliance," *International Organization* 47(2) (1993).

[22] See, e.g., Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013); Michael Barnett and Martha Finnemore, *Rules for The World: International Organizations in Global Politics* (Cornell: Cornell University Press, 2004); Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," *American Journal of International Law* 92 (1998), 367-397. For an account of the rise of global governance through

contemporary moment in global governance, wherein supranational judicial bodies are increasingly scrutinized in terms of their effects on state compliance with international norms, rules, and judgments.[23]

These developments in scholarship and the rise of the accountability norm described by Sikkink resonate with a view of international criminal law and its institutions as progressive, catalytic forces on states. As a discursive structure, characterizing these institutions as "catalysts" also recalls what Thomas Skouteris has called the notion of progress in public international law discourse. In the context of the "new tribunalism" of which the ICC is a part, this "vocabulary of progress" becomes a "legitimizing language"—a narrative of evolution and disciplinary progress.[24] In Skouteris' words, "It is a compelling story about how international law may finally be able to travel the coveted distance from a power-oriented approach to a rule-oriented approach, from indeterminacy to determinacy, from impunity to accountability."[25] Thus figured, international tribunals are "not only the latest addition to the repertoire of international legal action: they are also the catalyst for coping with the realist challenges of the 21st century."[26]

3. Complementarity as a Catalyst for Compliance

Most writing about the ICC's power to catalyze domestic investigations and prosecutions has interpreted complementarity as a matter of compliance with rules. As stated in the ICC Prosecutor's first policy paper: "[T]he system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States."[27] In this duty-based understanding, these "rules" include a legal obligation on states to implement the Rome Statute within their domestic penal code; to ensure that their courts are capable of accommodating prosecutions for international crimes; and, as the Statute's preambular language affirms, to investigate and prosecute those responsible.[28] A number of legal scholars, notably Jann Kleffner's pioneering work on complementarity, have sought to locate these duties

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international institutions, see Mark Mazower, *Governing The Word: The History of an Idea, 1815 to the Present* (New York: Penguin Books, 2013).

[23] On compliance, see Dinah Shelton (ed.), *Commitment and Compliance: The role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2003); Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (Philadelphia: University of Pennsylvania Press, 2007); Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge: Cambridge University Press, 2014). Attendant with this turn has been a growing interest in identifying "indicators" for measuring compliance. See, e.g., Sally Merry, "Measuring the World: Indicators, Human Rights, and Global Governance," *Current Anthropology* 52(3) (April 2011), 83-93.

[24] Thomas Skouteris, *The Notion of Progress in International Law Discourse* (Leiden: Proefschrift, 2008), 187. On the discourse of progress as the "dominant narrative of modern international law," see also David Koller, "… and New York and The Hague and Tokyo and Geneva and Nuremberg and…: The Geographies of International Law," *European Journal of International Law* 23(1) (February 2012); Gerry Simpson, "The sentimental life of international law," *London Review of International Law* 3(1) (2015), 4.

[25] Skouteris, *The Notion of Progress in International Law Discourse*, 137.

[26] Ibid.

[27] "Paper on some policy issues before the Office of the Prosecutor," ICC-OTP 2003 (September 2003), at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf.

[28] Rome Statute, Preamble, para. 10; see also Kampala Declaration, RC/Decl.1, para.5 ("Resolve to continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally-recognized fair trial standards, pursuant to the principle of complementarity.").

within the Rome Statute itself. For Kleffner, complementarity is understood as "aiming to induce and facilitate the compliance of States with their obligation 'to exercise [their] criminal jurisdiction over those responsible for international crimes,' which underlies the Rome Statute."[29] Furthermore, he argues, "The detailed content of the obligation imposed by the [Rome] Statute, as derived from the complementarity requirements, demands that State Parties conduct effective, genuine, independent and impartial investigations into allegations of ICC crimes without unjustified delays."[30]

This duty-based approach has involved two key strategies for complementarity. On the one hand, complementarity signals the Court's potential to act as a coercive stimulant on national jurisdictions (a threat-based relationship); on the other, it signals the ICC's ability to serve a more cooperative, managerial function, wherein it supports or, literally, "complements" national jurisdictions. While these divergent approaches have important implications for the realization of complementarity in practice, both share a vision in which the ICC can precipitate or spur progress in conducting investigations and prosecutions at the domestic level. This understanding of complementarity was actively developed under the tenure of former Prosecutor Luis Moreno-Ocampo, who identified "positive" complementarity—defined as the active encouragement of "genuine national proceedings"—as a principal pillar of his Office's strategy.[31]

This dissertation argues that complementarity's evolution as a tool for compliance has cast the domestic forms and possibilities for post-conflict justice in Uganda, Kenya, and the DRC within a predominantly retributive model, furthering "the criminal trial, courtroom, and jailhouse as the preferred modalities to promote justice for atrocity."[32] In this process, complementarity has largely been interpreted in a manner that privileges (even when it does not legally require) a mirroring of the ICC's normative and institutional frameworks. Domestic accountability is thus commonly understood as requiring, for instance, the establishment of exceptional courts that mimic the ICC's structures rather than prosecutions enabled through the "regular" criminal justice system. Prosecutions, too, are thought to necessitate adjudication as international crimes rather than "ordinary" crimes, while accountability itself is increasingly understood and prioritized as a project of criminal justice, rather than the plural approaches more commonly associated with transitional justice policy and practice.[33] Indeed, the ICC is

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[29] Jann K. Kleffner, "Complementarity as a Catalyst for Compliance," in Jann K. Kleffner and Gerben Kor (eds.), *Complementary Views on Complementarity: Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court, Amsterdam, 25/26 June 2004* (The Hague: TMC Asser Press, 2006), 80. See also Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, 473-478; Jann Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law," *Journal of International Criminal Justice* 1 (2003), 113 (noting that, "complementarity provides for a supervision of national criminal courts, supported by the threat that they relinquish the primary right to exercise jurisdiction if they fail to meet the relevant requirements"); Florian Jessberger and Julia Geneuss, "The Many Faces of the International Criminal Court," *Journal of International Criminal Justice* 10 (2012), 1088 ("The ICC's possible intervening looming over the affected states' reputation serves as a tool to trigger domestic prosecution and is a 'catalyst for compliance.'").

[30] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 307.

[31] "The Office of the Prosecutor - Report on Prosecutorial Strategy" (14 September 2006), II.2.a.

[32] Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), 5. Ruti Teitel similarly refers to the growing "enforcement of international human rights norms through judicial proceedings," in particular international criminal law enforcement. Ruti G. Teitel, "The Universal and the Particular in International Criminal Justice," in *Globalizing Transitional Justice: Contemporary Essays* (Oxford: Oxford University Press, 2014).

[33] See, e.g., Lisa J. Laplante, "Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes," *Virginia Journal of International Law* 49(4) (2009), 915-984. On the persistence (and necessity) of

itself now commonly referred to as a "transitional justice mechanism." Domestic accountability is thus increasingly understood and measured in retributive, outcome-oriented terms.

Judged by these terms, the ICC may appear to have accomplished little in Uganda, Kenya, or the DRC.[34] In Kenya, no senior official or political leader has been held to account for crimes committed during the 2007-08 elections and, while there have been a handful of scattered domestic prosecutions, they have been charged as "ordinary" crimes, in the ordinary criminal justice system.[35] Efforts to establish a domestic special tribunal have repeatedly failed and despite the appointment of various working groups and a domestic "task force" to review hundreds of PEV case files, the vast majority of them have been deemed unfit for prosecution due to an alleged lack of evidence.[36] There have been more, but still limited, domestic prosecutions in the DRC through mobile military courts; however, as I argue, these are primarily due to the efforts of human rights advocates who summon complementarity as a principle of burden-sharing and cooperation (rather than admissibility) to animate their work. The ICC itself is barely present.[37] Finally, in Uganda, there has been only one attempted prosecution to date of a former LRA member before its International Crimes Division, a proceeding which itself has been rife with fair trial violations.

Yet, from a process-oriented perspective, the "idea of the ICC" has been deeply alive in domestic politics and there has been considerable national-level activity pursued in complementarity's name.[38] Indeed, as this dissertation illustrates, the absence of domestic proceedings has not meant that states are inactive, but nor has it meant that compliance with rules necessarily produces greater accountability. Furthermore, an approach defined principally by outcome rather than process underscores the extent to which legalism animates the catalyst/compliance framework. More particularly, it underscores the dominance of what Bronwyn Leebaw has called "human rights legalism," which "not only insists upon the promotion of *law* and courts in general, but on the

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amnesties, see Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009).

[34] Nouwen's "most striking" finding in her commanding study of the Court's interventions in Uganda and Sudan was that the relevant compliance sought—an increase in domestic proceedings for crimes within the ICC's jurisdiction—was "barely observable in either state." She is careful to note, however, that an absence of domestic proceedings did not mean that complementarity was without catalytic effect. See Nouwen, *Complementarity in the Line of Fire*, 10, 33.

[35] See, e.g., Irene Wairimu, "Kenya: First Life Sentence in Local PEV Trial," *The Star* (12 June 2012); Human Rights Watch, "'Turning Pebbles': Evading Accountability for Post-Election Violence in Kenya" (December 2011).

[36] In June 2008, Kenya's Attorney General constituted a "task force" within the Director of Public Prosecutions (then subordinate to the AG's Office) to undertake a national wide review of the PEV cases; it later released two reports on domestic investigations and prosecutions, in 2009 and 2011. For a more detailed assessment of these figures, see Sosteness Francis Materu, *The Post-Election Violence in Kenya: Domestic and International Legal Responses* (The Hague: T.M.C. Asser Press, 2015), 102-111. The Attorney General also established a "Working Committee on the International Criminal Court" in 2012, following the government's failed admissibility challenges. See "Report of Government's Working Committee on the International Criminal Court" (March 16, 2012) (on-file).

[37] For a similar conclusion, see Milli Lake, "Ending Impunity for Sexual and Gender-Based Crimes: The International Criminal Court and Complementarity in the Democratic Republic of Congo," *African Conflict & Peacebuilding Review* 4(1) (Spring 2014). Lake concludes that, "while the ICC may have inspired certain aspects of legal reform in DRC, the Court itself has remained largely disengaged from domestic developments," 3.

[38] My thanks to Rod Rastan for this felicitous phrase.

centrality of *criminal* law in the aftermath of atrocities and political violence."[39]

Scholars have noted for some time the dominance of legalism—defined by the political theorist Judith Shklar as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by legal rules"[40]—in transitional justice literature. Kieran McEvoy notes, for instance, that, "a strongly positivistic trend of scholarship and practice persists in the legal understanding of transitional justice."[41] This, he suggests, is the product of the "institutionalization of transitional justice in major legal edifices," including the ICC.[42] In McEvoy's view, legalism is seductive, for it "encourages a notion of a rational and ordered place based on universal understandings."[43] Similarly, Shklar notes the influence of legalism as a "matter of rule following," one that seeks to separate legal analysis from politics as well as other disciplines. She writes:

> The urge to draw a clear line between law and non-law has led to the constructing of ever more refined and rigid systems of formal definitions. This procedure has served to isolate law completely from the social context within which it exists. Law is endowed with its own "science," and its own values, which are all treated as a single "block" sealed off from general social history, from general social theory, from politics, and from morality.[44]

Legalism thus shares with compliance an emphasis on rule abidance, wherein political problems are often subordinated to legal categories. In Shklar's words, "Politics is regarded not only as something apart from law, but as inferior to law."[45]

By contrast, this dissertation underscores the primacy of political context in understanding the ways in which domestic actors have negotiated ICC interventions at national level. Building on Leebaw's insight, it argues that these interventions and the goals they seek to achieve have not transcended "the influence of local politics or the impact of global asymmetries" but are, in fact, constituted by them.[46] Nevertheless, in The Hague the ICC has articulated a complex set of rules that states must satisfy in order to successfully challenge the admissibility of cases before the Court, leaving little room (or the perception of little room) for agency or political discretion. As I argue, these rules

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[39] Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge: Cambridge University Press, 2011), 6 (emphasis in original).
[40] Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1964), 1. For a similar, contemporary critique from a conservative legal scholar, see Eric Posner, *The Perils of Global Legalism* (Chicago: The University of Chicago Press, 2009).
[41] Kieran McEvoy, "Letting Go of Legalism: Developing a 'Thicker' Version of Transitional Justice," in Kieran McEvoy and Lorna McGregor (eds.), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* 15-45 (Portland: Hart Publishing, 2008), 19.
[42] Ibid.
[43] Ibid., 20. For a qualified defense of legalism and international criminal tribunals, see Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000).
[44] Shklar, *Legalism*, 2-3.
[45] Ibid., 111. For a similar argument in the context of humanitarianism, see David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004).
[46] Leebaw, 179. Leebaw emphasizes instead the importance of political judgment in the examination of systematic atrocities, which "informs the ways in which clashing local and international standards will be treated," 178. Sarah Nouwen and Wouter Werner have also called for an evaluation of the ICC's activities that acknowledge and understand its political dimensions; however, their framework of analysis emanates from the friend/enemies framing advanced by Carl Schmitt. See Sarah M.H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *European Journal of International Law* 21(4) (2010), 941-965.

perpetuate a mirroring effect between international and domestic institutions, often at the expense of more pluralistic approaches.

A catalyst/compliance framework also tends to privilege the ICC as the institutional locus for triggering domestic change, wherein rules and practices devised in The Hague radiate outwards. A central premise here, however, is that the effects of ICC engagement cannot be interpreted in institutional isolation. Indeed, the perpetuation of the ICC's mirroring effect is not only (or even mostly) the work of Court actors. It is also the result of private actors and norm entrepreneurs—international human rights NGOs, academics, influential donors—who have powerfully and deliberately sought to shape the public understanding of justice in the ICC's image. This constellation of global civil society actors, technical advisors, and international consultants that attend Court interventions are equally, if not more, important actors in spurring domestic reform agendas and influencing political priorities.[47] Indeed, while ICC case law and the Rome Statute are both sources of legal authority, it is often these entrepreneurs who play the most active role in mediating the normative content of complementarity and in framing the Court as a catalytic force.[48]

Notably, this vertical approach to change places a heavy burden on the Court itself. To catalyze, the ICC must be seen as a credible threat by states: its coercive power depends on safeguarding this perception. But the Court's lackluster record of confirmations and convictions to date indicates that it has largely failed to live up to these expectations, thus imperiling its catalytic potential. Furthermore, the Court and its political stakeholders (notably, the Assembly of States Parties) have often struggled to reconcile complementarity's more ambitious policy goals, particularly its cooperative dimensions, with the ICC's so-called "core function" as a court of law. In practice, then, a more narrow approach to the Court's relationship with domestic jurisdictions has been pursued, limited not only by geographical and institutional constraints but, increasingly, financial ones as well.

4. Structure

The following chapters address how the ICC, through the exercise of the principle of complementarity, has been framed as a catalyst for one particular set of

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[47] Recent work has drawn attention to the vital role played by these actors in the ICC's establishment and functioning. Nouwen, for instance, points out that, "In practice, most catalyzing effects are not the result of direct ICC-state interaction." *Complementarity in the Line of Fire*, 22. See also Lake, "Ending Impunity for Sexual and Gender-Based Crimes," 4 (concluding that "many of the developments within the Congolese justice sector have been propelled not by the ICC, but by the work of international and domestic NGOs"). On the significance of civil society's role in the ICC's creation and evolution, see Marlies Glasius, *The International Criminal Court: a global civil society achievement* (New York: Routledge, 2006); Fanny Benedetti, Karine Bonneau, and John L. Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Leiden: Martinus Nijhoff Publishers, 2014).

[48] For a similar assessment in the context of the work of other international tribunals and human rights institutions, see Xinyuan Dai, "The Conditional Effects of International Human Rights Institutions," *Human Rights Quarterly* 36 (2014), 589 (arguing that IHRIs "in and of themselves, do not directly impact states' policies or behaviors"; rather, "others—interested stakeholders and human rights activists—may (or may not) use them to gain additional leverage to push for improvement in human rights practices"); Patrice C. McMahon and David P. Forsythe, "The ICTY's Impact on Serbia: Judicial Romanticism Meets Network Politics," *Human Rights Quarterly* 30 (2008), 433 (arguing that "the court's effects must be considered in the context of the networked order in Europe").

outcomes: domestic investigations and prosecutions.[49] As highlighted in the problem statement and research questions above, I seek to trace not only how the understanding of complementarity has evolved since the ICC's inception, but also how judges in The Hague have interpreted the principle and how it has been implemented in practice by key Court actors, notably the Office of the Prosecutor. The dissertation then examines the process by which such proceedings have sought to be realized in the contexts of Uganda, Kenya, and the DRC, focusing in particular on the institutional and normative frameworks that have emerged in these countries.[50]

Chapter two examines how complementarity has evolved from a legal rule of admissibility—an organizing principle for the regulation of concurrent jurisdiction—to an instrument of policy. This policy, often referred to as "positive" complementarity, is one that promotes the ICC and the "Rome Statute System" as proactive agents for domestic accountability. In seeking to understand the meaning and purpose of this evolution, the chapter traces this more ambitious articulation of the ICC's relationship to national jurisdictions and argues that its ascendance reflects the work of norm entrepreneurs who, through a duty-based reading of the Statute, have progressively sought to articulate a more catalytic vision for the Court and a broader array of policy goals. It concludes that complementarity's evolution in this regard is testament to the significant influence of non-state actors, and of a growing effort on their part to route human rights norms through the framework of international criminal law.

This discursive project runs alongside the Court's jurisprudence, which, thus far, has established a largely conservative, Hague-centric interpretive framework for determining admissibility. Chapter three thus focuses on complementarity in its juridified form: it undertakes a detailed review of Article 17 jurisprudence and argues that the ICC has developed a body of case law that requires states to effectively mirror the same conduct (and arguably the same incident) that the OTP investigates as a precondition for rendering a case inadmissible. Although the Court's more recent case law in the context of Libya's admissibility challenges has unsettled this mirroring regime somewhat, the chapter contends that such a strict approach to admissibility challenges may serve to stymie, rather than catalyze, domestic proceedings. Furthermore, while Court officials and some commentators have defended the ICC's approach, suggesting that it is not inconsistent with the policy goals of complementarity, I argue that this division is symptomatic of legalism: it relies on an artificial division between the Court as a legal and political actor.

Chapter four shifts from doctrine to practice, and examines the role of the Office of the Prosecutor. Responsible for undertaking the investigations and prosecutions that are brought before the Court, the OTP is arguably the most significant actor shaping the ICC's catalytic potential, perched as it is between The Hague and national jurisdictions. The chapter thus queries in what ways the Office has sought to influence state behavior towards domestic proceedings through two key areas of its work: preliminary examinations and investigations. As the only country of the three to have been placed in preliminary examination, the dissertation offers a case study of the Kenyan experience in order to closely explore the political dynamics at play in that period, and what

[49] While the focus here is predominantly on whether and how the ICC has catalyzed domestic proceedings, I do not suggest that Court interventions have not had other, multi-dimensional effects.
[50] While the research presented herein endeavors to take account of recent developments in each country, the analysis centers most closely on national developments that took place between 2010 and 2013, during which time field research was carried out.

presumptions guided the OTP as it sought to push the state to establish a national accountability mechanism that, thus far, remains elusive. The second half of the chapter addresses the Office's investigatory practices, focusing on Uganda and the DRC in particular. It argues that while investigations could be a material site where a positive, cooperative approach to complementarity could be more meaningfully enacted, for the most part it has not been. This has often been to the detriment of the OTP's relationship with state and non-state actors at the national level, but also to the Office's confirmation and conviction record, which itself imperils the Court's catalytic potential.

Chapters five and six move away from Hague-based actors to national-level actors in Kenya, Uganda, and the DRC. Together, they address two key areas of "rule following" associated with the catalytic frame: the transformation of domestic judiciaries for the prosecution of atrocity crimes and the reform of national legal frameworks. Chapter five examines the emergence and attempted establishment of specialized domestic courts or chambers for the prosecution of serious crimes as one of the most frequently cited outcomes of ICC interventions, even though, as I argue, the link between these efforts and the Court's work is sometimes tenuous. In Kenya and Uganda, these divisions have been created or proposed to satisfy perceived obligations under the ICC's complementarity regime, although there has been only one attempted domestic prosecution (in Uganda) by such a division to date. By contrast, in the DRC, domestic military courts have undertaken a far greater number of prosecutions, even though they were not created in response to, and indeed preceded, the ICC's involvement. In describing these various courts, the chapter highlights the shifting, multiple ways in which complementarity has been invoked as a basis for their establishment. The chapter's second half identifies several concerns that these institutions have produced, in particular the enduring tensions between the exceptionalism that underwrites the creation of special courts and their relationship to ordinary criminal justice systems. It also examines the ways in which the establishment of domestic institutions in complementarity's name have accommodated to state power, leading in certain instances to outcomes that are themselves at odds with human rights norms.

Chapter six explores the normative impact of the ICC on the legal frameworks of these three states. It first argues that implementation has become a sophisticated and technocratic exercise in applying the Rome Statute as a "global script"; this, in turn, has contributed to an increasingly disciplinary approach to implementation, one that privileges conformity with the Statute. Second, I argue that it was less the ICC's intervention or the threat of domestic proceedings that catalyzed the passage of national implementation legislation in any of these countries; rather, implementation of the Statute was accelerated in order to "perform" complementarity for predominantly international audiences. The union of these two factors—uniformity of application and the power of external constituencies—was largely responsible for driving the implementation process in both Kenya and Uganda, but it glossed over deeper political fissures about the desirability of international criminal law as a framework for domestic accountability. In the DRC, by contrast, domestic politics have continually thwarted efforts to press for comprehensive implementing legislation (though looming presidential elections may yet contribute to its passage). Despite these different outcomes, the chapter queries the outsized role of external actors and constituencies in the implementation processes, raising questions about the content and form of the domestic legislation that was enacted.

In the final chapter, I offer several tentative conclusions arising out of this work. First, complementarity contains multiple meanings: it is not merely a rule of admissibility, but the juridical logic through which the ICC's potential as a catalytic force has been expressed. Second, although complementarity was initially seen as a mechanism to influence the choices of state actors, its effects on non-state actors appears to have been far more profound. Third, while legalism is central to the pursuit of a rules-based global order, the effects of ICC interventions in Uganda, Kenya, and the DRC—all peri-transitional countries, with long histories of political autocracy—underscore how global asymmetries, and the patronage networks they produce, are deeply entwined with the catalytic project. The increasing focus on "compliance" with ICC standards and procedures is partially a function of these asymmetries: it belies the outsized influence that external constituencies can hold over what activities states undertake in the name of complementarity. Finally, and for these reasons, the ICC's "catalytic effect" on state behavior is better understood as part of a complex political process, rather than a singular desired outcome of the complementarity regime. In light of these observations, I conclude with several suggestions for future inquiry and practice.

5. Terms, Methodology, and Country Selection

This dissertation draws upon a wide variety of primary and secondary sources, ranging from books and articles in the emerging complementarity canon, to news articles and parliamentary debates in Kenya and Uganda, to international and domestic jurisprudence. The primary approach is thus textual. Through discourse analysis I seek, in particular to trace how complementarity has been understood and portrayed by different actors and stakeholders as a shifting, protean principle, one that does not admit of a singular understanding.[51] In so doing, a note on terminology is warranted. Formally, the ICC is an institution and complementarity a principle of limitation: it governs the priority of the Court's jurisdiction. Yet regardless of formal ICC intervention in a country, complementarity is also invoked as a duty of member states. For instance, it can be said to "catalyze" the passage of implementation legislation merely as a precaution against the threat of ICC intervention. In the context of Kenya, Uganda and the DRC, however, where the Court itself has formally intervened, the operation and invocation of complementarity is fundamentally intertwined with the work of the ICC itself. Thus, in Uganda, a dedicated unit for adjudicating international crimes was seen as a necessary step to (potentially) displace the ICC, but complementarity was the principle that justified its creation. Throughout the dissertation, I have sought to make this conceptual distinction clear but I occasionally use the terms "ICC" and "complementarity" interchangeably.

In addition, the ideas reflected herein are deeply informed by several field research trips carried out in Nairobi, Kenya; Kampala, Uganda; and Kinshasa, DRC, over the course of 2011 and 2012, as well as the two and a half years I spent living and working in The Hague.[52] While not a work of legal ethnography, the dissertation adopts

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[51] See, e.g., Solomon T. Ebobrah, "Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations," *European Journal of International Law* 22(3) (2011), 669 (nothing that "although the term may appear universal, its application or functioning in practice differs according to each specific context").

[52] Research trips were conducted in the periods of June 2011 (four weeks), December 2011 (two weeks), January 2012 (one week), and November-December 2012 (ten days). All interviews were conducted in French or English.

a "multi-sited" focus,[53] one that shares an interest in using ethnographic methods as useful tools for "accessing the complex ways in which law, decision-making and legal regulations are embedded in wider social processes."[54] Though rooted in legal analysis, it seeks to contribute to a growing field of interpretive social science that uses interdisciplinary, qualitative methods to capture a wider, more situated perspective on the value and impact of global legal institutions.[55]

Understanding the theatre of the ICC's work outside of its institutional center in The Hague also afforded me the opportunity to better understand the complex circumstances in which its interventions unfold. Principally, the research trips allowed me to undertake interviews with a wide array of actors engaged in ICC-related work: Court officials working (either long-term or on mission) in Kampala, Kinshasa, and Nairobi; practitioners in the field of human rights and transitional justice, either in the national offices of international NGOs or for national organizations; domestic lawyers, judges, and bar associations; government officials; and an extensive community of international diplomats and donors. In addition, I was able to gather numerous documents—court judgments, parliamentary debates, draft laws, brochures—that were generally not available outside of the countries, and occasionally not publicly available within. On several occasions, I also attended and observed private meetings and public programs convened by NGOs working in country.

Informants were initially approached through personal contacts that my co-researcher and I had developed prior to the first research trip in June 2011, on the basis of their expertise in some aspect of the ICC's intervention at national level, as well as their engagement in domestic political or legal aspects of the Court's work.[56] Following a "snowball" approach, these initial meetings became important points of connection to other interlocutors: we relied on referrals from initial informants to identify additional interview subjects.[57] Despite the debt that this work owes to those individuals who gave of their time, I reference these interviews relatively sparingly in the chapters that follow.

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[53] See George E. Marcus, "Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography," *Annual Review of Anthropology* 24 (1995), 95-117.

[54] June Starr and Mark Goodale, "Introduction," in June Starr and Mark Goodale (eds.), *Practicing Ethnography in Law* (New York: Palgrave Macmillan, 2002), 2.

[55] Other literature from outside the field of international criminal law that has taken up more critical perspectives on the ICC and/or international criminal tribunals includes: Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford: Oxford University Press, 2011); Kamari Clarke, *Fictions of Justice: the International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009); Jelena Subotic, *Hijacked Justice: Dealing with the Past in the Balkans* (Cornell: Cornell University Press, 2009). See also Hugo van der Merwe, Victoria Baxter, Audrey R. Chapman (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington, D.C.: USIP Press, 2009).

[56] Interviews were formal but followed a semi-structured format: questions were prepared in advance, although the discussions frequently evolved to accommodate unexpected insights or new lines of inquiry.

[57] Given that the risk of selection bias is always present (particularly so for the snowball approach; the technique has been criticized for reducing the likelihood that the sample of informants represent a representative cross-section of the population), I should note that we generally had greater success in speaking with and accessing representatives of international and national NGOs, although in all three countries we were at least able to meet with several senior representatives from the domestic judicial sector, in-country ICC staff (from the OTP as well as the Registrar), and individuals engaged in donor work on behalf of the diplomatic community. It should be noted, however, that this study did not use interviews as a means of sampling the country populations or determining the factual accuracy of their views; rather, as noted, the interviews provided important contextual information for the claims that I develop herein. On snowball interviewing, see Paula Pickering, *Peacebuilding in the Balkans: The View from the Ground Floor* (Ithaca: Cornell University Press, 2007)

Because of the sensitivity of the subject matter, many interlocutors only spoke with the express understanding that their views were not for attribution. While others imposed no such restrictions, the sensitive nature of their work and its attendant security risks compels caution in identifying them. For these reasons, references to interview subjects occur only where the assertions provide explicit, additional validation of claims central to my analysis.[58]

Defined as "a person or thing that causes a change,"[59] I employ catalyst here in a causal sense. As a methodological approach to understanding the relationship between the ICC's work and the "rule following" examined in chapters five and six, then, I rely on process tracing. As defined by Bennett:

> Process tracing involves looking at evidence within an individual case, or a temporally and spatially bound instance of a specified phenomenon, to derive and/or test alternative explanations of that case. In other words, process tracing seeks a historical explanation of an individual case, and this explanation may or may not provide a theoretical explanation relevant to the wider phenomenon of which the case is an instance.[60]

Such an approach is necessary in light of the ambitious, often overly eager claims to validate Court interventions as the cause of domestic change. The challenge of understanding whether the relationship between relevant national-level events—the passage of domestic Rome Statute legislation, the establishment of a domestic war crimes court—and the ICC's actions is indeed causal (rather than contributory) is therefore crucial: more than one factor contributes to change. My intent is thus two-fold: to clarify to what extent the Court's interventions, as opposed to the influence of mediating actors and events, have catalyzed domestic change, and to better understand the nature of this mediated relationship as a catalytic force in itself.

A final note on country selection: at the time that this project began in mid-2010, the ICC had five active situations, from which I selected three.[61] For the purposes of this dissertation, ICC "intervention" is defined as those countries where the Court's engagement has advanced to at least an investigatory stage.[62] This was a minimum criterion in selecting the DRC, Kenya, and Uganda (as opposed to other countries, like Colombia, where the Court's engagement has been substantial but has not advanced to this threshold.) On the spectrum of Court engagement, intervention has thus entailed, at

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[58] Needless to say, however, my interlocutors do not necessarily endorse the conclusions advanced herein.
[59] Oxford Dictionary. The etymology of "catalyst" is chemical: it was introduced in the mid-19th century by a Swedish chemist as "change caused by an agent which itself remains unchanged."
[60] Andrew Bennett, "Process Tracing: A Bayesian Perspective," in Janet M. Box-Steffensmeier, Henry E. Brady, and David Collier (eds.), *The Oxford Handbook of Political Methodology* (Oxford: Oxford University Press, 2008), 704. See also *Process Tracing: From Metaphor to Analytic Tool* (Andrew Bennett and Jeffrey T. Checkel, eds.) (Cambridge: Cambridge University Press, 2014).
[61] Security concerns, resource constraints, and the sheer complexity of each of these diverse situations required selectivity for the purposes of conducting meaningful field research. On this basis, the Sudan and the Central African Republic (CAR) were excluded: Sudan principally because of the political difficulty of conducting such research inside the country, and CAR because of the apparently limited scope of the ICC's investigations there (which, to date, have led to an arrest warrant for only the former DRC Vice President Jean-Pierre Bemba) and the substantial implications that those proceedings, while formally part of the CAR referral, have had in the DRC. While subsequent developments in other ICC situations inform parts of my analysis, they are not addressed in depth here.
[62] On the term "international judicial interventions," see David Scheffer, "International Judicial Intervention," *Foreign Policy* (1996), 34.

the least, active deployment of ICC personnel to the countries in question, as well as a substantial (if developing) body of case law ranging from questions of admissibility and victim participation, to individual criminal liability and reparations.

This focus on direct Court engagement should not obscure, however, more "indirect" forms of intervention, including the use of preliminary examinations (explored further in chapter four) or the evolving, normative impact of the Rome Statute on national legal frameworks. Indeed, as the first two chapters argue, the treatment of complementarity as both policy concept and legal doctrine has had a profound effect on the popular understanding of the principle, as well as what it purports to require of states, regardless of whether or not they are the subject of a formal Court intervention. Nevertheless, such forms of intervention demand considerably less of the ICC's financial and material resources, and the connection between its work and national-level change is even more difficult to delineate. For these reasons, while the conclusions advanced herein may be relevant to other ICC interventions, they are not necessarily representative of them.

CHAPTER TWO
Tracing an Idea, Building a Norm: Complementarity as a Catalyst

Since the signing of the Rome Statute in 1998, complementarity has increasingly expanded from a legal concept to an instrument of policy. This policy sees the ICC not only as a forum for prosecution where states fail to undertake criminal investigations and prosecutions themselves, but also as a means to enable or encourage proceedings at the national level. As stated by former Prosecutor Luis Moreno-Ocampo in a speech to the ICC's Assembly of States Parties, one of his Office's "core policies" would be to pursue a "positive approach to cooperation and to the principle of complementarity." This meant, in his words, "encouraging genuine national proceedings where possible, relying on national and international networks, and participating in a system of international cooperation."[63]

Such a description of complementarity might now seem commonplace; however, the expansion of its definition, and of its popular understanding, was neither obvious nor ordained. Furthermore, while the vision of "positive" complementarity outlined by Moreno-Ocampo may have been "an inherent concept of the [Rome] Statute," it was also a policy invention. As Carsten Stahn notes, "In Court policy, complementarity was slowly discovered as a virtue, … as an instrument to foster legitimacy and enhance the efficiency of justice."[64] This discovery was chiefly driven by non-state actors—international human rights NGOs, influential donors, and academics—many of whom had initially sought a stronger role for the Court vis-à-vis national courts (primacy, rather than complementarity); had themselves served in previous leadership positions with other criminal tribunals; and, in certain cases, came to occupy important leadership positions in the early years of the ICC itself. These "norm entrepreneurs" have persuasively advanced the conception of complementarity as a catalyst, awhile framing it as a series of obligations upon states to legislate, investigate, and prosecute international crimes at the national level.[65]

This chapter traces the expansion in complementarity's meaning and purpose as a catalyst and queries how it has come to dominate so much of the ICC's discursive space. It is divided into three parts. First, it offers an overview of the Rome Statute's drafting history, emphasizing how the predominant understanding of complementarity among states at the time was as a principle of constraint. Unlike the ad hoc tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY), the drafters of the Statute chose not to grant the ICC primacy over national jurisdictions. This issue was deeply contested in the negotiations over the Court and reflected a delicate process that sought to balance supranational jurisdiction with an enduring concern for state sovereignty. Furthermore, in line with this process, a deliberate choice was made to permit states substantial leeway in their prosecution of international crimes, including, for instance, their ability to prosecute Rome Statute crimes as "ordinary" crimes.

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[63] Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Address by Prosecutor Luis Moreno-Ocampo (The Hague, 6 September 2004), 2, at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/LMO_20040906_En.pdf.

[64] Carsten Stahn, "Taking complementarity seriously: On the sense and sensibility of 'classical', 'positive' and 'negative' complementarity," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 235.

[65] The concept of "norm entrepreneur" has a long history explored further below. Cass Sunstein is first believed to have introduced the phrase in a 1996 article, wherein he defines entrepreneurs simply as "people interested in changing social norms." See Cass R. Sunstein, "Social Norms and Social Roles," *Columbia Law Review* 96(4) (May 1996), 903-968.

Despite these careful negotiations, the second section of the chapter examines the evolution of complementarity from a technical rule of admissibility crafted by states towards a more catalytic vision driven by private actors. In so doing, it traces complementarity's growth as a policy concept, which was embraced early on by the OTP as a way of encouraging national accountability for grave crimes. The intellectual history of complementarity is also considered, including the experiences of the ICTR and ICTY, whose completion strategies vis-à-vis the states of the former Yugoslavia and Rwanda played an important role in academic writing on the concept of positive complementarity and, in turn, influenced early ICC practice. Finally, the role of non-state actors in advancing the normative content of this concept is examined. Through this discourse analysis, the chapter demonstrates how the carefully negotiated compromises that informed the Rome Statute's drafting have been progressively reshaped through the principle of complementarity.

The final section attempts to better understand the means by which complementarity's polysemy (its meaning as both a rule of admissibility and a catalyst that compels domestic reform) evolved with such apparent speed. Indeed, rather than complementarity's "slow discovery" as a virtue, the pace of this discovery—given the degree to which it altered the perceived obligations of states, and the extent to which states have ratified that perception[66]—is perhaps more notable for its swiftness. One reason for this swiftness, I suggest, is that the framing of complementarity as a catalyst benefited from the unprecedented and influential role that non-state actors played in the establishment of the ICC itself. I also suggest that a growing literature on transnational "communities of practice," a concept advanced by the political scientist Emanuel Adler, offers a helpful lens through which to understand how this new norm has proliferated. In highlighting this dynamic interplay between practice and discourse the chapter concludes that, rather than a static legal concept, complementarity is better understood as an evolving, adaptive principle.

1. Complementarity as Constraint

While negotiations around the ICC's establishment inaugurated a wave of interest in complementarity, the principle itself is not new. As Mohammed El Zeidy notes, "the conditions or the parameters of [complementarity's] operation developed over a lengthy period of time until the adoption of the 1998 Rome Statute."[67] For example, the principle was the subject of much debate around the creation and operation of a UN War Crimes Commission during World War II, where the role of the Commission vis-a-vis Allied states played an "antecedent role" to the Rome Statute.[68] Still, most academic

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[66] For instance, the successful negotiation of duty-based language in the resolutions that emerged out of the Rome Statute Review Conference was seen as significant victories by civil society. See, e.g., Kampala Declaration, RC/Decl.1, para.5 (adopted 1 June 2010)("Resolve to continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally-recognized fair trial standards, pursuant to the principle of complementarity."); Resolution RC/Res.1 – Complementarity (adopted 8 June 2010), para. 2 ("Emphasizes the principle of complementarity as laid down in the Rome Statute and stresses the obligations of States Parties flowing from the Rome Statute").

[67] Mohamed El Zeidy, "The genesis of complementarity," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 77.

[68] Mark S. Ellis, *Sovereignty and Justice: Balancing the Principle of Complementarity between International and Domestic War Crimes Tribunals* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2014), 19.

commentary on the subject did not emerge until the early 1990s, spurred on by the end of the Cold War and, relatedly, the International Law Commission's (ILC) efforts to study the question of international criminal jurisdiction.

1.1 The International Law Commission: 1990-1994

Trinidad and Tobago first requested that the UN General Assembly consider the question of establishing an international criminal court in 1989.[69] In its initial report responding to that request, the Commission presaged much of the debate that would follow by emphasizing that the main questions to resolve in establishing such a court was whether it was intended to "replace, compete with or complement national jurisdictions."[70] The General Assembly subsequently requested that the Commission prepare a formal draft statute for an international court "as a matter of priority." It did so, culminating in the ILC's 1994 Draft ICC Statute, which proposed jurisdiction over genocide, aggression, war crimes, and crimes against humanity.

Of note in that 1994 draft was article 42, which drew upon the principle of *ne bis in idem* (the principle that a person should not be prosecuted more than once for the same criminal conduct) as embodied in the ICTY and ICTR statutes.[71] As proposed, a person could be retried under the proposed court's if the offense for which he or she had been tried by another court was "characterized as an ordinary crime," or if the proceedings "were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted."[72]

Support for this provision was far from unanimous, with substantially differing views as to the ICC's relationship with national jurisdictions. As Kleffner notes:

> Some members of the ILC envisaged the court as supplementing rather than superseding national jurisdiction, while others envisaged it as an option for prosecution in case the State concerned was unwilling to unable to do so. A third group of members suggested providing the court with limited inherent jurisdiction for a core of the most serious crimes, thus presumably envisaging exclusive jurisdiction of the international criminal court for these crimes.[73]

Although no final decision was taken on a specific model at the time, the draft statute presented by the ILC endorsed the third option: the court should be "complementary to national criminal justice systems in cases where such trial procedures may not be

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[69] Notably, this initial request focused on a court with far narrower subject matter jurisdiction: drug trafficking. After the Prime Minister drafted a motion (with the assistance of former Nuremberg prosecutor Benjamin Ferencz and law scholar M. Cherif Bassiouni) proposing that the International Law Commission study the idea, the General Assembly adopted it in 1989. Crucially, the language of that motion was to consider a court with jurisdiction to try crimes including, but not limited to, illicit drug trafficking. See, e.g., Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008), 37-38.

[70] El Zeidy, "The genesis of complementarity," 111.

[71] Draft Statute for an International Criminal Court (1994), at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf.

[72] Draft Statute, Article 42(2)(a); see also James Crawford, "Current Developments: The ILC's Draft Statute for an International Criminal Tribunal," *American Journal of International Law* 80 (1994).

[73] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 73.

available or may be ineffective."[74] The ILC further proposed, in article 35, a regime according to which jurisdiction would be allocated based on a determination of the admissibility of a case.[75]

In the commentary to this paragraph, the Commission explained to the General Assembly that the international court was "intended to operate in cases when there is no prospect of [the suspect] being duly tried in national courts."[76] Thus, "the emphasis is … on the Court as a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts [.]"[77] With respect to a situation where a person had already been tried by another (domestic) court, the 1994 draft retained the provision that subsequent trial by the ICC would not be barred where the initial trial had been for an ordinary crime, or in the case of sham, i.e., non-genuine, proceedings.[78] The ILC report thus reflected the "classical" conception of complementarity as a limiting jurisdictional principle. In Stahn's words, it was a "concept to regulate potential conflicts as between the (primary) jurisdiction of national courts and the residual jurisdiction of the ICC."[79]

1.2 The Ad Hoc and Preparatory Committees: 1995-1998

Whereas complementarity appeared only in passing in the ILC's earlier draft, it featured prominently in the discussions of the Ad Hoc Committee that was set up by the General Assembly to discuss the ILC's report, in advance of the Assembly's 1995 session.[80] The topic appeared under three general headings in the Committee's 1995 report: the "significance" of the principle, its jurisdictional implications, and the role of national jurisdictions.[81] As the report noted, many state delegations "stressed that the principle of complementarity should create a strong presumption in favor of national jurisdictions."[82] In so doing, a number of advantages were highlighted, including that "evidence and witnesses would be readily available," "language problems would be minimized," and the "applicable law would be more certain and developed."[83] Furthermore, states had a "vital interest in remaining responsible and accountable for prosecuting violations of their laws—which also served the interest of the international community."[84] An additional point of debate was whether the principle should be reflected in the Preamble of the Statute or its operative part.[85]

Other delegations expressed support for national courts retaining current jurisdiction with the proposed ICC but insisted that "the latter should also have primacy

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[74] ILC Draft Statute, Preamble.
[75] Ibid., Article 35 ("Issues of Admissibility"). The Rome Statute retains this provision: admissibility assessments are case-specific.
[76] *Yearbook of the International Law Commission 1994, Vol. II*, A/CN.4/SER.A/1994/Add.1, Part Two, 27 (commentary 1).
[77] Ibid.
[78] See ILC Draft Statute, Article 42(2)
[79] Carsten Stahn, "Complementarity: A Tale of Two Notions," *Criminal Law Forum* 19 (2008), 90.
[80] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 76.
[81] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, A/50/22 (1995), at http://www.legal-tools.org/uploads/tx_ltpdb/doc21168.pdf. See generally paras. 29-37.
[82] Ibid., para. 31.
[83] Ibid., paras. 31, 129.
[84] Ibid., para. 31.
[85] Ibid., paras. 35-37.

of jurisdiction."[86] A particular point of contention remained the principle of *ne bis in idem*, as it was seen by some delegations as "incompatible with what they considered to be the intention of the ILC not to establish a hierarchy between the ICC and national courts or to allow the ICC to pass judgment on the operation of national courts."[87] To that end, it was suggested that the distinction between ordinary crimes and international crimes that had survived previous drafts be deleted. In particular, "It was stressed that the standards set by the Commission were not intended to establish a hierarchy between the international criminal court and national courts, or to allow the international criminal court to pass judgement on the operation of national courts in general."[88]

A Preparatory Committee ("PREPCOM"), whose task it was to further develop the draft Statute replaced the Ad Hoc Committee in 1996, with the idea that a plenipotentiary conference would follow. Over the course of the next three years, "the original 43-page 1994 ILC draft Statute expanded into a draft Statute of 173 pages replete with bracketed options, alternative phrasing, and footnotes for consideration at the Rome Conference."[89] John Holmes, the head of the Canadian delegation that was asked to coordinate informal consultations on what then became article 35, produced a draft that, for the first time, introduced the terms "unwilling," "unable," and "genuine" into the text of the proposed Statute, along with a set of conditions for determining where those conditions would render a case admissible.[90]

According to Holmes, inability was not controversial in principle: relevant agreed upon factors were the "total or partial collapse" of a state's national judicial system," the state being unable to secure the accused, or being "otherwise unable to carry out its proceeding."[91] Unwillingness, however, proved more contentious, "as some delegations had concerns with regard to State sovereignty and constitutional guarantees in domestic systems against double jeopardy."[92] To assuage concerns about the subjectivity inherent in such a test the word "genuinely" was inserted, as it was thought to carry a more objective connotation.[93] Debates around the *ne bis in idem* principle also persisted, leading to the deletion of the ordinary crimes exception that had survived previous drafts.[94] The Statute instead refers to the "same conduct" of an accused, "to make clear that a national prosecution of a crime—international or ordinary—did not prohibit ICC retrial for charges based on different conduct."[95]

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[86] Ibid., paras. 32, 218.
[87] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 77.
[88] Ad Hoc Committee Report, para. 43.
[89] Schiff, 70. See also Immi Tallgren, "Completing the 'International Criminal Order': The Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court," *Nordic Journal of International Law* 67 (1998), 107-137. . Tallgren offers a compelling account of the PREPCOM negotiations through the analogy of "Master" and "Butler," the latter "see[ing] complementarity as a means of restricting the role of the ICC and its scope of jurisdiction" (i.e., constraint) and the former "represent[ing] the process of internationalization," 124.
[90] See J.T. Holmes, "The Principle of Complementarity," in R. Lee (ed.), *The International Criminal Court – The making of the Rome Statute* (The Hague: Kluwer Law International, 1999).
[91] Ibid., 45-49.
[92] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 85.
[93] In addition to concern that sham proceedings might be used to shield an accused, two other forms of unwillingness were agreed upon: undue delay inconsistent with an intent to bring the person to justice, and lack of independence or impartiality.
[94] Holmes, 57-58. Stigen also confirms that, the "ordinary crime" criterion, initially endorsed by the [ILC], "was proposed but rejected [in the negotiations] as it met too much resistance." Stigen, *The Relationship between the International Criminal Court and National Jurisdictions,* 335.
[95] Kevin Jon Heller, "A Sentence-Based Theory of Complementarity," *Harvard International Law Journal* 53(1) (2012), 224. For a similar conclusion, see Nouwen, *Complementarity in the Line of Fire*, 50. Article

1.3 The Rome Statute: Article 17 and the Substance of the Principle

In the end, the term "complementarity" itself hardly appears in the Rome Statute. The Statute only notes, in its tenth preambular recital and in Article 1, that the ICC "shall be complementary to national criminal jurisdictions."[96] Article 17 sets out the substantive criteria for determining the admissibility of a case, though it does not use the term "complementarity" as such. The article states that "a case is inadmissible where . . . [it] is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is *unwilling or unable* genuinely to carry out the investigation or prosecution."[97] A case will also be inadmissible when "the State has decided not to prosecute, unless the decision resulted from the *unwillingness or inability* of the State to genuinely prosecute," or when the person "has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3."[98]

The Statute thus sets forth a two-step test, "the first explicit question of which is whether a State is investigating or prosecuting the case or has done so."[99] Where there are no such proceedings evident at the national level – which under ICC case law requires, as the following chapter discusses, similar charges of conduct – the case is admissible. The more difficult assessment to be made is the second step: whether a state, even where proceedings are underway, is "unwilling or unable genuinely to carry out the investigation or prosecution." This prong of the test has generated significantly more controversy, as it invites the ICC to scrutinize the quality and standard of national proceedings.[100] As noted, it involves a more subjective assessment of the standards by which such proceedings should be judged.

The text of Article 17 makes clear that complementarity is a case-based assessment; the question is not whether a "situation" in general is or has been the subject of domestic investigations or prosecutions.[101] To that end, commentators and Court

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93(10) further supports this interpretation, as it refers to the Court providing assistance to a state party "conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crimes under the national law of the requesting State." Article 93(10) is discussed further in chapter three.

96 Rome Statute Preamble, tenth recital. Article 1 of the Statute also states that the ICC "shall be complementary to national criminal jurisdictions."

97 Rome Statute, Article 17 ("Issues of Admissibility").

98 To determine whether a State is "unwilling" to prosecute after an investigation, the Court will look to see whether the proceedings shielded the person concerned, whether the proceedings were unjustifiably delayed "inconsistent with an intent to bring the person concerned to justice," or whether the proceedings were not conducted impartially or independently and "in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice." Ibid., Arts. 17(2)(a-c).

99 Darryl Robinson, "The Mysterious Mysteriousness of Complementarity," *Criminal Law Forum* 21(1) (2010), 68. As chapter three examines further, the Court has only rarely entered into questions of ability or willingness, finding instead an absence of domestic proceedings in almost all of its admissibility decisions to date.

100 Robinson has drawn attention to the fact that, despite the two-step test clearly set out in the text of Article 17, a "slogan version" of complementarity has nevertheless come to exercise a "powerful grip on popular imagination." In this "slogan" version, complementarity is effectively reduced to a "one-step test" that focuses entirely on the unwillingness or inability prong of the complementarity test. Ibid., 67-102.

101 As defined by Pre-Trial Chamber I, cases "comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one more identified suspects, [and] entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear." Situations, by contrast, are "generally defined in terms of temporal, territorial and in some cases personal parameters." *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the

documents alike have noted that, "complementarity does not require an assessment of [a] state's overall justice system … merely that is it capable of conducting genuine proceedings in the particular case."[102] While the condition of that system can undoubtedly influence the ability to investigate or prosecute a particular case, it is not a determinative basis for admissibility. As explored further in the dissertation, however, arguments have emerged to the effect that a national system should be considered "available" only when it "incorporates the entire spectrum of substantive and procedural safeguards enshrined in the Statute and by which the ICC is to abide."[103]

Complementarity also combines optional and mandatory features. Article 17 provides that the "Court *shall* determine that a case is inadmissible" in response to a challenge lodged by a state or individual.[104] States, however, may also "refer" cases to the ICC, as both Uganda and the DRC have done.[105] El Zeidy has termed this "optional complementarity" and notes that it is the "reversed scheme of 'mandatory complementarity,'" in that it is not due to the Court's determination that a state was inactive, unwilling or unable, but rather the "state itself voluntarily decided to renounce the exercise of its jurisdiction in favor of the [ICC]."[106] This practice has generated a significant literature amongst commentators who contend that such referrals are unsupported by the Statute and the intention of the drafters.[107] Robinson, however, persuasively contests this view, noting that Article 14 expressly provides for state party referrals, and that they were a "recurring and explicit topic of deliberation throughout the negotiations."[108]

Articles 18 and 19 set out the procedural framework for complementarity. The former sets out a notification requirement of one month for the OTP when a situation has been referred, or where the Office initiates an investigation. Notably, states may also pre-empt an OTP investigation by invoking Article 18. Doing so obligates the requesting state to initiate an investigation, but compels the Prosecutor to "defer" to the domestic jurisdiction.[109] (To date, however, this procedure has "largely remained a dead letter."[110])

Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101, PTC I, 17 January 2006, para. 65. For further on the distinction, see Rod Rastan, "Situation and Case: Defining the Parameters," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011).

[102] Nouwen, *Complementarity in the Line of Fire*, 74, 106. As Nouwen notes, however, the Court's pre-trial chambers have "indicated that the word 'case' must be interpreted differently depending on the stage of the proceedings in which admissibility is assessed," 72-73.

[103] See Federica Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court," *Leiden Journal of International Law* 19 (2006), 1113.

[104] Three states have raised such challenges to date: Kenya, Libya, and the Ivory Coast.

[105] See Rome Statute, Article 14 "(Referral of a situation by a State Party").

[106] El Zeidy, "The Genesis of Complementarity," 137.

[107] See, e.g., William Schabas, "Prosecutorial Discretion v. Judicial Activism," *Journal of International Criminal Justice* 6 (2008).

[108] Darryl Robinson, "The Controversy over Territorial State Referrals and Reflections on ICL Discourse," *Journal of International Criminal Justice*, 9 (2011), 364. As a juridical short hand, then, the ubiquitous description of the ICC as a court of "last resort" is inaccurate. See, e.g., Max du Plessis and Jolyon Ford (eds.), *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries* (Pretoria: Institute for Security Studies, 2008). Du Plessis and Ford argue, "[T]he ICC is, by design, a 'court of last resort' – with the main responsibility for dealing with alleged offenders resting with domestic justice systems," 8.

[109] It should be noted that while this procedure applies to situations that are referred to the OTP or where the Prosecutor has opened an investigation *proprio motu*, it does not apply in situations referred by the Security Council.

Where the OTP has decided to prosecute, Article 19 grants the right to challenge admissibility to an accused, as well as to "a State which has jurisdiction over a case." Such challenges may be brought only once—and, for states, "at the earliest opportunity"—and "prior to or at the commencement of the trial."[111]

Taken together, the Rome Statute's complementarity criteria establish a "horizontal relationship between national and international courts: they constitute jurisdictional alternatives to one another with right of way normally given to national courts."[112] This "horizontal paradigm" in turn, appeared to "cement a systematic preference in the Rome Statute for domestic prosecution … and affirm[ed] that States may represent the most effective way of repressing international crimes.[113] Added to this were the decisions on the part of the drafters to explicitly depart from the primacy that characterized the ad hoc tribunals for Rwanda the former Yugoslavia, to not include the absence of domestic due process rights as a condition for admissibility, and, relatedly, to reject the distinction between international and ordinary crimes as a basis for the *ne bis in idem* provision.

Unsurprisingly, these compromises were met by dismay on the part of many who sought a stronger role for the Court. Federica Gioia notes, for instance, that "despite the ambitious objectives set forth in the Preamble of the Statute, the ICC still pays too great a tribute to state sovereignty,"[114] while Frédéric Mégret observes that human rights NGOs, in particular, found the Statute's "compromises" to "have been fundamentally unrepresentative of the state of international law, or least at variance with the better objectives of international criminal justice."[115] Ultimately, then, the Statute was a "bargained document," one in which the complementarity principle "emerged early … as a key protection of state sovereignty."[116]

2. From Constraint to Catalyst: The Evolution of Complementarity

The drafting history recounted above affirms that the Rome Statute was the result of extensive negotiation and significant compromise. The decision to vest the ICC with jurisdiction secondary to that of domestic courts was critical: many states insisted

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[110] Carsten Stahn, "Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), 240. Articles 89 and 94 also provide for consultation between a state and the Court in cases where an ICC request conflicts with domestic investigation of prosecution (or conviction). Similarly however, this regime has been little used to date. Article 17 is thus the dominant juridical avenue through which the Court's complementarity case law has been developed to date.

[111] Rome Statute, Article 19(4)-(5)

[112] Yuval Shany, *Regulating Jurisdictional Relations Between National and International Courts* (Oxford: Oxford University Press, 2007), 35.

[113] Padraig McAuliffe, "From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism," *Chinese Journal of International Law* 13 (2014), 271.

[114] Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court," 1096; see also Mohamed El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law," *Michigan Journal of International Law* 23 (2001-02), 869.

[115] Frédéric Mégret, "Implementation and the Uses of Complementarity," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 374.

[116] Schiff, 79, 85. For a similar characterization of the negotiations, see Gerry Simpson, "'Throwing a Little Remembering on the Past': The International Criminal Court and the Politics of Sovereignty," *University of California Davis Journal of International Law and Policy* 5(2) (1999).

upon it, even as many human rights advocates had, at least initially, hoped that the new institution would possess the same jurisdictional primacy enjoyed by the ICTY and ICTR. As Markus Benzing argues, "The most apparent underlying interest that the complementarity regime of the Court [was] designed to protect and serve is the *sovereignty* both of State parties and third states."[117] So understood, complementarity was thought to primarily be an instrument of limitation, a "technical term of art for a priority rule set out in Article 17 of the Rome Statute."[118]

2.1 Early ICC Policy: The Office of the Prosecutor

A "thicker" notion of the complementarity principle grew swiftly in the wake of the ratifications that brought the ICC formally into existence in the summer of 2002. While the Court did not start functioning until late the following year—after Prosecutor Luis Moreno-Ocampo had been elected and other key staff appointed—a "start-up team" within the Office of the Prosecutor suggested that an expert consultation process on complementarity be convened early on, to consider the "potential legal, policy and management challenges which are likely to confront the OTP as a consequence of the complementarity regime of the Statute."[119] Comprised of independent experts, the "Informal Expert Paper" that emerged from this process reflects the early seeds of a broader approach to complementarity. In its words, "The principle of complementarity can magnify the effectiveness of the ICC beyond what it could achieve through its own prosecutions, as it prompts a network of over 90 States Parties and other States to carry out consistent and rigorous national proceedings."[120]

The Paper took as its premise —both as a matter of "respect for the primary jurisdiction of States" and of the limits on the number of prosecutions the ICC could "feasibly conduct"—that the complementarity regime thus "serves as a mechanism *to encourage and facilitate* the compliance of States with their primary responsibility to investigate and prosecute core crimes."[121] The report argued that two principles should guide this approach: 1) partnership, which may include "possibly provid[ing] advice and certain forms of assistance to facilitate national efforts," as well as situations where the OTP and a state "agree that a consensual division of labour is in the best interest of justice"; and 2) vigilance, which "marks the converse principle … that where there is an indicia that a national process is not genuine, the Prosecutor must be poised to take follow-up steps, leading if necessary to an exercise of jurisdiction."[122]

The distinction between partnership and vigilance signaled an emergent distinction between complementarity as a contentious, competition-oriented principle and as the framework for a more consensual relationship between the Court and national jurisdictions. For the latter, the Paper envisioned a range of direct assistance and advice functions, including "exchang[ing] information and evidence to facilitate a national investigation or prosecution," providing technical advice (the OTP would, it was

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[117] Markus Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity," *Max Planck Yearbook of United Nations Law, Volume 7* (2003), 591-632, 595 (emphasis in original).
[118] Nouwen, *Complementarity in the Line of Fire*, 14.
[119] "Informal expert paper: The principle of complementarity in practice," ICC-OTP (2003), 2, at http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF.
[120] Ibid., 4
[121] Ibid., 3.
[122] Ibid., 4.

presumed, "build up a unique and unparalleled in-house expertise"), and training.[123] As to its "vigilance function," the Paper noted that "certain background contextual information … may be gathered in order to inform an admissibility assessment under either the 'unwillingness' or 'inability' branches" of the Statute. Such contextual information might include a state's legislative framework "(offences, jurisdiction, procedures, defenses);" "specific jurisdictional regimes (military tribunals);" and the "legal regime of due process standards, rights of accused, procedures."[124] Factors affecting the inability test could include a "lack of judicial infrastructure," as well as a "lack of substantive or procedural penal legislation rendering [the criminal justice] system 'unavailable.'"[125]

In this indexing, the Expert Paper articulates a number of possible indicia that have assumed a more determinative character over time in the course of their uptake in scholarship and a range of advocacy materials. Furthermore, it paints an early picture of both the coercive and cooperative dimensions of complementarity, and of the OTP's wide-ranging and discretionary role in its application. To that end, the Office's first policy paper, also published in 2003, emphasized that a "major part of [its] external relations and outreach strategy … [would] be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes."[126] The paper further developed the idea of a division-of-labor relationship between the Court and national jurisdictions, noting that it "will encourage national prosecutions, where possible for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice."[127] Such an approach suggested a two-tiered arrangement between the ICC and states, with those "most responsible" being prosecuted in The Hague. Architecturally, the OTP reflected the prioritization of this policy as well. The establishment of a separate division responsible for jurisdiction and complementarity issues (the Jurisdiction, Complementarity and Cooperation Division) underscored the importance attached to this aspect of the Office's work.[128]

2.2 Emergent Theories: Cooperation and Coercion

From the outset, then, complementarity's potential was understood as more than a tool for regulating jurisdiction but also, as Stahn notes, "a forum for managerial interaction between the Court and States."[129] This "systemic dimension" of complementarity, Stahn argues, "institutes a legal system under which the Court and domestic jurisdictions are meant to complement and reinforce each other in their mutual efforts to institutionalize accountability for mass crimes."[130] Scholars have offered different descriptions to explain this relationship. The ICC as "backstopping" national courts has been one, more passive iteration, while the Court as a "reinforcement"

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123 Ibid., 5-6.
124 Ibid., 13-14; 28-31.
125 Ibid., 15. At the same time, the Paper noted that the "standard for showing inability should be a "stringent one. As the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards." Ibid.
126 "Paper on some policy issues before the Office of the Prosecutor," 5.
127 Ibid., 3.
128 The JCCD's function is discussed further in chapter four. Notably, the establishment of the Division was not without controversy, as critics saw it as unduly politicizing the OTP's role. See,e.g., Schiff, 113-115.
129 Stahn, "A Tale of Two Notions," 88.
130 Ibid., 91.

mechanism has been another.[131]

By contrast, a catalytic relationship is more active in its design. Burke-White, for instance, has argued that, "international and domestic institutions are engaged in complex interactions whereby the international level, and particularly the ICC's complementarity regime, may catalyze changes at the national level."[132] Likewise, referencing complementarity's dynamic component, Stahn has written that, "complementarity serves as a catalyst for compliance by virtue of the construction of articles 17 and 19 of the Rome Statute."[133] And, as noted earlier, Kleffner argues that complementarity should be a "catalyst for compliance," insofar as it is "understood as aiming to induce and facilitate the compliance of States with their obligation 'to exercise [their] criminal jurisdiction over those responsible for international crimes,' which underlies the Rome Statute."[134]

2.2.1 Cooperation

Kleffner's reference to inducement and facilitation again suggests two different models for the Court's role as a catalyst: one coercive, the other cooperative.[135] In the latter, the ICC's relationship with domestic jurisdiction is fundamentally beneficent: the Court and national jurisdictions complement each other not only in a "negative" dynamic, wherein the ICC's competences are engaged by the absence (or non-genuineness) of state action, but "also in a positive fashion, i.e. through mutual assistance and interaction."[136] This policy of "positive" complementarity received early endorsement from the OTP. As Stahn argues, however, "positive" complementarity is not only a policy invention; it is also an "inherent concept of the Statute," reflected, for instance, in its cooperation regime.[137] Thus, "positive" complementarity is "focused on problem-solving, i.e. the ability of the Court to strengthen domestic jurisdictions and to organize a division of labor based on 'comparative advantages.'"[138]

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131 Anne-Marie Slaughter and William Burke-White, "The Future of International Law is Domestic (or, The European Way of Law)," *Harvard International law Journal* 47(2) (Summer 2006), 122.
132 William W. Burke-White, "Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo," *Leiden Journal of International Law* 18 (2005), 568. See also William W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice," *Harvard International Law Journal* 49(1) (Winter 2008). Burke-White argues, "As a strategy for encouraging national governments to undertake their own prosecutions of international crimes, proactive complementarity would allow the Court to catalyze national judiciaries to fulfill their own obligations to prosecute international crimes," 57.
133 Stahn, "A Tale of Two Notions," 92.
134 Kleffner, "Complementarity as a Catalyst for Compliance," 80.
135 Stigen echoes this two-sided approach, noting that, "The complementarity principle seeks to enhance national jurisdictions partly by stimulating and partly by applying pressure," 17. See also Rod Rastan, "Complementarity: Contest or Collaboration," in Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010). Rastan contends that, "limiting complementarity to a contest paradigm will prevent the realization of the statutory goal to put an end to impunity and thereby contribute to the prevention of crimes," 84.
136 Stahn, "Taking Complementarity Seriously," 260.
137 Ibid., 236. Nouwen similarly contends that the Statute's cooperation regime is what effectuates a policy of assisting domestic jurisdictions; in her view, "such a policy of assisting domestic jurisdictions is not inherent in complementarity." *Complementarity in the Line of Fire*, 97-98
138 Ibid., 260-261.

Even if it was "hardly … contemplated by all the [Rome Statute] negotiators," numerous commentators and jurists have endorsed this approach to complementarity.[139] Former ICC Judge Mauro Politi, for instance, notes that there is "no doubt" that one important goal of complementarity "is to establish a division of labor between national jurisdictions and the ICC, under which the Court should essentially concentrate on those who have major responsibility for the crimes involved."[140] Cherif Bassiouni likewise identifies that an "important ancillary function of the ICC is to prod national jurisdictions to assume their international legal obligations," which may extend to the Court providing technical assistance and capacity-building support to national criminal justice systems.[141] Cooperation also animates complementarity's affinity with a "managerial model of compliance," or a "global compliance system for the enforcement of international criminal law,"[142] wherein the ICC and states participate in a "cooperative venture to ensure accountability of perpetrators."[143] Gioia likewise writes that, "A 'friendly' version of complementarity relies on the assumption that the ICC is not meant to act as a censor of national jurisdictions but rather to allow for the most efficient sharing of competencies between the national and international level."[144]

Burke-White's scholarship has perhaps been the most well-known and influential articulation of the ICC's relationship to national jurisdictions, casting it explicitly in catalytic terms. An early article, from 2005, on the influence of the ICC in the DRC posited that the Court was not merely an institution acting against domestic states but rather part of a "multi-level global governance model," one that also "participates in the domestic process, altering political as well as legal outcomes."[145] As part of such a multi-level system, his elaboration of a "Rome System of Justice" is rooted in a "virtuous circle in which the Court stimulates the exercise of domestic jurisdiction through the threat of international intervention."[146] Burke-White's invocation of the ICC as the apex of an organic judicial chain (the "virtuous circle"), while also recognizing its coercive properties (the "threat of international intervention"), comes together in his idea of "proactive complementarity," in which the ICC "can and should encourage, and perhaps even assist, national governments to prosecute international crimes."[147]

Burke-White's writing—part of a growth of scholarly interest on the impact of the ICTY's proceedings on domestic jurisdictions more generally—also drew heavily on the introduction of a completion strategy for the Tribunal to support the notion of shared responsibility between national and international courts.[148] Characterizing the completion strategy as a catalytic force for domestic accountability in states like Bosnia

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139 Stigen, 476.
140 Mauro Politi, "Reflections on complementarity at the Rome Conference and beyond," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 145.
141 M. Cherif Bassiouni, "The ICC – *Quo Vadis*?," *Journal of International Criminal Justice* 4 (2006), 422.
142 Rod Rastan, "Complementarity: Contest or Collaboration?," 131.
143 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 311.
144 Federica Gioia, "Complementarity and 'Reverse Cooperation,'" in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 817.
145 Burke-White, "Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo," 559.
146 Burke-White, "Proactive Complementarity," 57.
147 Ibid., 56
148 See, e.g., Burke-White, "The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina."

and Serbia, he argued that such an approach could be instructive for the ICC's complementarity regime. In his words, "The structural changes in the ICTY's jurisdiction and mandate undertaken as part of the Completion Strategy essentially shifted the governance structure from one of absolute international primacy toward a new relationship with incentives similar to those of complementarity."[149] These changes occurred in the same period as the ICC's operations began to take shape, contributing to the developing concept of "positive" complementarity.

Under the completion strategy the ICTY's Rules of Procedure and Evidence were amended, such that the Tribunal could effectively incentivize domestic institutions by "send[ing] cases back to national jurisdictions, monitor[ing] domestic proceedings, and remov[ing] cases back to the international forum only if key targets were not met."[150] UN Security Council Resolution 1503, issued in August 2003, endorsed the Tribunal's strategy and called upon the international community to "assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY."[151] Coordinating mechanisms initially set out in the 1996 Rome Agreement, which governed the relationship between the ICTY and local courts, were likewise strengthened under the so-called "Rules of the Road," with the Tribunal, after years of delay, fulfilling its obligation to review locally-initiated cases before an arrest warrant could be issued by domestic authorities.[152]

This approach found early endorsement in OTP policy (not coincidentally, Burke-White served as an early advisor to Prosecutor Moreno-Ocampo). "Positive" complementarity was described as a deliberate way to promote national proceedings through the provision of information to states, advice, and the development of legal tools to empower domestic criminal jurisdictions.[153] The metaphor of catalyst was also embraced by those affiliated with the Office. In the words of Juan Mendez, the OTP's then Special Advisor on Crime Prevention, "Under its policy of positive complementarity, the Office of the Prosecutor can act as a catalyst for national action."[154]

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[149] Ibid., 320.

[150] Ibid. There is an abundant literature on the so-called Rule 11*bis* "referrals" and their impact on domestic jurisdictions in former Yugoslavia. For further discussion, see Fausto Pocar, "Completion or Continuation Stratey? Appraising Problems and Possible Developments in Building the Legacy of the ICTY," *Journal of Internatinal Criminal Justice* 6 (2008), 655-665; see also David Tolbert and Aleksandar Kontic, "The International Criminal Tribunal for the former Yugoslavia and the transfer of cases and materials to national judicial authorities: lessons in complementarity" and Fidelma Donlon, "Positive complementarity in practice: ICTY Rule11*bis* and the use of the tribunal's evidence in the Srebrenica Trials before the Bosnian War Crimes Chamber," both in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 888-954. For a more sober assessment of the ICTY's engagement with domestic institutions, see Yaël Ronen, "The Impact of the ICTY on Atrocity-Related Prosecutions in the Courts of Bosnia and Herzegovina," *Penn State Journal of Law & International Affairs* 3(1) (2014), 113-160.

[151] United Nations Security Council Resolution 1503, S/RES/1503 (28 August 2003), at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3f535ca64.

[152] For a thorough discussion of these developments and the ICTY's role on domestic war crimes prosecutions, see Lara J. Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge: Cambridge University Press, 2010). For an early assessment of the "Rules of the Road," see also Mark S. Ellis, "Bringing Justice to an Embattled Region—Creating and Implementing the 'Rules of the Road' for Bosnia-Herzegovina," *Berkeley Journal of International Law* 17(1) (1999), 1-25.

[153] Office of the Prosecutor, "Report on the activities performed during the first three years (June 2003-June 2006)," ICC-OTP (12 September 2006), 22-23.

[154] Juan Méndez, "Justice and Prevention," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 33.

The division-of-labor approach to cooperation as a means towards this end was also closely linked to the OTP's policy of "invited" referrals under Article 14. The 2006 report of the Office stated for instance, that, over the course of the first three years (2003-2006), it had adopted a formal policy "of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court."[155] As subsequent chapters detail, such a division of labor was the explicit basis for seeking the DRC government's referral, where it was made clear that the OTP's role was to prosecute senior leaders and those "most responsible," while domestic authorities would handle other responsible actors. More recently, Prosecutor Bensouda's statement suggests a similar approach to the situation in Libya. After not contesting Libya's admissibility challenges, she told the UN Security Council that, "Joint complementary efforts of both the Government of Libya and the ICC, strongly and actively supported by the international community, are … crucial for ending impunity in the country."[156] She further added that her Office would "prioritise its investigations and prosecution of those who are outside the territory of Libya and who are thus largely inaccessible to the Libyan authorities," while the government would focus on those suspects within Libyan territory.

2.2.2 Coercion

Coercion, in which the threat of ICC intervention is meant to function as a leveraging device on national jurisdictions, has arguably been the more predominant iteration of complementarity, rooted as it is in a compliance-oriented model of state interaction with the Court. Stigen, for instance, has posited that the Court's catalytic effect is fundamentally one of ICC-avoidance. In his words, "An ICC finding that the territorial state or the suspect's home state is unwilling or unable to proceed genuinely may well be perceived as a considerable stigma that states will seek to avoid."[157] In order to avoid such stigma, states would be compelled to act. Similarly, in his early work, Bruce Broomhall suggested that the ICC would "spur" on national prosecutions in order to avoid "adverse attention, the diplomatic entanglements, the duty to cooperate and other consequences of ICC activity."[158]

Kleffner's work on complementarity also explores the principle's coercive potential, "as a mechanism through which States Parties are induced to and facilitated in complying with [the] obligation [to investigate and prosecute ICC crimes]."[159] In his view,

> the novelty of complementarity lies in the fact that, for the first time in the history of international criminal law, States Parties have agreed *ex ante* that this

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155 OTP Report 2003-2006, 7.

156 To that end, the OTP and the Libyan government "recently concluded a burden-sharing Memorandum of Understanding, the purpose of which is to facilitate our collaborative efforts to ensure that individuals allegedly responsible for committing crimes in Libya as of 15 February 2011 are brought to justice either at the ICC or in Libya itself." See "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011)," remarks delivered in New York, 14 November 2013.

157 At the same time, Stigen correctly notes that the auto-referrals of Uganda and the DRC to the ICC suggest that, at least in some case, "being labeled as unable is something that some states can live well with," 475.

158 Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003), 84, 87.

159 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 309.

> failure [to investigate and prosecute] will entail a concrete legal consequence: States forfeiting the claim to exercise jurisdiction, including over their own nationals and officials.[160]

Kleffner's conception of the Court's role is similarly compliance-oriented. In his words, the ICC "can generate a pull-effect towards complying with the obligation to investigate and prosecute."[161] One reason for this anticipated effect is, he contends, the Court's "high degree of legitimacy" and its potential as a vehicle to "bestow legitimacy on national proceedings," which further "generates a pull towards compliance."[162] Additionally, in his view, the "procedural setting of complementarity contains elements of an interaction between the Court and national criminal jurisdictions, which may serve to induce states to carry out investigations and prosecutions."[163] A final reason is the threat of sanction, which "finds support in the largely *antagonist premise* on which the regime of complementarity is based."[164]

As with "positive" complementarity, the experience of the ad hoc tribunals in Rwanda and the former Yugoslavia also played an influential role in elaborating the catalytic potential of jurisdictional "forfeiture." The ICTR, like the ICTY, amended its Rules of Procedure and Evidence in 2004 under pressure from the UN Security Council, in order to allow the referral of cases from the Tribunal to "competent national jurisdictions, as appropriate, including Rwanda."[165] Notably, the requirement of a fair trial was explicitly included amongst the conditions that had to be satisfied for referral, leading in turn to the 2007 passage of a national law in Rwanda that sought to implement the ICTR's due process standards (including abolition of the death penalty).[166] Notwithstanding this accommodation, the Tribunal denied the first five requests for transfer to Rwanda, using the antagonist premise on which the primacy regime was based to strengthen, ostensibly, fair trial guarantees at the domestic level.[167]

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[160] Ibid., 319-320.
[161] Ibid., 311.
[162] Ibid., 313. Kleffner sees the ICC as carrying both procedural and substantive legitimacy, insofar as it "is based on the *specific consent of States* to the Rome Statute," while also safeguarding the sovereignty of states, "in as much as it reaffirms rather than encroaches upon their primary role in the investigation and prosecution of core crimes," 311, 314. Further, complementarity "benefits from a large degree of determinacy" and "leaves no doubt" that "the soel role of the ICC is to supply the deficiencies of national criminal jurisdictions," 315.
[163] Kleffner, "Complementarity as a Catalyst for Compliance," 82.
[164] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 320.
[165] UNSC Resolution 1503, preambular para. 8; Rule11*bis* of the ICTR's rules was so amended in April 2004. As with the ICTY, there is a similarly abundant literature on the ICTR's referral process and its impact at the national and local level in Rwanda. For a fuller treatment see L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Leiden: Martinus Nijhoff Publishers, 2005); Jesse Melman, "The Possibility of Transfer(?): A Comprehensive Approach to the International Criminal Tribunal for Rwanda's Rule 11bis To Permit Transfer to Rwandan Domestic Courts," *Fordham Law Review* 79(3) (2011), 1271-1332.
[166] See Organic Law No. 11/2007 of 16 March 2007 concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda, Official Gazette of the Republic of Rwanda, 19 March 2007; the law has subsequently been amended. For a fuller exploration of the 2007 law and domestic accountability in Rwanda, see Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge: Cambridge University Press, 2010). For an incisive reading of the death penalty's abolition as more than the result of top-down pressure from the ICTR, see Audrey Boctor, "The Abolition of the Death Penalty in Rwanda," *Human Rights Review* 10 (2009), 99-118.
[167] See "Complementarity in Action: Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial," International Criminal Tribunal for Rwanda (February 2015), para. 43, at http://www.unictr.org/sites/unictr.org/files/legal-

Under this threat-based approach, complementarity's catalytic potential rests on several presumptions. One presumption is that states necessarily want to avoid the ICC, or that the political costs of pursuing domestic prosecutions will necessarily prevail over the desire to keep the Court at bay. Put another way, the ICC may not be a court of "last resort" (as it is so often described), but rather a *forum conveniens* for states. Thus, the cooperative dimensions of complementarity might well stifle its coercive potential, insofar as a state could seek the ICC's assistance (as in the case of Uganda and the DRC), or may seek to "offload" complex cases to another judicial forum. Robinson makes a similar point when he acknowledges that "an over-strong regime might resist ICC intervention as a *threat to* government, [while] an under-strong government might welcome impartial and effective intervention as a *reinforcement of governance*."[168] Another presumption—one increasingly tested by the current posture of African states towards the ICC—is that the Court commands a high degree of "legitimacy," as Kleffner claims.

Notwithstanding these concerns, the Court's coercive capacities have been taken up as part of the OTP's approach to complementarity. In his first address to the ASP, the ICC Prosecutor noted that, "due to the dissuasive effect that the mere existence of the court generates, the possibility of presenting a case at the International Criminal Court could convince some states with serious conflicts to take the appropriate action."[169] Furthermore, one sees in the Office's approach to certain situation countries a more adversarial approach towards domestic jurisdictions. In Uganda, for instance, later attempts by the government to negotiate with the Lord's Resistance Army clashed with the ICC's outstanding arrest warrants. Similarly, in Kenya, the Prosecutor adopted a threat-based approach to complementarity in an attempt to force the government to establish a domestic tribunal to prosecute its post-election violence. This history is examined more fully in chapter four.

2.3 A Catalyst for Compliance: The Duties of Complementarity?

Complementarity's power to advance domestic accountability relies upon a duty-based reading of the Rome Statute. These duties have commonly been understood to encompass not only the prosecution of serious crimes through national criminal fora, but also the domestic implementation of the Rome Statute's substantive and procedural provisions. Most commentators root these duties in a purposive reading of the Statute, particularly its preambular language, which recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[170] As Padraig McAuliffe has noted, "the open-ended and aspirational language of the Preamble," in particular, supports a "teleological impulse to apply expansive modes of interpretation to admissibility provisions in the interest of maximizing the impact of its

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library/150210_complementarity_in_action.pdf. For a critical analysis of the ICTR's referral jurisprudence, see Nicola Palmer, "Transfer or Transformation: A Review of the Rule 11*bis* Decisions of the International Criminal Tribunal for Rwanda," *African Journal of International and Comparative Law* 20(1) (2012).

[168] Darryl Robinson, "The Controversy over Territorial State Referrals and Reflections on ICL Discourse," *Journal of International Criminal Justice* 9 (2011), 383.

[169] Press Release, "ICC – Election of the Prosecutor, Statement by Mr. Moreno Ocampo," ICC-OTP-20030502-10 (22 April 2003).

[170] Para. 6, Rome Statute. See, e.g., Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law," 1113. Gioia states that only investigations and prosecutions that "abide by the highest standards of fair trial" can be regarded as "proper implementation of the obligations at stake [in the Rome Statute]," and that "failure to comply with such standards should be construed as tantamount to failing to perform the obligation and result in the Court legitimately stepping in."

main institution, the ICC."[171] Much of the literature cited above exemplifies this teleological impulse.

In fact, as its careful drafting illustrates, there is no provision on states parties' prosecutorial duties in the operative part of the Statute.[172] While states may be obliged to investigate or prosecute crimes based on *other* rules of international law, the Statute itself obliges states only to cooperate with the Court (as Part IX of the treaty enumerates), to ensure that its domestic law facilitates cooperation with the ICC, and that offenses against the "administration of justice" be criminalized domestically.[173] Furthermore, as a matter of treaty interpretation, the preambular recital was deliberately not made part of the Statute's operative text; rather, it merely "recalls" a suggested pre-existing duty, not one arising from the treaty itself.[174]As Nouwen notes, the recital itself "merely reflects an aspiration, just like many of the other preambular considerations."[175] Similarly, it is not the case, as Kleffner and the ICC Appeals Chamber have both suggested, that states "forfeit" or "relinquish" their claims to jurisdiction merely by virtue of the ICC intervening.[176] Rather, until such time as an accused is convicted or acquitted for the same crimes, "states can, in theory, conduct national proceedings simultaneously with those of the Court."[177]

With respect to implementation, there is also no positive obligation on member states to implement the Rome Statute's substantive (or procedural) provisions.[178] As Alain Pellet (himself a member of the ILC that authored the 1994 draft Statute) states, "neither the signatory States nor even the States Parties have any clear obligations to bring their domestic legislation into harmony with the basic provisions of the Rome

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[171] McAuliffe, "From Watchdog to Workhorse," 285, 294. See also Darryl Robinson, "The Identity Crisis of International Law," *Leiden Journal of International Law* 21 (2008), 944-946 (noting that, through "victim-focused teleological reasoning aggravated by utopian aspirations," ICL seeks to "end" crime rather than merely manage it).

[172] See, e.g., Payam Akhavan, "Whither National Courts? The Rome Statute's Missing Half," *Journal of International Criminal Justice* 8(5) (2010); Anja Seibert-Fohr, "The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions," in A. von Bogdandy and R. Wolfrim (eds.), *Max Planck Yearbook of United Nations Law* 7 (Koninklijke Brill, 2003), 559

[173] Such rules may arise under relevant human rights treaties that impose a duty to criminalize and investigate, see, e.g., UN Convention Against Torture (Articles 4, 5, and 7) and the International Convention for the Protection of all Persons from Enforced Disappearance (Arts. 4, 6, 9 and 11). Regional human rights treaties may also impose such obligations: the Inter-American Court on Human Rights has, for instance, held that "[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." *Velásquez Rodriguez v. Honduras*, para. 174; Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Review* 100 (1991): 2539-615. Arguably, customary international law may also impose a duty to investigate and prosecute. See, e.g., International Law Commission, *Second Report on the Obligation to Extradite or Prosecute*, para. 26, UN Doc. A/CN.4/585 (June 11, 2007).

[174] Robinson, "The Mysterious Mysteriousness of Complementarity," 94-95.

[175] Nouwen, *Complementarity in the Line of Fire*, 39.

[176] See, e.g., *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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, ICC-01/04-01/07-1497, Appeals Chamber, 25 September 2009 ("Katanga Appeals Judgment"), para 85.

[177] Nouwen, *Complementarity in the Line of Fire*, 78-79.

[178] Article 88, Rome Statute.

Statute."[179] Indeed, as noted during the drafting of Article 20(3) on *ne bis in idem*, states explicitly rejected a proposal that would have made a case admissible before the ICC where the national proceeding failed to consider the international character or grave nature of a crime. For this reason, the Statute instead refers to the "same conduct" of an accused, "to make clear that a national prosecution of a crime—international or ordinary—did not prohibit ICC retrial for charges based on different conduct."[180]

In a related vein, the difference between "ordinary" and international crimes has also been advanced as a basis for domestic implementation. In the context of the ICC, Kleffner has again been one of the strongest proponents of this position. He argues that:

> Implementation can only be considered satisfactory if it comprehensively and effectively covers the entire range of conduct criminalized by the Rome Statute, without adversely affecting pre-existing obligations under international law that go beyond the Rome Statute, and while taking into account the need to fill gaps in the legislation that may lead to impunity, such as those resulting from the absence of universal jurisdiction."[181]

Notably, key ICC actors have also endorsed this view. Sylvana Arbia, the Court's former Registrar, writes:

> Without [implementing legislation], states could be left in the position of prosecuting only for some of the constitutive acts of the crimes, such as murder and rape. This could undermine the basis of national prosecutions, and may invite the ICC's Judges to take jurisdiction where this might not be needed.[182]

Arbia's qualification that the ICC "may" take jurisdiction grants that outcome it is not mandatory but the language of both she and Kleffner is equally impact driven and threat-based: failure to conform with the Rome Statute risks jurisdictional forfeiture.

Influential non-state actors have advanced similarly expansive interpretations. Of particular relevance are individuals whose organizations often act as a bridge between academic or policy communities and advocacy-oriented organizations engaged in accountability work. For instance, Mark Ellis, who serves as Executive Director of the International Bar Association (described as "the world's leading organisation of international legal practitioners, bar associations and law societies"[183]), is unequivocal that state failure to "effectively incorporate the Rome Statute into its domestic body of

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[179] Alain Pellet, "Entry Into Force and Amendment of the Statute," in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. 1* (Oxford University Press, 2002), 153.

[180] Kevin Jon Heller, "A Sentence-Based Theory of Complementarity," 224. That said, as Robinson notes, it may be "prudent to ensure that [a state's] criminal laws are at least as broad as the subject matter jurisdiction of the ICC." It is not, however, required. See Darryl Robinson, "Three Theories of Complementarity: Charge, Sentence, or Process?," *Harvard International Law* Journal, 53 (April 2012), 169, fn. 25.

[181] Jann Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*. 112.

[182] Silvana Arbia and Giovanni Bassy, "Proactive Complementarity: A Registrar's Perspective and Plans," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 65.

[183] International Bar Association, "About the IBA," http://www.ibanet.org.

criminal and procedural law" would trigger a finding of "inability" under the Rome Statute.[184] In his view,

> [A] State Party must incorporate the Rome Statute's substantive criminal law provisions into its domestic body of law. This is the complementarity part of the test. It requires States Parties to take steps such as criminalizing all offences contained in the Statute, ensuring that the principle of command responsibility is incorporated into domestic legislation, removing any statute of limitations for Rome Statute offences, and perhaps most importantly, denying immunity to heads of state.[185]

Similarly, David Donat Cattin, Secretary-General of the influential Parliamentarians for Global Action's (a "non-profit, non-partisan international network" of legislators whose "vision is to contribute to the creation of a Rules-Based International Order for a more equitable, safe and democratic world"[186]), argues that the principle of complementarity "implies that States shall fully implement the Rome Statute in their domestic legal orders in order to comply with their primary responsibility to realize the object and purpose of the treaty (and [Rome Statute] system)," which is to put an end to impunity and deter future crime.[187] The PGA, in turn, describes complementarity as follows:

> Complementarity means that states have the primary obligation to investigate and prosecute those responsible for international crimes, but also that the Court will only intervene when states do not have the genuine will or the capacities to do so. ... To this effect, the first and minimal condition enabling States to abide to this obligation of accountability for genocide, crimes against humanity, war crimes and crime of aggression is the existence of legislation that incorporates in their National law the crimes and general principles of law contained in the Rome Statute.[188]

Notably, as chapter six illustrates, the PGA played a crucial role in the implementation of the Statute in Uganda and Kenya, as well as the DRC.

Other views of complementarity encompass even more ambitious policy goals, including that domestic criminal justice systems satisfy "international standards."[189]

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[184] Ellis, *Sovereignty and Justice*, 123.

[185] Ibid., 125. Curiously, later in his text, Ellis nevertheless appears to endorse the Libyan government's challenge to ICC admissibility on the grounds that it is "irrelevant" if the acts are charged as "ordinary crimes" pursuant to the Libyan Criminal Code. In so doing, he avers that his "position is supported by a number of jurists who have argued that the prosecution of international crimes using ordinary domestic law would satisfy a state's obligations under the Rome Statute," 211.

[186] Parliamentarians for Global Action, "About Us – Overview," http://www.pgaction.org/about/overview.html.

[187] David Donat Cattin, "Approximation or Harmonisation as a Result of Implementation of the Rome Statute," in Larissa van den Herik and Carsten Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2012), 361-62. For a similar analysis, see Roberto Bellelli, "Obligation to Cooperate and Duty to Implement," in Roberto Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (UK: Ashgate Publishing, 2010), 221.

[188] "Implementing Legislation on the Rome Statute," http://www.pgaction.org/programmes/ilhr/icc-legislation.html.

[189] As with investigations and prosecutions, it is clear that the absence of due process and/or the failure to meet such standards is not grounds for admissibility under Article 17. For a convincing articulation of this view, see Kevin Jon Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process," *Criminal Law Forum* 17 (2006), 255-280.

Linking these goals to the juridical foundation of complementarity, Ellis contends that "inability" as set forth in Article 17(3) should encompass states that "lack the type of judicial systems that is required under the international standard of legal fairness, or have failed to incorporate implementing legislation necessary to cooperate with the Court, or have failed to ensure fair trial proceedings."[190] To that end, he has proposed the establishment of an International Advisory Group that could, at the request of the ICC or a state party, provide an "objective, impartial and non-political evaluation regarding a state's ability to carry out judicial proceedings with international standards."[191] In his view, questions this Group should ask in making its assessments would include the following:

> Does the domestic court have extensive backlogs resulting in long pre-trial detention? Does the state have a sufficient number of trained defense lawyers and an effective legal aid program for indigent defendants? Are there sufficient guarantees against outside pressure on the judiciary? Does the state impose the death penalty? Can the court provide witnesses and victims with medical, psychological and material support during and after trial through a witness and victim support office? Can the court provide these same witnesses and victim security protection prior to, during and after the trial? Is there ongoing political strife and repression in the country? Does the state have detention facilities that meet international standards?[192]

While Ellis' ambitious criteria could be asked of any country's criminal justice system, here it is the language of complementarity that animates them.

"Positive" complementarity is also summoned by many human rights and rule-of-law actors in their efforts to engage criminal justice sector reform more broadly. For instance, at a 2011 workshop on witness protection held in Uganda, a paper prepared by the OHCHR drew explicitly on the ICC, noting that the Court has "emphasized the importance of witness protection in recent decisions, demonstrating that [it] is a key concern." To that end, and "in line with the doctrine of positive complementarity, the application of witness protection standards by the Court will serve a great role in demonstrating adequate capacity, competence and credibility" of Ugandan courts.[193] Similarly, in his work on witness protection, Chris Mahony has argued that Uganda "must now consider *the requirements* of ICC complementarity."[194] According to Mahony, "the creation of a witness protection programme is a critical element of ICC

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[190] Ellis, *Sovereignty and Justice*, 113. Elsewhere, Ellis has also argued, that, "If [s]tates desire to retain control over prosecuting nationals charged with crimes under the ICC Statute, they must ensure that their own judicial systems meet international standards. At a minimum, states will have to adhere to standards of due process found in international human rights instruments, particularly as they relate to the rights of defendants." See Mark S. Ellis, "The International Criminal Court and its Implication for Domestic Law and National Capacity Building," *Florida Journal of International Law* 15 (2002), 241.

[191] Mark S. Ellis, "International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions," *Hague Journal on the Rule of Law* 1 (2009), 84. In the same article, Ellis also calls for the creation of an International Technical Assistance Office, whose purpose would be to "provide technical and unbiased assistance to domestic war crimes courts," 82.

[192] Ibid., 85.

[193] See OHCHR: Uganda, "Judicial Workshop on Victim and Witness Protection in Uganda" (August 2011), at http://www.uganda.ohchr.org/EN/Pages/DisplayNews.aspx-NewsID=JuditialWorkshop.htm. The quoted material was included in OHCHR's concept note for the workshop (on-file).

[194] Chris Mahony, "The justice sector afterthought: Witness protection in Africa" (Pretoria: Institute for Security Studies, 2010), xi (emphasis added).

complementarity considerations," as it "may well be a future driver of African protection mechanisms."[195]

The "requirements" of complementarity, as Mahony puts it, underscores the centrality of compliance to this catalytic framing. Materials that domestic NGOs circulate in countries like Kenya, Uganda, and the DRC reinforce this discourse. The Ugandan Coalition for the ICC, for instance, urges Uganda's "compliance with the Rome Statute,"[196] while a study on the DRC prepared by Protection International"—an international NGO dedicated to the protection of human rights defenders—notes that the passage of domestic implementing legislation would "enable the DRC to comply with its obligation … to integrate the Rome Statute in its internal legislation."[197] A convening of government officials throughout southern Africa (supported by the University of Pretoria's Centre for Human Rights, International Criminal Legal Services, and the Konrad Adenauer Foundation) even notes in its workshop report that the "[p]erception that [Rome Statute] crimes *can* be prosecuted as ordinary crimes"[198]—itself a correct statement of the law—is an "obstacle" for promoting greater domestication of the Statute.

Framing complementarity as a duty for states, and the bridge that this builds to compliance, offers a way to route broader governance objectives through the authority of the ICC. Indeed, Ellis' suggested questions are themselves reflected in the views of the Ugandan government, which states that, "Complementarity is … envisioned and approached more broadly in Uganda, encompassing the adoption of relevant institutional, legal and judicial measures to strengthen the rule of law institutions and the administration of justice more generally."[199] Rather than a constraint on the ICC, then, complementarity effectively extends the Court's authority.

3. Networks and the Social Production of a (New) Norm

Complementarity's transformation from constraint to catalyst represents a significant evolution away from the carefully negotiated compromises that informed the Rome Statute's drafting. Rooted in the grammar of compliance, this evolution is noteworthy both for the relative speed with which it has evolved (given that it imposes a greater burden on states parties), and the degree to which it has come to dominate the public discourse about complementarity. But how should the uptake and proliferation of this new norm be understood?

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[195] Ibid.

[196] Uganda Coalition for the International Criminal Court (UCICC), "Strategic Plan 2011-2013," 6. The plan adds that "Uganda being the host ought to be a good example in implementing the [Kampala] Declaration that was passed."

[197] Isabelle Fery, "Executive summary of a study on the protection of victims and witnesses in D.R. Congo," (Brussels: Protection International, July 2012), 11.

[198] Workshop Report, "Expert Workshop: Giving Effect to the Law on War Crimes, Crimes Against Humanity and Genocide in Southern Africa," Workshop Report (University of Pretoria: 13-14, June 2011) (emphasis added), at http://www.iclsfoundation.org/wp-content/uploads/2012/02/final-workshop-report-english.pdf.

[199] "The Role of Specialised Courts in Prosecuting International Crimes and Transitional Justice in Uganda," Remarks of the Honorable Minister of State and Deputy Attorney General at the UNDP Policy Dialogue on 'Complementarity' and Transitional Justice (New York: 12-13 October, 2011), at http://www.jlos.go.ug/old/index.php/document-centre/news-room/archives/item/213-the-role-of-specialised-courts-in-prosecuting-international-crimes-and-transitional-justice-in-uganda.

3.1 Norm Entrepreneurs

In her commanding study of complementarity's "catalytic effect" in Uganda and Sudan, Sarah Nouwen persuasively focuses on the efforts of norm entrepreneurs, whom she defines as "activists, often foreigners working in cooperation with local actors, who promote the adoption of international norms (or what in their view should be international norms) at the domestic level."[200] Driven by a "pro-ICC" ideology, Nouwen argues that these activists have in turn sought to build a network of actors—ICC officials, diplomats, domestic human rights advocates, rule-of-law and development experts—who have increasingly turned to complementarity not as a rule of admissibility, but as a normative ordering principle.[201] Significantly, however, she also suggests that the latter understanding is not only the work of entrepreneurs but also of norm "hijackers," whom she accuses of "misrepresentation" when invoking complementarity in the literal sense—to describe, for instance, a division of labor between the ICC and national jurisdictions, or to endorse certain standards and benchmarks for domestic proceedings that "are laudable from a human rights perspective, but do not fit complementarity."[202]

There is a growing literature on norm diffusion, much of which helpfully illustrates the means by which a broader understanding of complementarity – one that imposes a range of duties upon states – has acquired such currency in the public's imagination. In particular, by focusing on the role that non-state actors have played as agents of this new discourse, the significance of the network of ICC supporters, rather than the Court as an institution in itself, comes more clearly into focus. Aaron Boesenecker and Leslie Vinjamuri note that, "International human rights NGOs are quintessential [norm] facilitators; they both participate in global networks and discussions on justice and accountability and work locally in conflict and post-conflict situations to diffuse norms through a power of socialization."[203] Many of these organizations, ranging from Human Rights Watch to Avocats sans Frontieres, and Amnesty International to the International Center for Transitional Justice, also maintain national offices in key ICC situation countries, creating a vital, network between those sites where international criminal law is produced—The Hague, Brussels, Geneva, New York—and enacted.

The motivations of these influential "trans-sovereign entrepreneurs"—the interpretive community they inhabit[204]—is informed through the views advanced by scholars like Burke-White, Kleffner, and Stahn, who have sought to expand the earlier consensus around complementarity and explore more deeply the policy dimensions of this new ordering principle. In part, these efforts offered new readings of the Rome Statute (through systematic and teleological interpretation), but their purpose in doing so was the same as those working within the ICC: to magnify the Court's influence. These

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[200] Nouwen, *Complementarity in the Line of Fire*, 23; see also Subotic, *Hijacked Justice*, 4.
[201] Nouwen defines this ideology as based on three interrelated beliefs: (1) that international courts "mete out better justice than domestic systems"; (2) that international crimes must be prosecuted as such; and (3) because, "at a minimum, once the ICC is involved the fledgling Court must be seen to succeed." She further suggests that this ideology has been "at times more powerful than complementarity," to the detriment of its catalyzing effect. See *Complementarity in the Line of Fire,* 13.
[202] Ibid., 192. For a similar critique, see McAuliffe, "From Watchdog to Workhorse."
[203] Aaron P. Boesenecker and Leslie VInjamuri, "Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms," *International Journal of Transitional Justice* 5 (2011), 359.
[204] See Julie Mertus, "Considering Nonstate Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application," *NYU Journal of International Law and Politics* 32 (2000), 554.

"teleological impulses" also match well with the community of NGOs engaged in developing the "cascading" international accountability norm that Sikkink has described. Indeed, as she and Martha Finnemore have noted, "Ideational commitment is the main motivation when entrepreneurs promote norms or ideas because they believe in the ideals and values embodied in the norms"; in so doing, they construct new "cognitive frames," which, when successful, "resonate with broader public understandings and are adopted as new ways of talking about and understanding issues."[205]

The desire to diffuse and entrench more deeply a norm of international accountability dovetailed with the desire to think about complementarity not merely as a principle of admissibility but as the basis of a new "Rome Statute System." Thus, while many of the entrepreneurs advancing this new, more ambitious norm may have initially wished more for the ICC —that it, too, would be a court of primacy like the ICTY and ICTR—this shortcoming was progressively reinvented post-Rome. Complementarity as a "catalyst" became the new cognitive frame.

3.2 Transnational Networks

While complementarity's intellectual history is important to understand, so too is the sociology of its transformation. Here, Emanuel Adler's work on transnational "communities of practice" is instructive as it points to the dense array of ICC-engaged actors who helped advance the complementarity-as-catalyst framework.[206] Adler's work is illuminating insofar as it examines the social construction of shared norms and ideas, as well as how a group of actors "develops a common body of knowledge and common practices by engaging in their field in relation with each other."[207] Extrapolating this insight to the transnational, Adler suggests that "we can take the international system as a collection of communities of practice"— diplomats, human rights activists, lawyers—who may share "a sense of joint enterprise that is constantly being renegotiated," as well as shared practices, which "are sustained by a repertoire of communal resources, such as routines, words, tools, ways of doing things, stories, symbols, and discourse."[208] In a similar vein, Margaret Keck and Sikkink point to the role of "transnational advocacy networks," which can be understood as one component of Adler's communities of practice. Keck and Sikkink define such a network as "those actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services."[209] It is through

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[205] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52(4) (Autumn 1998), 897-898. For a similar study of norm entrepreneurship in international law, see Peter Hilpold, "Intervening in the Name of Humanity: R2P and the Power of Ideas," *Journal of Conflict & Security Law* 17(1) (2012).

[206] Adler builds on the work of Etienne Wenger, whose theory of communities of practice was rooted in his observation that people develop knowledge socially, i.e., through others who are engaged in similar activities and motivated by shared concerns. Etienne Wenger, *Communities of Practice: Learning, Meaning, and Identity* (Cambridge University Press: 1998).See also see Julie Mertus, "From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society," *American University International Law Review* 14(5) (1999), 1335-1389.

[207] Elena Baylis, "Function and Dysfunction in Post-Conflict Judicial Networks and Communities," *Vanderbilt Journal of Transnational Law* 47 (2014), 643.

[208] Emanuel Adler, "Communities of practice in International Relations," in *Communitarian International Relations: The epistemic foundations of International Relations* (Routledge Press, 2005), 15

[209] Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998), 2. Pertinent to complementarity, they note that such networks are "most prevalent in issue areas characterized by high value content and informational uncertainty, although the value-content of an issue is both a prerequisite and a result of network activity." Ibid.

participation in these relationships that information is not only transmitted, but also where meaning itself develops. These relationships and repertoires underscore "the role of knowledge communities, communities of discourse, and, more generally, 'communities of the like-minded' in the structuration and dynamic evolution of social reality."[210]

An attention to communities and networks resonates in the general context of international criminal law, which remains a specialized field (if one that enjoys significant influence), and in the context of a singular body like the ICC, popularly seen as the institutional apex of the international justice "movement." ICC staff not only share a sense of joint enterprise (to combat impunity), but so do the transnational communities of human rights NGOs, advocates, and academics that played a pivotal role in the Court's establishment. As Gerry Simpson argues, "Never before had non-state actors played such a prominent role in bringing a treaty into existence. NGOs such as Amnesty International, No Peace Without Justice and Human Rights Watch were highly influential – providing expertise and advice, drafting and circulating proposals and cajoling delegates."[211]

Marlies Glasius' monograph on the establishment of the ICC also captures well the development of these network ties and the sense of community among them. Describing the "organization of national and international conferences, expert meetings, public debates, seminars, symposia, and workshops" that were organized in the years leading up the Rome conference, she writes that the conferences were "characterized by an intermingling of officials with the NGO and the activist communities, and by high-level legal debates, rather than political confrontations."[212] International, regional, and national meetings alike "often boasted one or more international guests drawn from the ranks of the NGO Coalition, the Yugoslavia and Rwanda tribunals, or from the academic community."[213] This intermingling of networks focused on the normative growth of ICL and the institutional growth of the ICC endures post-Rome, concomitant with the expansion in complementarity's definition and meaning.[214] In Elena Baylis' words, "in the ICL tribunal context, [networks] are also acting as the framework for a transnational community that conceives of itself as building the field of ICL."[215]

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[210] Adler, *Communitarian International Relations*, 4.

[211] Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), 36. For detailed profiles of key actors and organizations, see Benedetti, Bonneau, and Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998,* 68-117; Claude E. Welch, Jr. and Ashley F. Watkins, "Extending Enforcement: The Coalition for the International Criminal Court," *Human Rights Quarterly* 33 (2011), 927-1031.

[212] Glasius, *The International Criminal Court: A global civil society achievement,* 39.

[213] Ibid.

[214] Academic collections about the Court regularly include contributions from Court officials and human rights advocates alike; academic institutions house a number of legal training projects that seek to enhance the impact of the "Rome Statute System"; and many former staff members of the *ad hoc* tribunals were part of the initial vanguard within the ICC (later moving to academia themselves). In short, to an unusual degree, "network ties and communal identity exist with and across organizational boundaries" in the field of international criminal law." See Baylis, "Function and Dysfunction in Post-Conflict Judicial Networks and Communities," 633.

[215] Ibid., 649. In defending international criminal justice, David Koller makes a related point: "[t]he ultimate value of international criminal law may rest … in its role in identity construction, in particular in constructing a cosmopolitan community embracing all of humankind." See David S. Koller, "The Faith of the International Criminal Lawyer," *NYU Journal of International Law and Politics* 40 (2008), 1060.

The dominant framing of complementarity as a catalyst for compliance/rule-following amongst these transnational communities of practice is also significant in illuminating their vertical engagement with advocates and civil society organizations at national level. As Adler argues, "learning means redefining reality by means of 'contextual' community knowledge, from which [practitioners] borrow in order to get their bearings."[216] Here, the transmission of information has also helped redefine the meaning of complementarity away from a technical rule of admissibility to a normative ordering principle, one that emphasizes the obligation of states to undertake domestic investigations and prosecutions in conformity with the Rome Statute. The pursuit of this framework has, in turn, brought international and domestic actors together in a series of joint "capacity-building" projects, a number of which were highlighted at the ICC Review Conference in 2010. From Avocats sans Frontieres' "Integrated Project on Fighting Impunity and the Reconstruction of the Legal System in the DRC" to "Danish Support to the War Crimes Court and the Judiciary in Uganda," these efforts have collectively furthered the cognitive framing of complementarity as a catalyst for accountability.[217]

4. Conclusion

Over the past decade, complementarity has become the normative site and an adaptive strategy for realizing a broad array of ambitious goals, wherein the ICC is meant to not only complement national forums, but to actively encourage domestic proceedings as well. As mediated by a dense, interconnected web of non-state actors—NGOs, ICC officials, human rights advocates, and academics—complementarity has thus become increasingly polysemous, imbued with multiple meanings (admissibility rule, as well as catalyst) and dimensions (cooperative, as well as coercive). Furthermore, in the shift towards a more "positive," policy-based vision for complementarity, states are understood to have not only the right to investigate and prosecute international crimes under the Rome Statute, but the duty to do so. Rather than a concession to sovereignty, then, the popular understanding of complementarity now sees it more as a condition of sovereignty, i.e., a series of benchmarks that states must satisfy in order to successfully challenge the ICC's control over a case. The following chapter examines the juridical nature of these challenges in further detail.

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[216] Adler, *Communitarian International Relations*, 20. Writing in another context, the legal scholar Annelise Riles' description of a discourse community is equally apt. As she notes, "'language' is quoted and reprinted from one conference document to the next and as states begin to conform their practices, or at least their discourse, to the norms expressed therein, some of what is agreed upon at global conferences gradually will become rules of 'customary international law.'" Annelise Riles, *The Network Inside Out* (University of Michigan Press, 2001), 8.

[217] For descriptions of these (and other) projects, see "Focal points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes," RC/ST/CM/INF.2, 30 May 2010 (see examples D and I). See also Jelena Subotic, "The Transformation of International Transitional Justice Advocacy," *International Journal of Transitional Justice* 6 (2012), 106-125.

CHAPTER THREE
Mirror Images: Complementarity in the Courtroom

The previous chapter explored complementarity's discursive shifts, tracing its ascension from an admissibility principle to a more expansive norm focused on the ICC's ability to catalyze accountability efforts at the national level. In light of this ambitious and expanding norm, it might be expected that states would be granted a relatively wide margin of discretion over the contours of their criminal proceedings. Indeed, several commentators—expressing concern at the risk of an overly permissive admissibility regime—have suggested that the ICC's "institutional bias" might "give too much deference to national proceedings."[218] Other scholars have counseled in favor of a more flexible approach, suggesting that would be a "smart way of stimulating national proceedings."[219]

This chapter argues that, rather than encouraging such flexibility, a series of strict tests for admissibility have instead characterized the Court's Article 17 practice. Most notable amongst these is an emphasis on whether proceedings initiated by the OTP and a state that would seek to successfully challenge admissibility are sufficiently similar. As described by the Appeals Chamber, "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."[220] Furthermore, when faced with competing claims about domestic proceedings (particularly challenges brought by an individual accused), ICC judges have undertaken a relatively superficial review, while setting a high evidentiary threshold for challengers to satisfy. The Court has also effectively narrowed the opportunity to bring admissibility challenges by restricting the scope of review for pre-trial chambers when determining whether to issue an arrest warrant.

While much of the ICC's early complementarity jurisprudence unfolded in the context of individual defendants who raised admissibility challenges following the referral of situations to the Court by the state itself (as in Uganda and the DRC), more recent decisions have been triggered at the behest of states, notably in Kenya, Libya, and in the recent case of Simone Gbagbo, the Ivory Coast. This chapter explores the evolution of the ICC's admissibility jurisprudence and identifies its key elements as developed and articulated by the Court to date. Particular attention is paid to the Appeals Chamber's 2009 and 2011 decisions in the challenges brought by Germain Katanga and the Kenyan government, as well as the challenges filed by the Libyan government to the cases brought against Saif Gaddafi and Libya's former chief of intelligence, Abdullah al-Senussi. To date, the challenge filed on behalf of al-Senussi has

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[218] See, e.g., Lars Waldorf, "'A Mere Pretense of Justice': Complementarity, Sham Trials, and Victor's Justice at the Rwandan Tribunal," *Fordham International Law Journal* 33(4) (2011), 1270. See also Drumbl, *Atrocity, Punishment, and International Law*, 206 (positing that, "the ICC shall approach complementarity determinations with some restraint").

[219] Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, 18; Michael Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?," *Santa Clara Journal of International Law* 8(1) (2010), 164 (concluding that "the ICC should work with states to enhance their domestic capacity and defer to domestic investigations or prosecutions in any feasible conditions").

[220] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 21 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi," ICC-01/11-01/11 OA 4, Appeals Chamber, 21 May 2014 ("Gaddafi Admissibility Appeals Judgment"), para. 73; see also *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi," ICC-01/11-01/11 OA 6, Appeals Chamber, 24 July 2014 ("Al Senussi Admissibility Appeals Judgment"), para. 119.

been the only one to succeed. Attention is also paid to the judicial treatment of Article 93(10), which provides a statutory basis for the policy of "positive" complementarity. Here, too, however, the Court has taken a restrictive approach, choosing to separate its treatment of requests for ICC cooperation—a core tenet of "positive" complementarity—from admissibility challenges.[221]

In reviewing this body of case law, I suggest that the ICC has largely followed a strict approach to complementarity, adopting standards for admissibility that would require domestic proceedings to be framed in much the same way as the OTP's cases—in effect, to mirror them. While this approach is consistent with the coercive dimension of complementarity, insofar as it seeks to pull states towards compliance with the Rome Statute framework, it also places a heavy burden on states, one that they may be unprepared (or unwilling) to meet. Rather than catalyzing domestic proceedings through greater judicial dialogue, then, the Court's admissibility regime way well thwart them. Furthermore, while some commentators have responded to this criticism by seeking to bifurcate the juridical operation of complementarity from its treatment outside of the courtroom, I suggest that this division is unsustainable and symptomatic of legalism: it relies on an artificial division between the Court as a legal and political actor.

1. Complementarity as Admissibility Rule

1.1 "Same Case" Test: Person, Conduct, and Incident?

The "same case" test has its origins in the ICC's investigations in the DRC, following the government's referral to the Court in April 2004. Thomas Lubanga Dyilo was the first accused to be surrendered to the ICC and also the first to be found guilty: in March 2012, he was convicted on the sole charge of recruiting, conscripting, and enlisting child soldiers.[222] Two other former rebel leaders, Germaine Katanga and Mathieu Ngudjolo Chui, have also been tried: Ngudjulo Chui was acquitted in December 2012, while Katanga was convicted in March 2014.[223] Notably, as these were cases in a situation that the government itself had referred to the Prosecutor, they raised little opposition with Kinshasa. Indeed, at the time that the OTP lodged its application, Lubanga had been in the custody of Congolese authorities since March 2005, where he was being held on several charges, including genocide and crimes against humanity.[224] An arrest warrant for Lubanga was first sought in January 2006 and issued under seal by the Pre-Trial Chamber the following month.[225] In its application, the Prosecutor acknowledged that proceedings against Lubanga were underway in the DRC; however, it argued that this was not a bar to admissibility since, at the time of the Congolese

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[221] *Situation in the Republic of Kenya,* Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, ICC-01/09, PTC II, 29 June 2011 ("PTC Article 93(10) Decision").
[222] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06, TC I, 14 March 2012.
[223] *The Prosecutor v. Mathieu Ngudjolo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-02/12, TC II, 18 December 2012 ("Ngudjolo Judgment"); *The Prosecutor v. Germain Katanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/07,TC II, 7 March 2014. Bosco Ntaganda surrendered himself to the Court in March 2013; however, his trial has not yet begun. Although President Kabila initially refused to transfer Ntaganda to The Hague (and later expressed an intention for the DRC to prosecute him domestically), no admissibility challenge in those proceedings has been filed to date.
[224] See, e.g., William A. Schabas, "'Complementarity in Practice': Some Uncomplimentary Thoughts," *Criminal Law Forum* 19 (2008), 11.
[225] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, ICC-01/04-01/06, PTC I, 10 February 2006 ("Lubanga Arrest Warrant Decision").

government's referral to the ICC in March 2004, the government had stated that it was not able to prosecute crimes falling within the Court's jurisdiction.[226]

In deciding whether to approve the requested warrant, Pre-Trial Chamber I actively examined whether the case was admissible since, in its view, such a determination had to necessarily precede the issuance of a warrant. The Chamber rejected the OTP's argument that the Congolese government's referral of the situation rendered the case admissible *per se*. Importantly, it noted that for the purpose of the admissibility analysis, the DRC national judicial system "ha[d] undergone certain changes since March 2004, particularly in the region of Ituri," where Lubanga's alleged crimes had been committed, and where the OTP had opted to begin its investigations.[227] As a result, the Court found the Prosecutor's "general statement that the DRC national judicial system continues to be unable in the sense of article 17 … of the Statute does not wholly correspond to … reality any longer."[228]

The Pre-Trial Chamber nevertheless determined that the case was admissible. In so doing, it concluded that, "it is a condition *sine qua non* for a case arising from the investigations of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court."[229] Drawing on its earlier definition of a case in the context of victim participation, the Chamber noted that the word "case" referred to "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects."[230] Because Lubanga was charged with crimes other than those related to the recruitment of child soldiers – even where those crimes were broader in scope than those charged by the ICC – the case was not being investigated or prosecuted by the DRC within the ambit of Article 17(1)(a).[231] There was thus no bar to admissibility.

In decisions reviewing other arrest warrants, the Court has subsequently applied the "same person, same conduct" test.[232] In these instances, the relevant pre-trial chambers have acted *proprio motu* under the discretionary power provided under Article 19(1) of the Rome Statute, leading them to conclude that the while the proceedings in question concerned the same person, they did not concern the same conduct. In several cases, the Prosecutor advanced an even narrower test, arguing in subsequent motions that the "same conduct" test required domestic proceedings to involve not only the same acts, but also the same incidents, i.e., the same factual allegations.[233] While there has been

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[226] *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecutor's Application for Warrant of Arrest, ICC-01/04-01/06-8, 13 January 2006, para. 186.
[227] Lubanga Arrest Warrant Decision, para. 36.
[228] Ibid.
[229] Ibid., para 31.
[230] Ibid. (citing *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Application for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6, 18 January 2006, para. 65).
[231] Lubanga Arrest Warrant Decision, paras. 39-40.
[232] See, e.g., *The Prosecutor v. Germain Katanga*, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for German Katanga, ICC-01/04-01/07-4, PTC I, 6 July 2007 (finding the case admissible before the ICC because the proceedings against Katanga in the DRC "did not encompass the same conduct" that was the subject of the Article 58 application); *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, Decision on the Prosecution Application Under Article 58(7) of the Statute, ICC-02/05-01/07-I-Corr, PTC I, 27 April 2007.
[233] See, e.g., *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Prosecutor's Application under Article 58(7), ICC-02/05-56, 27 February 2007, paras. 266-267; *The Prosecutor v. German Katanga*, Public Redacted Version of the 19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defense of Germain

no explicit judicial endorsement of these additional requirements, Pre-Trial Chamber III, in the case of former Cote d'Ivoire President Laurent Gbabgo, indicated that a case encompasses "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects."[234]

Katanga was the first accused to challenge the admissibility of his case. In March 2009, before Trial Chamber II, he filed an application under Article 19(2)(a) on the basis that, *inter alia*, the same conduct test was overly strict and constituted "flawed" precedent.[235] Instead, he argued that the Court should adopt a more flexible approach to admissibility, one based on a "comparative gravity" or "comprehensive conduct" standard.[236] While there was "no mathematic formula" for such a standard, Katanga averred, "Only when the ICC Prosecutor's scope of investigation is significantly more comprehensive than the scope of national investigations, would there be a basis for admissibility."[237] Furthermore, even if the same conduct test did apply, Katanga argued that he was being investigated by the DRC at the time the ICC issued its arrest warrant and that these investigations encompassed crimes committed on or about 24 February 2003 in the village of Bogoro, which was the basis of the ICC's case as well.

The Trial Chamber dismissed the challenge, but rather than opine on the validity of the test (around which Katanga's motion had primarily been framed), it found that the DRC authorities were unwilling to prosecute Katanga.[238] The Chamber implicitly affirmed the validity of the test, however, insofar as it rejected Katanga's claim that the prosecution had failed to produce documents about the attack on Bogoro that he alleged were relevant to admissibility, on the grounds that they were not "decisive."[239] The presumption that domestic proceedings had to encompass the same conduct (the attack on Bogoro) was thus implicit in the Court's dismissal. The Appeals Chamber clarified this determination on review—finding that inaction at the domestic level, not unwillingness, rendered the case admissible—but it did not address the alternative standard ("comprehensive conduct"') that Katanga had proposed.[240] Other defendants

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Katanga, pursuant to Article 19(2)(a), ICC-01/04-01/07-1007, 30 March 2009 (stating that the term "case" should … be understood as being constituted by the underlying event, incident, and circumstances – i.e. in the criminal context, the conduct of the suspect in relation to a given incident").

234 *The Prosecutor v. Laurent Gbagbo*, "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo," ICC-02/11-01/11, PTC III, 30 November 2011, para 10. The chamber did not, however, specify what would be encompassed by the notion of "incident."

235*The Prosecutor v. Germain Katanga*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a), ICC-01/04-01/07-949, 11 March 2009 ("Katanga Admissibility Challenge").

236 Ibid., paras. 46-47, 51.

237 Ibid., para. 47. The defense also proffered a "comparative gravity/comprehensive conduct" test, para 51.

238 *The Prosecutor v. Germain Katanga*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07, TC II, 16 June 2009, para. 95 ("Katanga Admissibility Decision") ("In light of these statements, and without the need to rule on the 'same conduct test' which the Defence for Germain Katanga sought to challenge in its Motion, the Chamber cannot but note the clear and explicit expression of unwillingness of the DRC to prosecute this case.")

239 Ibid., para. 72. In arriving at this determination, the Chamber noted that one of the documents – a request by the Kinshasa High Military Court to extend Katanga's provisional detention – "does not specify the exact date of the acts allegedly committed in Bogoro" and that it was not "conclusive as to whether the acts allegedly committed there could be attributed to Germain Katanga," paras. 68, 70.

240 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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, ICC-01/04-01/07-OA8, Appeals Chamber, 25 September 2009, para. 81 ("Katanga Admissibility Appeals

before the ICC have raised similar challenges. In *Gbagbo*, the chamber was also asked 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." The petition noted that the "short-sighted view of complementarity" endorsed 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 … as part of the overall process of reconciliation and peace building."[241] But the Court declined.

Significantly, the context for these cases was one in which the state had supported the ICC's intervention (at least initially) through self-referral. As Stahn notes, "state authorities sided with the ICC, rather than the defence, since they had an interest in seeing the case being tried internationally."[242] By contrast, the proceedings in Kenya and Libya present an alternative picture, as those challenges were both brought by governments under Article 19(2)(b). In Kenya, the government disputed the correctness of the test on the basis that the "same person" element of the test was flawed. Instead, national investigations should cover "the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC."[243] It also offered a "proposed timetable for investigative processes" at the national level, including a report on PEV investigations under a new Director of Public Prosecutions (one that would "extend up to the highest levels, and on the cooperation with the ICC Prosecutor") and, by September 2011, a "report on progress made with investigations and readiness for trials in light of judicial reforms."[244] The Pre-Trial Chamber rejected the state's challenge within two months, finding that the proposed measures "fall short of any concrete investigative steps regarding the … suspects in question."[245]

On appeal, the government continued to press its view that, "it cannot be right that in all circumstances in every Situation and in every case that may come before the ICC the persons being investigated by the Prosecutor must be exactly the same as those being investigated by the State"; rather, "[t]here simply must be a leaway [sic] in the exercise of discretion in the application of the principle of complementarity."[246] To that end, it averred, much as Katanga did, that a better test should query whether national proceedings capture the "same conduct in respect of the persons at the same level in the

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Judgment") (finding that, "In light of the above, the Appeals Chamber does not have to address in the present appeal the correctness of the "same-conduct" test used by the Pre-Trial Chambers to determine whether the same 'case' is the object of domestic proceedings.")

[241] *The Prosecutor v. Laurent Gbagbo*, Decision on the "*Requeté relative a la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut*," ICC-02/11-01/11, PTC I, 11 June 2013, paras. 11-12 ("Gbagbo Admissibility Decision"). Notably, the national proceedings that Gbagbo alleged were underway related to economic crimes (see para. 8), over which the Rome Statute has limited subject matter jurisdiction.

[242] Carsten Stahn, "Admissibility Challenges before the ICC," 234.

[243] *The Prosecutor v. William Samoei Ruto, et al.,* Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ICC-01/09-01/11 and ICC-01/09-02/11, PTC II, 31 March 2011, para. 32.

[244] Ibid., para. 79.

[245] See *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, PTC II, ICC-01/09-01/11, 30 May 2011, para. 65 ("Ruto et al. Admissibility Decision"). The Chamber noted further that it "lack[ed] information … as to the conduct, crimes or the incidents for which the three suspects are being investigated or questioned for," para. 69; see also paras. 56, 60-61in the parallel Kenyan cases.

[246] *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Corrigendum to the "Document in Support of the 'Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,'" ICC-01/09-02/11, 21 June 2011, para. 43.

hierarchy being investigated by the ICC."[247]By a majority, the Appeals Chamber affirmed the Pre-Trial Chamber's decision. It clarified that "where summonses to appear have been issued, the question is no longer whether suspects at the same hierarchical level are being investigated by Kenya, but whether the same suspects are the subject of investigation by both jurisdictions for *substantially* the same conduct."[248] The majority further rejected Kenya's appeal to domestic discretion, noting that the only purpose of admissibility proceedings under Article 19 is to determine if there is a jurisdictional conflict. While complementarity might favor national jurisdictions, the Chamber noted, "it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level."[249] Finally, it specified that a successful challenge required concrete investigative steps: "mere preparedness" to take such steps would not suffice.[250]

Like Kenya, the Libyan government also contended in its challenges to the Gaddafi and Al-Senussi cases that the "same case" test should be broadened, recognizing 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."[251] Further, 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 OTP's investigation.[252] Conformity to ICC practice should instead yield to a more flexible standard, Libya argued, "with a policy of giving the benefit of doubt to States exercising jurisdiction."[253]

While not discarding the test, Pre-Trial Chamber I took a noticeably broader approach in both cases than in previous admissibility decisions. In each challenge, it rejected the suggestion that "conduct" must be understood as "incident specific,"[254] but it affirmed that domestic investigations must be "case-specific," meaning that:

> [I]t 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

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[247] Ibid. Kenya further averred that, in conducting preliminary investigations with respect to other situation, the Prosecutor should consider the "operation and capability of the national system as a whole as being determinative of whether he should intervene," para. 89.

[248] See *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* Judgment on the Appeal of the Republic on Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," Appeals Chamber, 30 August 2011, paras 42, 47 ("Ruto et al. Admissibility Appeals Judgment"); see also paras. 41, 46 in the parallel Kenyan cases. Arguably, the Chamber opened the door to a potentially less demanding standard by its reference to "substantially," but it did not elaborate on the implication of this qualification.

[249] Ruto et al. Admissibility Appeals Judgment, para. 44; see para. 43 in the parallel Kenyan cases.

[250] Ibid., para. 41; ibid., para. 40.

[251] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11, 2 April 2013, para. 88, 43 ("Al-Senussi Admissibility Application"); see also Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130-Red, 1 May 2012 ("Libya Admissibility Application").

[252]Al-Senussi Admissibility Application, para. 88.

[253] Al-Senussi Admissibility Application, para. 97; Libya Admissibility Application, para. 92.

[254]*The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11, PTC I, 31 May 2013, paras, 73, 76-77 ("Gaddafi PTC Decision"); Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11, PTC I, 11 October 2013, para, 66 ("Al-Senussi PTC Decision").

> 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.[255]

As to the question of what constitutes "substantially" the same conduct, the Chamber found that will "vary according to the concrete facts and circumstances of the case, and, therefore, requires a case-by-case analysis."[256] Significantly, contrary to duty-based arguments over the need to implement Rome Statute legislation domestically, the Chamber took the opportunity in both decisions to clarify that "the question of whether domestic investigations are carried out with a view to prosecuting 'international crimes' is not determinative of an admissibility challenge."[257] In its words, "the decision to exclude reference to the ordinary crimes exception [of the ICTY and ICTR Statutes] was a deliberate decision that followed extensive discussions during the negotiating process."[258]

Pre-Trial Chamber I nevertheless rejected the challenge brought on behalf of Gaddafi—chiefly because the Zintan militia was holding him, thus making the state "unable" to obtain him for purposes of trial[259]—but it found al-Senussi's case inadmissible. It did so, in part, on the ground that while "it is not required that domestic proceedings concern each of those events [mentioned in the arrest warrant] at the national level," the "incidents" or "events" in Senussi's case were "indeed the same as the one before the Court."[260] The Appeals Chamber affirmed both rulings, holding:

> 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. The Appeals Chamber considers that to carry out this assessment, it is necessary to use, as a comparator, the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents.[261]

Notably, Judge Anita Usacka took issue with the Court's continued fidelity to the "same case" test. In dissent, she argued:

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[255] Al-Senussi PTC Decision, para. 66(i).
[256] Gaddafi PTC Decision, para. 77; Al-Senussi PTC Decision, paras.48, 66(iii);
[257] Gaddafi PTC Decision, para. 85; Al-Senussi PTC Decision, para. 66(iv). Similarly, adopting a significantly more permissive posture than it had under previous Article 19 challenges, the OTP supported most of these claims, noting that, "There is no requirement that the crimes charged in the national proceedings have the same 'label' as the ones before this Court." See *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11, 5 June 2012, para. 23.
[258] Gaddafi PTC Decision, para. 87. Thus, "It is the Chamber's view that Libya's current lack of legislation criminalising crimes against humanity does not per se render the case admissible before the Court," para. 88.
[259] Though the Chamber found that Libya had "fallen short of substantiating [its submission], by means of evidence of a sufficient degree of specificity and probative value," the gravamen of its opinion fell on its finding that the national system was "unavailable" within the meaning of Article 17(3) because it was unable to "obtain" the accused as well as necessary witnesses or testimony, and because it could not "overcome the existing difficulties in securing a lawyer for [Gaddafi]." See Gaddafi PTC Decision, paras. 135, 206-208, 215.
[260] Al-Senussi PTC Decision, para. 79. The Chamber noted that, "all or some of the 'incidents' or 'events'…are encompassed in the national proceedings may still constitute a relevant indicators that the case subject to the proceedings is indeed the same case before the Court."
[261] Gaddafi Admissibility Appeals Judgment, para. 73.

> Establishing such a rigid requirement would oblige domestic authorities to investigate or prosecute exactly or nearly exactly the conduct that forms the basis for the "case before the Court" at the time of the admissibility proceedings, thereby being obliged to "copy" the case before the Court. Instead of complementing each other, the relationship between the Court and the State would be competitive, requiring the State to do its utmost to fulfil the requirements set by the Court.[262]

Echoing Judge Usacka, Kevin Jon Heller has remarked that, "the same-conduct requirement expects states to be mind-readers: if [states] do not accurately anticipate the precise conduct that will draw the ICC's attention—no small task, given the 'universe of criminality in atrocity-crime situations'—they will be deemed 'inactive' with regard to the international proceedings and the Court will admit the case."[263]

Despite such criticism, the "same case" doctrine appears to have become an interpretive mainstay of the Court's jurisprudence. It was most recently applied in the Appeals Chamber's May 2015 judgment rejecting the Ivory's Coast challenge to the proceedings against Simone Gbagbo, notwithstanding the fact that Ms. Gbagbo had already been convicted and sentenced to 20 years imprisonment, on different charges, by a domestic court in March of that year.[264] Thus, while the test might be defensible as a matter of statutory interpretation,[265] it is an exacting one with the potential of placing the Court in awkward disjuncture with national jurisdictions. Rather than encouraging flexibility in the manner and method by which states pursue domestic accountability, the came conduct test, as it has been applied to date, promotes the opposite. [266]

1.2 Admissibility Challenges and Timing

In addition to the substantive constraints imposed by the same conduct requirement, the Court has also applied substantial procedural limitations on admissibility challenges. As noted, most ICC pre-trial chambers have addressed admissibility challenges pursuant to Article 19(1), which the Court interprets with broad discretion to determine *proprio motu* the admissibility of a case.[267] In July 2006, however, the Appeals Chamber issued a decision that significantly restricted the scope of such

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[262] Gaddafi Admissibility Appeals Judgment, Dissenting Opinion of Judge Anita Usacka, para. 52; see also Al Senussi Admissibility Appeals Judgment, Separate Opinion of Judge Anita Usacka, para. 14 (finding that the PTC "may have been too demanding when it considered whether Libya was able genuinely to investigate and prosecute in relation to Mr. Gaddafi").

[263] Kevin Jon Heller, "A Sentence-Based Theory of Complementarity," 241. See also Heller, "Radical Complementarity," *Journal of International Criminal Justice* (2016, forthoming).

[264] *The Prosecutor v. Simone Gbagbo,* Judgment on the appeal of Cote d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Cote d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo," ICC-02/11-01/12 OA, Appeals Chamber, 27 May 2015.

[265] As commentators have noted, the "same conduct" language was added to the chapeau of Article 20(3) during the Rome Statute's drafting to ensure that the principle of *ne bis in idem* would be respected, without prohibiting ICC retrial for charges based on different conduct. See Kevin Jon Heller, "A Sentence-Based Theory of Complementarity"; Darryl Robinson, "Three Theories of Complementarity," 175-182.

[266] Sharon A. Williams and William A. Schabas, "Article 17: Issues of admissibility," in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart Publishing, 2008), 616. For an alternative view, see Diane Bernard, "Standard of Review and the Complementarity of the International Criminal Court," in Lukasz Gruszczynski and Wouter Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford: Oxford University Press, 2014).

[267] See, e.g., *The Prosecutor v. Joseph Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05, PTC II, 10 March 2009 ("Uganda Admissibility Decision").

review, holding that "the Pre-Trial Chamber should exercise its discretion only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect."[268] Rather than the Pre-Trial Chamber conducting its own review of admissibility, then, the Appeals Chamber suggested that it would be possible (indeed preferable) for the accused to do so, noting that such a challenge could theoretically be lodged after an arrest warrant had issued but prior to the accused's arrest.

This decision has attracted significant criticism. As Gilbert Bitti and Mohamed El Zeidy note, the decision ignores the fact that admissibility is "a general principle in the Rome Statute which does not need to be reiterated in every single provision."[269] Furthermore, the Chamber's decision ignores, or overlooks, the practical context of ICC arrest warrants, many of which are often issued under seal. In practice, this effectively prevents a defendant from challenging admissibility prior to his or her surrender to the ICC. As the *Katanga* Trial Chamber noted, "[T]he DRC did not challenge the admissibility of the case when this warrant of arrest was communicated to it and … as soon as said warrant was unsealed, Germain Katanga's transfer to The Hague was ordered immediately."[270]

The logic of the Appeals Chamber's decision implies a circular approach to assessing prosecutorial or judicial activity at the national level, particularly in situations of self-referral. In Katanga's admissibility decision, for instance, the Chamber affirmed that the case was inadmissible but the grounds of its determination focused on the first-prong of the admissibility test: inactivity.[271] Specifically, the Chamber found that there were no proceedings against Katanga at the time he raised his challenge because the DRC had closed them upon his transfer to The Hague.[272] This approach to the admissibility provision thus subordinated the presence of domestic proceedings to a narrow question: Were proceedings ongoing "at the time of" the Court's actual determination of the admissibility of the case?[273]

The Chamber appeared untroubled by the potentially chilling effect that such relinquishment of jurisdiction might have on the duty of states to exercise their criminal jurisdiction. In its words, "It is purely speculative to assume that a State that has

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[268] *Situation in the Democratic Republic of Congo*, Judgment of the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," ICC-01/04-169, Appeals Chamber, 13 July 2006. Such exceptional circumstances, the Chamber noted, "may include instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review," para. 52.

[269] Gilbert Bitti and Mohamed M. El Zeidy, "The *Katanga* Trial Chamber Decision: Selected Issues," *Leiden Journal of International Law* 23 (2010), 323.

[270] Katanga Admissibility Decision, para 95.

[271] As noted, the Appeals Chamber corrected the Trial Chamber and held that complementarity comprised a two-part test: "(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 persons concerned. It is only when the answers to these questions are in the affirmative that … one has to examine the question of unwillingness and inability." See Katanga Admissibility Appeals Judgment, para. 78.

[272] Ibid., para. 82.

[273] Ibid., para 75. One commentator, acknowledging this apparent catch-22, describes it as follows: "[O]nce transferred, if the domestic investigation is terminated then this means that Article 17(1)(a) does not render the case inadmissible; and the decision to transfer, reflecting a decision that the person should be brought to justice, means that the case is also not inadmissible under Article 17(1)(b)." See Ben Batros, "Evolution of the ICC Jurisprudence on Admissibility," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 601.

refrained from opening an investigation into a particular case or from prosecuting a suspect would do so, just because the [ICC] has ruled that the case is inadmissible."[274] While the Chamber's reasoning is consistent with the plain language of Article 17(a)(1), judicial inquiry into the broader context of domestic proceedings becomes immaterial. As other chambers have similarly ruled, the nature of any past investigations—who initiated them, for what crimes, based on what evidence—is irrelevant.[275]

The insistence that concrete investigative steps must be underway at the time the Court makes a determination on an admissibility challenge is further compounded by Article 19(5) of the Statute, which stipulates that such challenges be made "at the earliest opportunity."[276] This requirement is particularly difficult for states that may have a genuine desire to conduct domestic proceedings, but suffer from the challenges common to many post-conflict states, e.g., collapsed (or compromised) judicial systems, limited capacity, or inadequate national legal frameworks. Indeed, it is on this basis that the Libyan government lodged its objection, in part, on the grounds that "no State emerging from conflict could ever benefit from the complementarity principle."[277]

Similarly, in Kenya's admissibility challenge, the government averred that the Pre-Trial Chamber had erred by failing to give it sufficient time to submit additional evidence before ruling on the application. The Appeals Chamber rejected this argument, concluding that a two-month period was sufficient between the receipt of an admissibility challenge and a ruling upon it. Further, relying on the two-stage test articulated in the Katanga judgment, the Chamber reiterated that the admissibility challenge must be "sufficiently substantiated" at the time the motion is filed. States cannot expect to be allowed to make further submissions.

1.3 Evidentiary Thresholds

An additional limitation is the scrutiny, or lack thereof, with which ICC chambers have assessed claims of ongoing domestic proceedings as part of admissibility challenges. In this regard, Katanga's proceedings illustrate the negative consequences of the Appeals Chamber's 2006 judgment, which resulted in the Pre-Trial Chamber conducting a "very limited review of the admissibility of the case against Katanga in the context of issuing the arrest warrant against him and in the light of the restricted information provided by the Prosecutor."[278] As a result, when Katanga brought his admissibility challenge before the Trial Chamber, the Chamber was thrust into the "difficult position of trying to

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[274] Ibid., para. 86.

[275] For similar outcomes, see *The Prosecutor v. Jean-Pierre Bemba Gombo*, 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," ICC-01/05-01/08OA3, Appeals Chamber, 19 October 2010, para. 74 (recalling that a "decision not to prosecute" in terms of Article 17(1)(b) "does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC"); Gbagbo Admissibility Decision, paras. 21, 27 (noting that "national authorities chose to refrain" from opening an investigation into Gbagbo for "violent crimes," while his prosecution for economic crimes "has been impaired since his surrender to the Court").

[276] Rome Statute, Article 19(5). Article 19(4) articulates a further deadline, requiring that the challenge be filed prior to the commencement of the trial. The *Katanga* Trial Chamber further held that the "commencement of trial" is actually the moment of the constitution of the Trial Chamber, rather than the start of the trial per se; the Appeals Chamber did not pronounce on the merits of this interpretation, but noted that its decision to do so "does not necessarily mean that it agrees with the Trial Chamber's interpretation of the term." See Katanga Admissibility Appeals Judgment, para 38.

[277] Libya Admissibility Application, para. 101.

[278] Bitti and El Zeidy, "The *Katanga* Trial Chamber Decision: Selected Issues," 324.

respect the 13 July 2006 Appeals Chamber Judgment and to guess the Pre-Trial Chamber's attitude if it had been engaged in a detailed review of the admissibility of the case during the issuance of the arrest warrant."[279]

The Trial Chamber's reasoning is noteworthy for its approach to the question of state "willingness," which has otherwise yet to be addressed by the Court. Notably, the Trial Chamber did not address the activity or inactivity of the DRC authorities (as the Appeals Chamber later did); rather, it proceeded directly to what Robinson has termed the "slogan" version of the test, i.e., it proceeded directly to an unwillingness/inability assessment.[280] It examined the intent of the DRC to bring Katanga to justice, and considered that the evidence presented to date supported the "clear and explicit expression of unwillingness of the DRC to prosecute [the] case."[281] Indeed, echoing an argument that had initially been rejected by the Pre-Trial Chamber in *Lubanga*, the Trial Chamber held that, regardless of the conduct for which the accused was being tried, because the Congolese authorities had willingly surrendered him to the Court, the national system must be deemed "unwilling" within the meaning of Article 17.[282]

In arriving at this conclusion, the trial judges uncritically accepted the DRC's submissions that it had voluntarily relinquished jurisdiction. It cited to a letter from the government, which stated the DRC's "official position" that the ICC must reject Katanga's admissibility challenge because, in so doing, the ICC would be "doing justice" to "His Excellency Mr. Joseph Kabila, President of the DRC, [who] has demonstrated to the world his determination to fight resolutely against impunity by making the DRC to date an unequalled model of cooperation with the ICC."[283] The Court further appeared to accept as dispositive a letter submitted to the OTP by the Director of the Immediate Office of the Chief Prosecutor of the High Military Court in Kinshasa, which stated that "the Military Prosecuting Authority had not initiated any investigation against Germain Katanga in relation to the attack on Bogoro on 24 February 2003."[284] Such "clear and explicit" expressions of unwillingness, according to the Chamber, meant that the "DRC clearly intend[ed] to leave it up to the Court" to prosecute Katanga for the attack in Bogoro.[285]

Yet, by the Chamber's own admission, disagreement did exist as to whether domestic criminal proceedings against Katanga had been initiated and whether there was unwillingness to prosecute. One of the threshold questions was defense counsel's claim that the Prosecutor had "inadvertently or negligently" failed to provide the Pre-Trial Chamber with information of the existence of domestic proceedings against Katanga at the time the arrest warrant was issued.[286] These documents included a request filed by

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[279] Ibid.
[280] See Robinson, "The Mysterious Mysteriousness of Complementarity."
[281] Katanga Admissibility Decision, para 95.
[282] Ibid., para 77. ("This second form of unwillingness, which is not expressly provided for in Article 17 of the Statute, aims to see the person brought to justice, but not before national courts. The Chambers considers that a State which chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done, must be considered as lacking the will referred to in Article 17.")
[283] Ibid., para. 94.
[284] Ibid., para 93.
[285] Ibid., para 95.
[286] *The Prosecutor v. Germain Katanga*, Document in Support of Appeal of the Defense for Germain Katanga Against the Decision of the Trial Chamber "Motifs de la Décision Oral Relative a l'Exception d'Irrecevabilité de l'Affaire," ICC-01/04-01/07, 8 July 2009, paras 42-51.

the Kinshasa High Military Court in March 2007 to extend Katanga's provisional detention, which contained reference to Bogoro "as one of the ten locations where people had allegedly been killed in the course of systematic attacks against the civilian population."[287] In light of this submission, the Chamber even acknowledged that the document contained "objective information indicating that Germain Katanga was one of several persons under investigation for crimes … between 2002 and 2005 in, among other locations, Bogoro."[288]

The awkward posture in which the Trial Chamber found itself – effectively second guessing the issuance of Katanga's arrest warrant, following the Pre-Trial Chamber's limited review – likely contributed to its cursory analysis of the documents that had allegedly not been provided.[289] These documents suggest, at the least, discrepancies between the DRC government's representation and the situation on the ground at the time, but the Chamber declined the opportunity to query the matter further. In particular, the judges found "no need to answer the question" as to whether the materials would have led the Pre-Trial Chamber to exercise its discretion differently because, in its view, the document did not contain "decisive information" on the question of whether there had been domestic proceedings, nor was it "conclusive as to whether the acts allegedly committed there could be attributed to Germain Katanga."[290] As with the Court's later decisions, this apparent endorsement of a "conclusive" and/or "decisive" standard sets a high threshold for indicia of domestic activity.

The Trial Chamber's conclusions also appeared to rest on an uncritical acceptance of the representations of the Congolese executive. In effect, it treated the state as a unitary actor, overlooking evidence that there had been disagreement *within* the state on the status of Katanga's case, as well as on the ability to try cases at the sub-state, i.e., provincial, level.[291] Phil Clark, for instance, notes that the ICC's Ituri-only focus at the time of Katanga's challenge had raised concerns amongst senior judicial officials since Ituri then had one of the better functioning local judiciaries in the DRC. Clark quotes Chris Aberi, the Sate Prosecutor in Bunia:

> When the ICC first came here, we showed them the dossiers we had already assembled on Lubanga and others. We were ready to try those cases here. We had the capacity to do this and it would have had a major impact for the people here, to see these [rebel] leaders standing trial in the local courthouse.[292]

Michael Reed of the International Center for Transitional Justice poses a similar question: "We have little sense of how the ICC measures willingness. Is willingness determined

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[287] Katanga Admissibility Decision, para. 68.
[288] Ibid., para 70.
[289] In Bitti and El Zeidy's words, rather than undertaking a more robust inquiry into whether proceedings had been underway, the Trial Chamber "used a clever legal argument to overcome a practical problem," 324. See also Matthew E. Cross and Sarah Williams, "Recent Developments at the ICC: *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*—A Boost for 'Co-operative Complementarity'?," *Human Rights Law Review* 10(2) (2010), 342 ("On the facts, the decision rested on a delicate, and perhaps somewhat strained, definition of 'inactivity.'")
[290] Katanga Admissibility Decision, paras. 70-73.
[291] See Phil Clark, "Chasing Cases: The Politics of State Referral," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 1194-95.
[292] Ibid.

according to what a country's executive branch says? By the judicial system's choice of cases?"[293]

The evidentiary threshold established by the Trial Chamber in Katanga is compounded by the Appeals Chamber's treatment of the Kenyan admissibility challenge. There the Chamber clarified that a state challenging the admissibility of a case "bears the burden of proof to show that the case is inadmissible" and that, to "discharge that burden," 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."[294] Concrete evidence would have to be submitted that pointed to "specific investigative steps," including, *inter alia*, "interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses."[295] Despite these requirements, the Appeals Chamber refused to grant the Kenyan government's requests to submit additional evidence or to present its argument in an oral hearing, where it had wanted the state police commissioner to testify concerning the progress of national proceedings. In the Chamber's view, "although there might have been reasons to hold an oral hearing," the decision not to do so was not an abuse of discretion.[296]

Judge Usacka again dissented strongly from this view. She criticized the Pre-Trial Chamber for not seeking submission on such "pivotal matters" as the "definition of investigation and prosecution, standard of proof, and the type of evidence that was required to meet the burden, even though the Appellant had requested a hearing on those matters."[297] She further argued that the Pre-Trial Chamber abused its discretion in failing to consider Kenya's submissions that investigations were underway (it had, for instance, included a case file referring to Ruto as a suspect with information on the scope of the investigation) or about their prospective nature, i.e., the possibility that, while in an early stage, the investigations might satisfy Article 19's standards at some point in the near future since "the assessment of complementarity is the outcome of an ongoing process."[298] In her view, the Kenyan government should have been allowed more time to submit further evidence; moreover, the Pre-Trial Chamber could (and should) have used its authority to request additional documentation.

The Court's approach in both the Katanga and Kenya's admissibility challenges suggests that the level of scrutiny applied to investigations and prosecutions at the national level has been less than thorough, and that a desire for speed or "efficiency" has overwhelmed the opportunity for more careful analysis and dialogue with national (or local)-level courts and prosecutors.[299] Notably, the Court appeared to adjust this

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[293] "The ICC on the Ground: Complementarity at work in Colombia and the DRC," International Center for Transitional Justice (May 2010), at https://www.ictj.org/sites/default/files/ICTJ-Global-Newsletter-May-2010-English.pdf.

[294] See *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," ICC-01/09-02/11 OA, Appeals Chamber, 30 August 2011, para. 61 ("Kenya Admissibility Appeals Judgment").

[295] Ibid., para. 40.

[296] Ibid., para. 108.

[297] Ibid., Dissenting Opinion of Judge Anita Usacka, 20 September 2011, para. 25; see also para. 8.

[298] Ibid., para. 20; see also para. 27 ("The Court should not circumvent [the high threshold] created by unwillingness or inability 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.")

[299] One commentator has also suggested that the Pre-Trial Chamber's imposition of a "high legal burden of proof" on the Kenyan challenge was because of its lack of faith in the government's intentions: "the real

approach in the course of Libya's admissibility challenge to the case against Gaddafi, when it requested further clarifications on a variety of issues to obtain "concrete, tangible and pertinent evidence that proper investigations are currently ongoing" in Libya."[300] While this additional information did not alter the Pre-Trial Chamber's admissibility determination, the breadth of the additional information it sought—and the year it took to reach its decision—suggests the possibility of a more probing approach in assessing future challenges, albeit still an exacting one.[301]

1.4 Due Process: Domestic Legal Systems on Trial

Following the two-stage test for dealing with admissibility challenges, states are not first evaluated as to their willingness and ability to prosecute. This determination comes second, and has only rarely been dealt with in the complementarity case law to date. When it has, however, the legal framework applied suggests a similarly exacting approach to admissibility determinations. In Uganda, for instance, the Pre-Trial Chamber invoked its *proprio motu* powers to examine the continued admissibility of the case against LRA leader Joseph Kony, following the creation of a new special division within the Ugandan High Court meant to prosecute serious crimes. In finding that it remained properly seized of the case notwithstanding this development, the Chamber suggested a strict approach to complementarity, consistent with the expanded concept of it as a tool for compliance. In its words, "Pending the adoption of *all* relevant texts and the implementation of *all* practical steps, the scenario … remains therefore the same as at the time of the issuance of the warrants, that is one of *total inaction* on the part of the relevant national authorities."[302]

The adequacy of a state's domestic legal framework was considered most extensively in the context of Libya, where the fairness of domestic proceedings and the adequacy of the country's national criminal code were central issues. Whereas the Kenyan accused were aligned with the government's admissibility challenges, in Libya both Gaddafi and al-Senussi sought transfer to The Hague on the basis that they would not be afforded a fair trial domestically. These challenges have presented perhaps the most complex set of questions for the Court to consider, in a political environment where there is little desire to cooperate with the ICC's warrants but where genuine

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issue is that it simply did not believe that Kenya was acting in good faith." See Clare Brighton, "Avoiding Unwillingness: Addressing the Political Pitfalls Inherent in the Complementarity Regime of the International Criminal Court," *International Criminal Law Review* 12 (2012), 658.

[300] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11, PTC I, 7 December 2012, para. 9. These documents included: 1) issues relating to the status of domestic proceedings (including what investigative steps have been taken, whether evidence has been collected, and of what type); 2) issues relations to the subject-matter of the domestic investigations (including the "anticipate contours" of the case at the national level"; 3) issues of Libyan national law (including progress made in relation to law reform and the incorporation in Libyan law of international crimes as defined under the Rome Statute, and whether such reform would impact on the proceedings against Gaddafi); 4) issues relating to Gaddafi's exercise of his rights under Libyan national law; and 5) issues relating to the capacity of Libyan authorities to investigate and prosecute (including questions of resource allocation, witness protection, and custody). Ibid., paras. 14-47.

[301] Notably, however, Pre-Trial Chamber I did not seize a similar opportunity in rejecting the Ivory's Coast admissibility challenge to the case against Simone Gbagbo; it concluded that, despite evidence suggesting national proceedings had been initiated, the document provided was "contrary, sparse and disparate." Further clarification was not sought. See *The Prosecutor v. Simone Gbagbo,* Decision on Cote d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, ICC-02/11-01/12, PTC I, 11 December 2014, para. 65.

[302] Uganda Admissibility Decision, para. 52 (emphasis added).

political transition offered—at least for a time—greater prospects for domestic accountability. Put differently, the concern was not that Libyan authorities were unwilling to prosecute Gaddafi and al-Senussi, but rather that they were too willing.[303]

In its challenge to the case against Gaddafi, Libya submitted that an active investigation—broader than but including the same incidents and conduct as those contained in the ICC warrant—was ongoing since the date of Gaddafi's capture, and that it was willing and able genuinely to carry out the proceedings.[304] The government focused on efforts made to strengthen judicial capacity building and to improve the security situation, but argued that, "It is not the function of the ICC to hold Libya's national legal system against an exacting and elaborate standard beyond that basically required for a fair trial."[305] Similar arguments were made in the challenge to the al-Senussi case, with Libya asserting that an appropriate courtroom complex and prison facilities would be available.[306] It noted, however, that due process need not "ensure that the domestic proceedings accord with a particular ideal as determined by the ICC."[307] In this case, the Prosecutor agreed.[308]

As noted, the Court issued divided rulings. In the case of Gaddafi, the Chamber rejected Libya's challenge chiefly on the grounds of "inability," insofar as it was unable to "obtain" both the accused as well as testimony from witnesses who were being held in detention facilities not yet under the government's control.[309] A third main line of reasoning, however, was that *national* due process standards were relevant to the principle of complementarity. Specifically, the Chamber found that the failure to provide Gaddafi with a defense attorney, despite the guarantee of counsel under Libyan law, was "an impediment to the progress of proceedings," as it meant that, "a trial cannot be conducted in accordance with the rights and protections of the Libyan national justice system."[310] In short, while a state's failure to satisfy international standards of due process might not render a case inadmissible, the failure to respect national due process standards—"in the context of the relevant national systems and procedures"—could.[311]

The Chamber, however, granted the state's challenge to the admissibility of al-Senussi's case. While that case was substantially different than Gadaffi's (for one, he was

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[303] As Mégret and Samson put it, "Violating someone's due process rights denotes not unwillingness, but if anything, its opposite in an extreme form." See Frédéric Mégret and Marika Giles Samson, "Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials," *Journal of International Criminal Justice* 11 (2013), 574. For a "modified" approach to this thesis, advocating a focus on "core fair trial elements … without turning the ICC into a traditional human rights body," see Elinor Fry, "Between Show Trials and Sham Prosecutions: The Rome Statute's Potential Effects on Domestic Due Process Protections," *Criminal Law Forum* 23 (2012).
[304] Libya Admissibility Application, para. 101.
[305] Ibid., para. 99.
[306] Al-Senussi Admissibility Application, paras. 176, 181, 193.
[307] Ibid., para. 111.
[308] OTP Response to Libya Application, para. 28 ("The Statute requires that the State with jurisdiction must establish a genuine willingness and ability, but it need not also establish that its domestic procedural protections comport with the ICC Statute and Rules of Procedure and Evidence.").
[309] Gaddafi PTC Decision, paras. 206-11.
[310] Ibid., para. 214.
[311] Ibid., 200

in the custody of the Libyan government), the Court's approach suggests a modified approach to due process questions.[312] In affirming the decision, the Appeals Chamber,

> recall[ed] that, in the context of admissibility proceedings, the Court is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated. Rather, what is at issue is whether the State is willing genuinely to investigate or prosecute.[313]

The Chamber concluded that, even accepting the fair trial violations that would flow from lack of access to a lawyer during the investigation stage of proceedings, "such violations would not reach the high threshold for finding that Libya is unwilling genuinely to investigate or prosecute Mr. Al-al-Senussi."[314] In its view, such a high threshold meant proceedings that would "lead to a suspect evading justice … in the equivalent of sham proceedings that are concerned with that person's protection."[315]

While the Court's decision in al-Senussi has been criticized,[316] its general approach to both of the Libyan cases suggests that there may be an overall loosening of other admissibility doctrines, particularly where, in an environment of political transition, the desire of state authorities to investigate and prosecute is not in doubt. Complementarity-as-admissibility in this context thus hews more closely to the goals of complementarity-as-catalyst. At the same time, the Appeals Chamber's effective rejection of the "due process" thesis, as well as its explicit affirmation that conduct need not be charged as international crimes, suggests that there may be a greater margin for discretion in future admissibility assessments, even if the restrictive "same case" test endures.

2. "Positive" Complementarity in the Courtroom

The ascendance of the concept of "positive" complementarity within the OTP and amongst non-state actors seeking to maximize the ICC's catalytic properties is partly rooted, as chapter two argued, in a cooperative spirit of mutual assistance and interaction. Article 93 sets forth the ways in which states parties are obligated to cooperate with the Court and also the way in which the Court *may* cooperate with states (both state and non-state parties.) Article 93(10), in particular, provides the legal basis for such cooperation. It authorizes (but does not require) the ICC to, upon request:

> [C]ooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crimes within

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[312] The Pre-Trial Chamber's apparent emphasis on the fact that al-Senussi's lack of counsel "at the present time" was not dispositive of "inability" (as it appeared to be in the case of Gaddafi), suggests a more permissive temporal approach by the Court as well. Ibid., paras. 307-308.
[313] Al Senussi Admissibility Appeals Judgment, para. 190.
[314] Ibid., 190
[315] Ibid., par. 218.
[316] See, e.g., Kevin Jon Heller, "It's Time to Reconsider the Al-Senussi Case. But How?" (2 September 2014), at http://opiniojuris.org/2014/09/02/time-reconsider-al-senussi-case/. Similarly, civil society reaction to the Court's decision was decidedly mixed. The only international NGO to explicitly welcome the ruling was No Peace Without Justice, which considered it "a positive answer to Libyans' aspirations to see the alleged perpetrators of crimes against them face justice where those crimes were committed." See "Libya: NPWJ and NRPTT welcome ICC ruling on the Al-Senussi case" (24 July 2014).

> the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting state.[317]

While a broad array of information can be provided—ranging from the "transmission of statements, documents or other types of evidence obtained in the course of an investigation or trial conducted by the Court," to "the questioning of any person detained by order of the Court"—the Statute provides certain safeguards for the provision of such information, including if the documents or information sought were provided by another state, or a witness or expert.[318]

But while the Court has endorsed, as in *Katanga*, positive complementarity's vision of certain division-of-labor relationships between the Prosecutor and national jurisdictions,[319] direct assistance under Article 93(10) has found little judicial support to date.[320] It was raised directly in the course of the Kenyan litigation when the government filed, along with its admissibility challenge, a request for assistance from the Court seeking the "transmission of all statements, documents, or other types of evidence obtained by the Court and the Prosecutor in the course of the ICC investigations."[321] Other than that request, however, judicial precedent is scant. The only previous occasion in which such a request appears was in Katanga's challenge, where defense counsel pointed to "evidence that the DRC was keen on investigating this case at the national level" and noted that the government had "submitted a request for legal assistance to the Prosecutor, making use of the mechanism in Article 93(10)."[322] Counsel stated that it was "unaware of the fate of that request," but, two weeks later, the OTP noted the following in its reply:

> The ICC was not created to be an international investigative bureau with resources to support national authorities. It is instead a judicial body with jurisdiction over the most serious crimes of international concern and established to be complementary to national criminal jurisdictions. Furthermore, Article 93(10), which addresses requests for cooperation from States to the Court, does not impose an obligation on the ICC to render assistance to States. Compliance

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[317] Rome Statute, Article 93(10)(a). As noted, non-state parties may also be granted requests for assistance as well. Ibid., Article 93(10)(c).

[318] Ibid., Article 93(10)(b)(i)-(ii). Christopher Hall urges an added set of safeguards, namely that the OTP develop criteria for determining whether, consistent with Article 21(3), the assistance the Office might provide could have "a seriously detrimental impact on human rights," for instance through application of "the death penalty, torture or other ill-treatment, unfair trial or other human rights violations." See Christopher Hall, "Positive Complementarity in Action," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 1032-1033.

[319] As the Appeals Chamber noted, "[T]here 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 envisioned in the … Preamble." Katanga Appeals Admissibility Judgment, para. 85.

[320] For similar conclusions, see Nidal Nabil Jurdi, "Some lessons on complementarity for the International Criminal Court Review Conference," *South African Yearbook of International Law* 34 (2009), 36 ("No traces of positive complementarity can be found in either the *Lubanga, Katanga*, and *Ntaganda* cases, or in the Ugandan situation."); Nouwen, *Complementarity in the Line of Fire*, 101; Karolina Wierczynska, "Deference in the ICC Practice Concerning Admissibility Challenges Lodged by States," in *Deference in International Courts and* Tribunals, 369 ("At the moment the complementarity principle, as interpreted by the ICC, seems mainly focused on the mechanism of control.").

[321] *Situation in the Republic of Kenya*, Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194, ICC-01/09, 21 April 2011, para. 2.

[322] Katanga Admissibility Challenge, para. 50

> with a request is discretionary and dependent on the fulfillment of the factors listed therein, including considerations of witness protection and the principle of originator consent.[323]

Subsequent proceedings indicate no judicial determination as to the outcome of Katanga's request.

The Court's assessment of the Kenyan government's 93(10) application, considered in June 2011, preceded the onset of its more overtly volatile relationship with the state (President Kenyatta himself was not elected until two years later), as well as serious allegations of witness intimidation and interference. While these subsequent developments raise legitimate questions about the good faith of the government's application (and its intention to undertake a genuine investigations), at the time the Court appeared unwilling to indulge the state's request for assistance. First, it explicitly stated that any requests for assistance under 93(10) should be assessed apart from complementarity: in the Pre-Trial Chamber's words, "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."[324] Then, in a subsequent, terse opinion, the Chamber articulated relatively strict conditions for such requests, stating that "the requesting State Party must show that it is at a minimum investigating or has already investigated" Rome Statute crimes.[325] Referring only to the cooperation request—not the information provided in the government's admissibility challenge—the Chamber concluded that, "The Government submitted … a two-page [request], which lack[s] any documentary proof that there is or has been an investigation, as required pursuant to article 93(10)(a) of the Statute."[326]

The relationship between a state's admissibility challenge and a related Article 93(10) request is difficult to ignore, particularly where the need to satisfy a high admissibility standard may well depend on information in the Court or Prosecutor's possession.[327] Indeed, read alongside the "same case" jurisprudence highlighted above,

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[323] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Public Redacted Version of the 19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a), ICC-01/04-01/07, TC II, 30 March 2009, paras. 100-101 ("OTP Response to Katanga Admissibility Challenge"). Notably,when the OTP and DRC signed a 2004 cooperation agreement (in the absence of national legislation), a provision was included, consistent with Article 93(10), that the OTO "could cooperate with national jurisdictions and provide them with assistance in their investigations, prosecutions and eventual trials for crimes committed within the ICC's subject matter jurisdiction." See Judicial Cooperation Agreement between the Democratic Republic of Congo and the Office of the Prosecutor of the International Criminal Court, para. 39 (on-file).

[324] Ruto et al. Admissibility Decision, para. 34.

[325] *Situation in the Republic of Kenya*, Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, ICC-01/09, PTC II, 29 June 2011, para. 33.

[326] Ibid., para. 34. As noted by Judge Usacka, however, the government had submitted evidence that investigations were underway at the time of the admissibility challenge. See Dissenting Opinion of Judge Anita Usacka, 20 September 2011, para. 8.

[327] On appeal, Kenya insisted on the "inter-relationship" between it's Article 93(10) request and its Article 19 application (and thus appealable as of right under Article 82(1)(a)), noting that a state "may simply not have evidence available to the Prosecutor of the ICC or may even be deprived of such evidence," further complicating the state's ability to pursue "an identical cohort of individuals" as those of the ICC. *Situation in the Republic of Kenya*, Decision on the admissibility of the "Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(1) of the Statute and Rule 194 of the Rules of Procedure and Evidence,"

the Chamber's fleeting treatment of Kenya's cooperation request establishes both a high bar to merit assistance but also a paradox: in order for states to receive assistance they must demonstrate that they have investigated the same person as the Court, yet to do so they may lack the very evidence for which they seek assistance.[328] As Stahn agues, "this approach leaves limited space to take into account emerging justice efforts under domestic jurisdiction."[329]

Judge Usacka has again been a dissenting voice on this issue. In the Kenyan cases, her dissent correctly suggests that the Pre-Trial Chamber "did not take into account that … [it] has the power to adapt the admissibility proceedings to … changing circumstances," or on how it could "facilitate the Appellant by asking for more information or awaiting additional evidence on the start of investigations."[330] While subsequent actions of the Kenyan government may give Furthermore, in her dissent in *Gaddafi*, she specifically endorsed that the Court "is in an ideal position to actively assist domestic authorities in conducting [investigations and prosecutions], be it by the sharing of materials and information collected or of knowledge and expertise."[331] Such explicit approval of the Court's role in encouraging domestic accountability has yet to find similar endorsement from other judges.

3. Complementary as Policy and Law

Complementarity's evolution in both legal and policy discourse underscores the dynamic, shifting nature of the principle. Given the ambitious goals that animate "positive" complementarity in particular, one desirable approach is to conceive of it as "primarily a device to accommodate diversity."[332] Under this view, a broad conception of the interpretive principles that underwrite admissibility is necessary if the Court is to play a catalytic role in a world of multiple, complex states. Furthermore, if the ICC is to encourage national investigations and prosecutions, then it will likely have to do so in a way that preserves political discretion and flexibility to states.

This approach rests uneasily, however, with the ICC's complementarity jurisprudence to date. Commentators have defended the Court's "refusal to import the policy aspects of positive complementarity into the admissibility regime," contending that it "does not detract from the existence and importance" of such a policy; rather, "It is simply to say that this decision of complementarity is not one which is enforced by judicial decisions."[333] The ASP has attempted a similar partition of the juridical approach to complementarity from its policy goals as a catalyst. For example, the Assembly's 2012 report on complementarity states:

ICC-01/09-70 (7 July 2011). The Appeals Chamber rejected the government's request, affirming the formal partition 93(10) requests from admissibility challenges.

[328] It should be noted that the Court's decision, as well as t

[329] Stahn, "Admissibility Challenges before the ICC," 237.

[330] Kenya Admissibility Appeals Judgment, Dissenting Opinion of Judge Anita Usacka, para. 28.

[331] Gaddafi Admissibility Appeals Judgment, Dissenting Opinion of Judge Anita Usacka, para. 65.

[332] Frédéric Mégret, "Too much of a good thing? Implementation and the uses of complementarity," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 390.

[333] Ben Batros, "The *Katanga* Admissibility Appeal: Judicial Restraint at the ICC," *Leiden Journal of International Law* , 23 (2010), 36o. Batros argues that the *Katanga* Appeals Chamber "took the facts as they existed at the time, rather then trying to use the judgment to create new facts which might have been more in line with the ideals of complementarity," 361. See also Batros, "Evolution of the ICC Jurisprudence on Admissibility," 600. For an opposing view, see Charles Cherner Jalloh, "Kenya vs. The ICC Prosecutor," *Harvard International Law Journal* 53 (August 2012),

> As stressed in the Court's first report, two aspects of the term "complementarity" have to clearly be separated. The first aspect is the question of admissibility as provided for in the Rome Statute, this being a judicial issue to be ultimately determined by the judges of the Court. The second aspect of complementarity relates to the complementary roles of the Court and national jurisdictions in contributing toward ending impunity. Within this second aspect, the term "positive complementarity" is sometimes used to refer to the active encouragement of and assistance to national prosecutions where possible.[334]

The OTP has also ratified this dichotomy, stating that complementarity has two dimensions: "(i) the admissibility test, *i.e.* how to assess the existence of national proceedings and their genuineness, which is a judicial issue; and (ii) the positive complementarity concept, *i.e* a proactive policy of cooperation aimed at promoting national proceedings."[335]

Such a bifurcated approach may be appealing insofar as it allows the OTP to summon different versions of complementarity, for different purposes and audiences. Whereas the Office took a dim view of cooperation in *Katanga* and the Kenyan cases, it has otherwise championed (at least rhetorically) such a relationship outside of the courtroom. But the goal of promoting national proceedings and questions of judicial admissibility are intimately linked; they cannot be "clearly separated." Indeed, while the Court's apparent endorsement of a burden-sharing component to "positive" complementarity lends support to complementarity's more cooperative dimensions, it simultaneously "downplays the significance of the national duty to investigate and prosecute."[336] As noted in a 2009 report on the DRC:

> Despite the intention spelled out in the ICC Rome Statute to complement and give precedence to investigations and prosecutions in national courts, the national justice sector seems to use the ICC as an excuse for not pursuing such cases. UN officials working to strengthen national capacities have been frustrated when, in at least one case, a judge insisted he should not take up a case if there were a chance that the ICC might prosecute it. [337]

Thus, just as ICC prosecutions can create an incentivizing environment for states consistent with the complementarity-as-catalyst framework, they may also have a chilling effect.

Furthermore, even if judicial proceedings must, as a matter of statutory interpretation, "mimic" those of the ICC, that requirement cannot be easily reconciled with broader goals for the Court to function as a catalyst for domestic accountability. As Drumbl notes, "Should [such] trials become the expected baseline of post-conflict justice, the result may be the universalization of a methodology that is unaffordable to nearly all

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[334] Assembly of States Parties, "Report of the Court on Complementarity," ICC-ASP11/39, 16 October 2012, para. 2.
[335] OTP Prosecutorial Strategy, 2009-2012 (1 February 2010), para. 16
[336] Cross and Williams, "Recent Developments at the ICC," 343; see also Susana SáCouto and Katherine Cleary, "The *Katanga* Complementarity Decisions: Sound Law but Flawed Policy," *Leiden Journal of International Law* 23 (2003).
[337] Laura Davis and Priscilla Hayner, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC* (ICTJ: March 2009), 30.

states or would only remain affordable if the justice narrative were limited to a tiny subsection of perpetrators."[338] Evidence of such "universalization"—or "mirroring," as the Appeals Chamber termed it—can be seen in Uganda, where, in the absence of clear precedents for challenging complementarity, the "safer route" appears to be following the ICC as closely as possible. Nouwen quotes the then Principal Judge of the Ugandan High Court as follows, "The ICC wants us to do everything the way they did it: we must use the same Statute and the same standards."[339]

The ICC's reluctance thus far to develop a more pro-active approach to its admissibility jurisprudence suggests that the Court has been cautious to incorporate explicit policy considerations into its admissibility jurisprudence. Ultimately, however, the policy goals of complementarity and the body of law the principle produces are linked. Legalism suggests that the political imperatives of complementarity-as-catalyst can be separated from, or subordinated to, legal questions, yet both have a powerful influence on the ability and willingness of states to pursue accountability at the domestic level.

4. Conclusion

Despite the ascension of the complementarity-as-catalyst norm, ICC judges have appeared noticeably more reticent to incorporate this goal as part of their interpretive framework. At the same time, the weight of Article 17 jurisprudence has seen the ICC emerge as the privileged forum for prosecution. Specifically, under the Court's case law, in order for a state to successfully challenge admissibility, domestic proceedings must be conducted in relation to the same "case" as that of the ICC, such that they concern the same person, conduct, and possibly even the same factual incidents. This already substantial threshold is even more pronounced in the case of "self referrals," where the practical value of Article 17 to individuals contesting admissibility appears increasingly unclear. Furthermore, when faced with competing claims about the existence of national-level proceedings, the ICC has undertaken a relatively superficial level of review, while setting a high evidentiary threshold for challengers to satisfy. And despite otherwise endorsing the "burden sharing" model that has accompanied the policy of "positive" complementarity, as a cooperation regime under Article 93(10) it has barely registered.

Thus, despite many claims about the Court's complementary nature to domestic jurisdictions, a *de facto* primacy regime—not unlike the Rule 11 referral system pioneered by the ICTY and ICTR, though without their explicit "conditional referral" authority—appears to have instead been erected. Complementarity thus appears less as a space for constructive engagement and dialogue than a set of unifying criteria with which states must comply.[340] The Libyan admissibility challenges may signal a more rigorous approach to Article 17 assessments and a partial loosening of the Court's interpretive commitment to the "mirror" test, but it remains to be seen whether this approach will prevail in the long term.

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[338] Drumbl, *Atrocity, Punishment, and International Law*, 210.

[339] Nouwen, *Complementarity in the Line of Fire*, 205.

[340] Stahn similarly gestures towards the "possibility of adopting a dialogue-based understanding of complementarity which would promote continued interaction with domestic jurisdictions in deference of cases." See "Admissibility Challenges before the ICC," 245.

CHAPTER FOUR
Complementarity and the Office of the Prosecutor

While the previous chapter focused on complementarity within the ICC's juridical framework, this chapter addresses its policy dimensions as engaged by another crucial Court actor: the Office of the Prosecutor. As the organ responsible for investigating the situations and prosecuting the cases brought before the Court, the OTP is a critical participant in the complementarity landscape. Situated at once between the ICC's institutional center in The Hague and the various country contexts in which it operates, the Office—through the exercise of prosecutorial discretion and its access to local actors working on the ground—shapes not only the overall work of the Court, but can also have a significant influence on the contours of domestic accountability efforts. Indeed, as a material site for engagement and cooperation with national-level actors, the OTP is uniquely positioned to undertake a variety of activities that could further its stated interest in "encouraging States to carry out their primary responsibility to investigate and prosecute international crimes."[341]

This chapter focuses on two key aspects of the OTP's work relevant to the ICC's potential for catalyzing domestic proceedings: preliminary examinations and investigations. Returning to the dual approach to complementarity outlined in chapter two, it first examines the Office's increasing reliance on preliminary examinations as a primary example of complementarity's coercive power, wherein the threat of prosecutorial action might stimulate domestic efforts at accountability. As the only country of the three examined herein to have been subject to a preliminary examination, a case study of Kenya is offered in order to understand how the Office sought to use the potential leveraging power of this period to push for the establishment of a domestic criminal tribunal. While ultimately unsuccessful, the Kenyan experience highlights both the context-specific nature of the preliminary examination phase but also the diverse political dynamics in which ICC interventions unfold.

The second half of the chapter addresses the Office's investigatory practices, which, I argue, are a material site where a more positive, cooperative approach to complementarity could be enacted. To date, however, the OTP has largely done the opposite, choosing not to base any of its investigators in situation-countries or to develop a more sustained field-based presence. Furthermore, while the Office has relied on its relationships with local information providers, known as "intermediaries," it has too often employed a unilateral approach to evidence gathering, failing to integrate their concerns and priorities into the investigative process. Particular attention in this regard is paid to Uganda and the DRC, where even in the midst of "invited" referrals, the Office's in-country field presence has been minimal.

` A focus on investigations is also important as it has become increasingly clear that the ICC has an evidence problem, one that imperils the Court's ability to serve as a credible threat should a state fail to pursue proceedings at the national level. The withdrawal of charges against Kenyan President Uhuru Kenyatta is only the most recent, though undoubtedly the most damaging, in a series of setbacks for the OTP.[342] Indeed,

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[341] OTP, "Policy Paper on Preliminary Examinations" (November 2013), para. 100.

[342] In May 2014, the Prosecutor withdrew charges against President Uhuru Kenyatta on the basis of insufficient evidence; in so doing, she noted the Kenyan government's lack of cooperation and non-compliance with the OTP's investigation, as well as the deaths of several important potential witnesses and the recanting of earlier testimony by other key witnesses. Furthermore, in March 2013, the Prosecutor was

to date, more than one-third of those individuals who have undergone the confirmation of charges process before the Court have had the charges against them dismissed or withdrawn in their entirety.[343] One report notes that this is "a substantially higher rate of dismissal than the acquittal rate seen at other international criminal bodies following a full trial, even though the standard at trial—beyond a reasonable doubt—is higher than the burden at the confirmation stage."[344] Furthermore, in acquitting the ICC's second defendant, Mathieu Ngudjolo Chui, Trial Chamber II dedicated a portion of its judgment to criticizing the OTP's investigatory methods and the credibility of its witnesses.[345] Similar criticisms were raised in the *Lubanga* judgment and earlier in the Kenya cases as well, when Judge Christine Van den Wyngaert chastised the OTP for its "failure to investigate properly" prior to bringing charges against Kenyatta, revealing, in her words, "grave problems in the Prosecution's system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff."[346] If the Court is to safeguard its potential as a threat-based catalyst, ensuring effective investigations and prosecutions are thus essential.

This chapter first offers a brief overview of how preliminary examinations and investigations have been structured within the overall architecture of the OTP. The second part turns to the OTP's use of preliminary examinations as a key tool in its efforts to prod national jurisdictions into action. An overview of the emergent policy

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also granted permission to withdraw charges against Francis Muthaura, on the basis that "serious investigative challenges, including a limited pool of potential witnesses" led her to the conclusion that there was no longer a reasonable prospect of conviction. See *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura, ICC-01/09-02/11, TC V, 11 March 2013, para. 11.

[343] *The Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243Red, PTC I, 8 February 2010 ("Abu Garda Decision"); *The Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, PTC I, 16 December 2011; *The Prosecutor v. William Samoei Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, PTC II, 23 January 2012 (confirming charges against William Ruto and Joshua Sang, but declining to confirm charges against Henry Kosgey); *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, PTC II, 23 January 2012 (confirming charges against Francis Muthaura and Uhuru Kenyatta, but declining to confirm charges against Mohammed Hussein Ali). Note that this number does not include those charges levied (and confirmed) against those individuals charged with offenses against the administration of justice. More recently, the confirmation decision against former Côte D'Ivoire president Laurent Gbagbo was also "postponed" by Pre-Trial Chamber I due to insufficient evidence. Though later confirmed, the proceedings raised similar questions about the strength of the Prosecutor's case. See *The Prosecutor v. Laurent Gbabgo*, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11, PTC I, 3 June 2013.

[344] War Crimes Research Office, *Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor* (2012), 9 ("WCRO Report"). The burden of proof during the ICC confirmation of charges stage is "substantial grounds to believe," Rome Statute, Art. 61(7).

[345] *The Prosecutor v. Mathieu Ngudjolo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-02/12, TC II, 18 December 2012, para. 516 ("Ngudjolo Judgment").

[346] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, TC I, 14 March 2012, paras. 482-83; *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, ICC-01/09-02/11, TC V, 26 April 2013, Concurring Opinion of Judge Christine Van den Wyngaert, paras. 1, 4-5. Similar concerns have been raised over sexual and gender based crimes, which the OTP, particularly under Bensouda's tenure, has identified as a priority but remain those most vulnerable to failing judicial scrutiny. The Women's Initiatives for Gender Justice has noted that gender-based crimes are the "most vulnerable category" of crime at the ICC, with more than 50 percent of such charges being dismissed before trial, attributable, in part, to "the Prosecution's use of open-source information and failure to investigate thoroughly." See "Legal Eye on the ICC" (March 2012).

framework on examinations is provided, as well as its link to the Office's policy on complementarity. The chapter then offers a case study of the Kenyan experience in order to closely explore the political dynamics at play in that period, and what presumptions guided the OTP as it sought to support efforts for a national accountability process. Focusing on Uganda and the DRC, the chapter finally considers how the OTP's evidence-gathering practices, particularly under Moreno-Ocampo's tenure, were in fact designed to minimize the time investigators spent in affected communities and their degree of engagement with local actors, thereby diminishing the investigatory phase's potential to enact a more "positive," cooperative posture with national jurisdictions.

1. Structure of the Office of the Prosecutor

The OTP is made up of three divisions: Jurisdiction, Complementarity, and Cooperation (JCCD); Investigations; and Prosecutions.[347] Led by Phakiso Mochochoko since February 2011, the JCCD is, as Stegmiller notes, the "division that heavily influences policy decisions and the Prosecutor's selective choices originate there."[348] Its Situation Analysis Section is primarily responsible for conducting preliminary examinations, which includes evaluating information the Office receives and making recommendations as to whether an investigation has a sufficient basis to process. Meanwhile, its International Cooperation Section is regarded as the Office's "diplomatic" arm: it carries out external relations activities, including negotiating cooperation agreements, providing legal advice on complementarity and cooperation, and "liais[ing] with external actors to implement the complementarity policy."[349]

Notably, the Division's role has not been without controversy, with sceptics suggesting that, as a unit "defined by diplomatic (external relations and complementarity) expertise," it negotiates with states, unduly politicizing what should remain (or appear to remain) the OTP's strict independence.[350] While the number of staff engaged in preliminary examination analysis has recently increased within the Office, Paul Seils, the JCCD's former Head of Situation Analysis, noted in 2011 that the section "is small, with five members of staff at the time."[351] Communication amongst JCCD and Investigations analysts is also important. As Seils notes, the former are "usually assisted in the analysis

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[347] See Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 (23 April 2009) ("OTP Regulations"), Regulations 7-9. The OTP also has an Executive Committee, which is responsible for strategic, policy and budgetary decisions. Ibid., Regulation 4(1).

[348] Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC* (Berlin: Duncker and Humblot, 2011), 457.

[349] Gregory Townsend, "Structure and Management," in Luc Reydams, Jan Wouters, and Cedric Ryngaert (eds.), *International Prosecutors* (Oxford: Oxford University Press, 2012), 289 (citing ICC OTP Operations Manual (February 2011)). In full, the JCCD is responsible for the following: "(a) the preliminary examination and evaluation of information pursuant to articles 15 and 53, paragraph 1 [of the Rome Statute] and rules 48 and 104 and the preparation of reports and recommendations to assist the Prosecutor in determining whether there is a reasonable basis to proceed with an investigation; (b) the provision of analysis and legal advice to [the Executive Committee] on issues of jurisdiction and admissibility at all stages of investigations and proceedings; (c) the provision of legal advice to [the Executive Committee] on cooperation, the coordination and transmission of requests for cooperation made by the Office under Part 9 of the Statute, the negotiation of agreements and arrangements pursuant to article 54, paragraph 3 [of the Rome Statute]; and (d) the coordination of cooperation and information- sharing networks." Regulation 7, OTP Regulations.

[350] Schiff, 114.

[351] Paul F. Seils, "Making complementarity work: maximizing the limited role of the Prosecutor," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 999.

of the data on crimes by one or two colleagues from the Analysis Section of the Investigations Division, although this will depend on available resources."[352]

The current head of the Investigations Division, Michel De Smedt, has served in this position since January 2006.[353] The Division's responsibility, in part, is for "the provision of factual crime analysis and the analysis of information and evidence, in support of preliminary examinations and evaluations, investigations and prosecutions."[354] Thus, following a decision to proceed with an investigation, a "joint team" consisting of staff from the OTP's three divisions is formed; one former investigator has referred to these teams as the "core operational units" of the Office.[355] With respect to the composition of the investigative teams, it appears that the ICC has sought to employ investigators from various backgrounds, a decision that some commentators have criticized because of their lack of law enforcement training, but others have welcomed for the multi-disciplinary approach that it offers.[356]

Regulation 32 provides that each team "shall regularly report its progress and activities" to an Executive Committee composed of the Prosecutor, Deputy Prosecutor, and the heads of the ID and JCCD.[357] One former ICC investigator who led investigations against Germain Katanga and Ngudjolo Chui described the concept of the joint team approach as one in which "investigators, prosecutors and cooperation staff … all work together from the very beginning of an investigation… Decisions in the joint team are taken jointly."[358] This tripartite approach distinguishes the ICC from its ad hoc predecessors, both of which followed a more "linear" model in which "an entire investigation team … reports directly to the Chief Prosecutor or to his executive office."[359] While this model aims at "adopting a more holistic and balanced investigative approach,"[360] several OTP staff members have likened the interdivisional concept to a

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[352] Ibid.

[353] Serge Brammertz initially served as the OTP's Deputy Prosecutor for Investigations; however, that position remained vacant after Brammertz's departure in 2007. Under Prosecutor Bensouda's tenure, the Office has since been reorganized, with three individuals each directing the three divisions and the Deputy Prosecutor in charge of them all. In November 2011, the ASP elected James Stewart as the Court's second Deputy Prosecutor, and Fabricio Guariglia has led the OTP's Prosecution Division since October 2014.

[354] The Division is additionally responsible for "the preparation of the necessary security plans and protection policies for each case to ensure the safety and well-being of victims, witnesses, Office staff, and persons at risk on account of their interaction with the Court," in "cooperation and coordination" with the Registrar; providing investigative expertise and support; and preparing and coordinating the field deployment of Office staff. See Regulation 8, OTP Regulations.

[355] Diane Lupig, "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court," *American University Journal of Gender Social Policy and the Law* 17(2) (2009), 438, n.7.

[356] For instance, Bernard Lavigne, who oversaw the ICC's early investigations in the DRC, testified during the Lubanga proceedings that his team included former members of [NGOs] who could provide better open-mindedness to enable the other team members not to limit themselves to their police backgrounds." In his view, this "may have had a negative impact on the quality of their work." *The Prosecutor v. Thomas Lubanga Dyilo*, Deposition of Witness DRC-OTP-**W**WWW-0582, ICC-01/04-01/06- Rule68Deposition-Red2-ENG, TC I, 16 November 2010, at 16-17; see also "Paper on Some Policy Issues before the Office of the Prosecutor," 8. At the same time, tribunals like the ICTY have also championed a multi-disciplinary approach with considerable success. See, e.g., *ICTY Manual on Developed Practices* (2009), 12; see also WCRO Report, 33-34.

[357] OTP Regulations, Regulation 32.

[358] *The Prosecutor v. Germain Katanga and Mathieu Ngudjulo Chui*, Transcript, ICC-01/04-01/07-T-81-Red-ENG, 25 November 2009, at 7:4-9; see also 29:17-19.

[359] Hiroto Fujiwara and Stephan Parmentier, "Investigations," in Luc Reydams, Jan Wouteres, and Cedric Ryngaert (eds.), *International Prosecutors* (Oxford: Oxford University Press, 2012), 590.

[360] Ibid., 593.

"three-headed dragon," insofar as it "divides authority, requires consensus throughout, and can subject all decisions to a difficult interpersonal dynamic."[361]

2. Preliminary Examinations

2.1 Legal Framework

The preliminary examination is a unique pre-investigative stage within the statutory framework of the ICC. While the scope and length of the examination falls within the discretion of the OTP, Article 15 of the Rome Statute mandates the Prosecutor to first determine, regardless of the manner in which a situation comes before the Court, whether there is a "reasonable basis to proceed" with an investigation.[362] As noted by the Court, "reasonable basis" is the lowest evidentiary standard in the Statute; as compared to evidence gathered during the investigation stage, the standard is neither "comprehensive" nor "conclusive."[363] At a minimum, however, the preliminary examination involves assessing whether the jurisdictional and admissibility requirements are met in order to open a formal investigation, and whether, "taking into account the gravity of the crime and the interests of victims, there are nevertheless substantial reasons to believe than an investigation would not serve the interests of justice."[364]

Once a situation is identified, Article 53(1)(a)-(c) establishes the legal framework for a preliminary examination.[365] Seeking, in part, to provide clarity on its approach to the process, the OTP first published a policy paper on the subject in October 2010 (revised as of November 2013).[366] The Office identified three general principles—independence, impartiality, and objectivity—that guide preliminary examination practice and set forth a four-phase procedure:

> Phase 1: During this phase, the Office conducts an "initial assessment" of all information and communications on alleged crimes received under Article 15. As an initial filtering exercise, the initial purpose is to both exclude information that is outside the ICC's jurisdiction and to analyze the seriousness/gravity of information that "appears to fall within the jurisdiction of the Court."

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[361] Townsend, 292 (citing statements of anonymous OTP staff members).
[362] Rome Statute, Article 15 ("Prosecutor").
[363] *Situation in the Republic of Kenya*, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, PTC II, 31 March 2010, para. 27 ("Kenya Article 15 Decision"); *Situation in the Republic of Cote d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11, PTC III, 3 October 2011. In both decisions, the Chamber further noted that this standard reflected the Prosecutor's more limited powers during the examination stage as compared to the investigation stage under Article 54.
[364] These criteria are enumerated in Article 53(1)(a)-(c) of the Rome Statute ("Initiation of an Investigation"). Notably, the term "interest of justice" is not defined. See "Policy Paper on the Interests of Justice" (September 2007) for the Office's interpretation and approach to applying these criteria, at http://icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf. For criticism of this approach, see Michael Newton, "A Synthesis of Community Based Justice and Complementarity," in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015).
[365] Rule 104 of the Rules of Procedure and Evidence and Regulation 27 of the OTP's Regulations also govern preliminary examinations. Regulation 27 requires the Office to make a "preliminary distinction" amongst information that pertains to matters that are either manifestly outside the Court's jurisdiction, related to an ongoing examination, or unrelated to an existing situation.
[366] OTP, "Policy Paper on Preliminary Examinations."

> Phase 2: The second phase represents the "formal commencement" of an examination: it includes all communications not rejected in Phase 1, as well as referrals by states parties or the Security Council. The purpose at this stage is to ascertain whether the pre-conditions for the exercise of jurisdiction under Article 12 are satisfied and "whether there is a reasonable basis to believe" that the crimes fall within the ICC's subject matter jurisdiction. This phase thus entails not only a "thorough factual and legal assessment" of the crimes allegedly committed to ascertain potential cases falling within the Court's jurisdiction, but it also includes "gather[ing] information on relevant national proceedings if such information is available at this stage."
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> Phase 3: The third phase focuses on the admissibility of potential cases in terms of complementarity and gravity ("the scale, nature, manner of commission of the crimes, and their impact.")
>
> Phase 4: The final phase involves examining whether any "interests of justice"—a "countervailing consideration"—should apply before making a final recommendation to the Prosecutor on whether there is a reasonable basis to initiate an investigation. Once the Prosecutor is satisfied that there is a reasonable basis to open an investigation into a situation, the authorization of the Pre-Trial Chamber must be sought.

In following this procedure, the Prosecutor has broad discretion as to the means by which to assess the "seriousness" of the information the Office receives. In particular, "he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organization, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court."[367]

As noted, the discretion afforded the OTP during the preliminary examination stage is significant. Unlike investigations, where the Prosecutor must obtain the authorization of the Pre-Trial Chamber to proceed, judicial oversight of preliminary examinations is limited, nor are Article 17's admissibility requirements applicable at this stage.[368] Furthermore, there is no time limit for conducting preliminary examinations, nor any guidance as to what constitutes a "reasonable time" to conclude one. Notably, in the first situation in the Central African Republic, Pre-Trial Chamber III noted that preliminary examinations were to be conducted "within a reasonable time regardless of its complexity" and, to that end, requested the Prosecutor to provide it with a report containing information on the current status of the preliminary examination, as well as an estimate of when it would be concluded.[369] In reply, however, the OTP stated its view

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[367] Rome Statute, Article 15(2). The Office "does not enjoy investigative powers" at the preliminary examination stage, however, "other than for the purpose of receiving testimony at the seat of the Court."
[368] Pre-Trial Chamber I's decision under Article 53(3)(a), ordering the OTP to reconsider the decision not to investigate the situation referred to it by the Union of Comoros (on the grounds that the Prosecutor committed material errors in her determination of the gravity of the potential cases) is the first time that a decision by the OTP not to investigate has been successfully challenged. See *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of Comoros to review the Prosecutor's decision not to initiate an investigation," ICC-01/13, PTC I, 16 July 2015.
[369] See *Situation in the Central African Republic*, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05, PTC III, 30 November 2006.

that, "there is no obligation under the Statute or the Rules to provide such an estimate or to give such a date."[370] In the Office's view, this was intentional on the part of the drafters, to accommodate such factors as the degree of state cooperation, the availability of information, and the scale of the alleged crimes.[371]

The temporal dimension of preliminary examinations—for instance, the setting of deadlines for the establishment of domestic proceedings or other, similar benchmarks to demonstrate "willingness"— also allows the Office to engage in potentially wide-ranging dialogue with a state. The Colombian experience, which has remained within the examination phase for more than ten years, is instructive in this regard as it has not only influenced the government's approach to accountability, but also helped shaped the contours of its protracted peace negotiations.[372] As the Kenyan case illustrates, domestic political developments can also have a significant influence on the timing or duration of preliminary examinations. Importantly, however, while the OTP has stated that its examination activities are conducted in the same manner regardless of how a situation comes before the Court—in its words, "no automaticity is assumed"[373]—it would appear that, in practice, different standards may well apply. For instance, while several *proprio motu* examinations have lasted for one year or more (Colombia, Kenya), Security Council referred situations (as in Libya) have remained in examination status for a matter of days.

While the outcome of a preliminary examination depends on the circumstances of each situation, three options are ultimately available to the OTP. It may first decline to initiate an investigation or it may alternatively choose to proceed.[374] According to Seils, "By the time the process of preliminary examination reaches its conclusion there should almost always be substantial clarity on the type of the alleged criminal conduct, the numbers of incidents and victims of that conduct and related matters concerning aggravation or impact."[375] A third approach is to keep a situation under preliminary examination, in order to "collect information in order to establish a sufficient factual and legal basis" for a final determination. Seils has, in fact, argued for a more open-ended

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[370] See "Prosecution's Report Pursuant to Pre-Trial Chamber Ill's 30November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic," 15 December 2006. The Office nevertheless stated that it was "committed to completing its analysis of the CAR situation as expeditiously as possible and informing the relevant parties in a timely fashion in accordance with the Rules and Regulations of the Court." Ibid.

[371] By contrast, Olasolo has argued that the Office is required to close preliminary examinations within a reasonable period of time, and is obliged to inform information providers if it decides not to initiate an investigation. Hector Olasolo, *The Triggering Procedure of the International Criminal Court* (Leiden: Martinus Nijhoff, 2005), 62.

[372] See, e.g., Alejandro Chehtman, "The ICC and its Normative Impact on Colombia's Legal System" (DOMAC/16, October 2011); Kai Ambos, "The Colombian peace process (Law 975 of 2005) and the ICC's principle of complementarity," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 1071-1096.

[373] "Policy Paper on Preliminary Examinations," para. 28; see also "Report on Preliminary Examination Activities 2013" (November 2013), para. 10.

[374] Closed examinations where the OTP made public its decision not to proceed to investigation include the situations in Palestine, Comoros (now under review), the Republic of Korea, Honduras, and Venezuela. An examination of Iraq, which concerns allegations of abuses committed by British soldiers, was reopened following an earlier decision to close the examination. Notably, while the Office has not closed an investigation to date, Prosecutor Bensouda announced her decision in December 2014 to "hibernate" the Office's investigations in Sudan, in order to "shift resources to other urgent cases, especially those in which trial is approaching." See "Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)," 12 December 2014, at http://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf.

[375] Seils, "Making complementarity work," 993.

approach to examinations as an exercise in "creative ambiguity."[376] According to the OTP's 2014 report, eight situations remain under such review.[377]

2.2 Relationship to Complementarity

There has been little empirical examination to date of the effects of preliminary examinations, and whether they have indeed catalyzed national accountability efforts. Anecdotal accounts support the contention that the preliminary examination procedure has had a deterrent effect. Juan Mendez, for instance, argues that the Court's examination of Cote d'Ivoire (which later became an investigation) played an important role in deterring a further escalation of violence, following a rise in ethnic hate propaganda that was being broadcast on national radio and television in the wake of a failed attempt to overthrow then President Laurent Gbabgo.[378] Similarly, as noted, Colombia is frequently cited as an example of the OTP's "positive" complementarity approach, insofar as the 2005 passage of the so-called Justice and Peace Law—meant to establish a criminal accountability process for violence committed during the country's long-running armed conflict—was an outcome, in part, of the OTP's public scrutiny of the situation there.[379]

These examples also illustrate the OTP's adoption of a progressively more public approach to preliminary examinations. While earlier examinations were largely confidential, their potential virtue as a tool to prompt states into action has, like complementarity itself, been discovered over time. As Human Rights Watch notes, "This increased publicity is closely tied to the OTP's policy of using preliminary examination to promote two aims at the heart of the Rome Statute: spurring national justice officials to pursue their own rigorous investigations (complementarity) and signaling to would-be rights violators that the international community is watching (deterrence)."[380] Compliance with these norms is thus reinforced in the approach to preliminary examinations as well.

To that end, the Office now often publicizes, where confidentiality and security considerations permit, when it initiates an examination and provides periodic updates of its activities.[381] These measures include publishing, as of 2011, an annual summary of activities performed during the course of the year, as well as including information in the

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376 Paul Seils, "Putting Complementarity in its Place," in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), 326.

377 Those situations that remain in Phase 2 include Honduras, Iraq, Ukraine, and Afghanistan; Colombia, Georgia, Guinea, and Nigeria remain in Phase 3. See "Report on Preliminary Examination Activities 2014" (2 December 2014) ("Annual Report 2014").

378 See Juan E. Mendez and Jeremy Kelley, "Peace Making, Justice, and the ICC," in in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015).

379 See Chehtman, "The ICC and its Normative Impact on Colombia's Legal System"; Ambos, "The Colombian peace process (Law 975 of 2005) and the ICC's principle of complementarity."

380 Human Rights Watch, "ICC: Course Correction – Recommendations to the Prosecutor for a More Effective Approach to 'Situations under Analysis'" (16 June 2011).

381 Regulation 28 governs the publicity of activities taken under Article 15. While the Office is required to "send an acknowledgement in respect of all information received on crimes to those who provided the information," it is within the Prosecutor's discretion to "make public such acknowledgement," and "to make public the Office's activities in relation to the preliminary examination of information on crimes under article 15," or a determination that there is no reasonable basis to proceed with an investigation. See Regulation 28, OTP Regulations.

Office's weekly bulletin, which it began distributing in 2009.[382] OTP policy documents also provide that it may "disseminate statistics on information on alleged crimes under Article 15; make public the commencement of a preliminary examination through press releases and public statements; publicize events, such as OTP high-level visits to the concerned countries, so that information can be factored in by relevant departments within States and [international organizations]; and issue periodic reports on the status of its preliminary examination."[383] Collectively, these measures seek to bring greater transparency to the examination process but also greater scrutiny to those states under review.

It would also appear that the OTP's investment in the preliminary examinations stage has expanded under Bensouda's leadership. As noted in her assessment of the Office's current strategic plan:

> As one of the three core activities of the Office, stronger emphasis is now placed on the Office's preliminary examinations activities. Through its preliminary examinations work, the Office is committed to contributing to two overarching goals: the ending of impunity, by encouraging genuine national proceedings through its positive approach to complementarity, and the prevention of crimes.[384]

The Prosecutor has likewise drawn a direct link between preliminary examinations and the catalytic potential of complementarity. Writing in 2012, she noted that the phase "gives the States concerned the possibility of intervening to put an end to crimes before the Office of the Prosecutor initiates an investigation," enabling the latter "to act as a catalyst for national proceedings."[385]

Despite the threat that opening a formal investigation carries, there are potentially important "positive" complementarity components to the preliminary examination stage as well. Indeed, according to the OTP, "at all phases of its preliminary examination activities, consistent with its policy of positive complementarity, the Office will seek to encourage where feasible genuine national investigations and prosecutions by the State(s) concerned and to cooperate with and provide assistance to such State(s) pursuant to Article 93(10) of the Statute."[386] As chapter three noted, however, the extent to which the OTP has affirmatively provided information to national authorities through use of the Article 93(10) regime is uncertain: there is no mention, for instance, of such assistance in any of the Office's preliminary examination reports. Moreover, the provision of such information appears to itself be at odds with the OTP's declaration that, at the preliminary examination stage, it "does not enjoy investigative powers" and "cannot invoke the forms of cooperation specified in Part 9 of the Statute from States."[387]

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[382] Reports on Preliminary Examination Activities from 2011-2014 are available online at the OTP's website. It would appear, however, that the Office has since discontinued its practice of weekly briefings as the last posted briefing is from November 2013.
[383] ICC-OTP, "Prosecutorial Strategy 2009-2012" (1 February, 2010), paras. 38-39; see also "Policy Paper on Preliminary Examinations," paras. 89-90 and Annual Report 2014, para. 95.
[384] Fatou Bensouda, "Foreword," Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*; see also "Interview with Fatou Bensouda, ICC Chief Prosecutor," VRWG Bulletin, Issue 21 (Fall 2012), 4.
[385] Fatou Bensuoda, "Reflections from the International Criminal Court Prosecutor," *Case Western Reserve Journal of International Law* 45(1-2) (Fall 2012), 505-511, 508.
[386] "Policy Paper on Preliminary Examinations," para. 94.
[387] Ibid., para. 85; see also Annual Report 2014, para. 11.

2.3 Preliminary Examinations in Practice: A Case Study of Kenya

As a regional actor, the African Union engaged with the Kenyan state in the immediate aftermath of the 2007-08 election violence.[388] Beginning in late January 2008, an AU Panel of Eminent African Personalities, overseen by former UN Secretary-General Kofi Annan, mediated a political settlement through the Kenyan National Dialogue and Reconciliation process; this led to the National Accord and Reconciliation Agreement ("National Accord"), signed between then President Mwai Kibaki (of the Party of National Unity) and Prime Minister Raila Odinga (of the Orange Democratic Movement) in February 2008. The National Accord set forth a four-part agenda to address the consequences of the violence, including the establishment of a power-sharing, coalition government between Kibaki and Odinga; the creation of a Commission of Inquiry on Post-Election Violence (CIPEV), also known as the Waki Commission; and a Truth, Justice and Reconciliation Commission (TJRC).[389]

The CIPEV's remit "was to investigate the facts and circumstances surrounding the [post-election] violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters."[390] The Commission's mandate expired in October 2008, at which point it published its final report. Chief amongst its many recommendations was that a Special Tribunal for Kenya (STK)—established by an act of Parliament and operating outside of the existing judicial system—be established to "seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya."[391] It further provided:

> 2. The Special Tribunal shall apply Kenyan law and also the International Crimes Bill, once this is enacted, and shall have Kenyan and international judges, as well as Kenyan and international staff to be appointed as provided hereunder.
>
> 3. In order to fully give effect to the establishment of the Special Tribunal, an agreement for its establishment shall be signed by representatives of the parties to the Agreement on National Accord and Reconciliation within 60 days of the presentation of the Report of the Commission of Inquiry into the Post-Election

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[388] For a more detailed history of the election violence in Kenya and its historical antecedents, see, e.g., Makau Mutua, *Kenya's Quest for Democracy: Taming Leviathan* (Kampala: Fountain Publishers, 2009); Michela Wrong, *It's Our Turn to Eat: The Story of a Kenyan Whistleblower* (London: Fourth Estate, 2009); Gabrielle Lynch, *I Say to You: Ethnic Politics and the Kalenjin in Kenya* (Chicago: The University of Chicago Press, 2011). Daniel Branch's *Kenya: Between Hope and Despair, 1963-2011* was also published in 2011; like Lynch, he traces an escalation of government corruption over time that evolved in conjunction with an increasingly ethnicized political landscape, leading to the explosive violence of late 2007. For an account of the violence that consumed the 2007 election, see Human Rights Watch, "Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance" (March 2008).

[389] The National Accord and Reconciliation Act, 2008; Kenya National Dialogue and Reconciliation: Commission of Inquiry on Post-Election Violence, 4 March 2008; Kenya National Dialogue and Reconciliation: Truth, Justice and Reconciliation Commission, 4 March 2008. The TJRC Act provided that the Commission's broad objective would be to "seek and promote justice, national unity, reconciliation and peace, among the people of Kenya by inquiring in to the human rights violations in Kenya and recommending appropriate redress" (Preamble). Its temporal jurisdiction was enormous: December 12, 1963 to February 28, 2008 (see General Parameters).

[390] Commission of Inquiry into Post-Election Violence (15 October, 2008) ("CIPEV Report"), vii, at http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf

[391] Ibid., 472.

> Violence to the Panel of Eminent African Personalities, or the Panel's representative. A statute (to be known as "the Statute for the Special Tribunal") shall be enacted into law and come into force within a further 45 days after the signing of the agreement.[392]

Crucially, in an effort to ensure these terms were implemented, the Commission recommended referral of the post-election violence to the ICC—including a sealed envelope with "a list containing names of … those suspected to bear the greatest responsibility"—in the event that the STK failed to materialize, or if "having commenced operating, its purposes [were later] subverted."[393] In short, it sought to leverage domestic criminal prosecutions through The Hague.

Complementarity's coercive dimension was thus the dominant logic behind the CIPEV's recommendation. If the STK was not established within the Commission's specified time frame, and if the government proved unwilling or unable to investigate and prosecute, the report and its confidential findings would be turned over to the Office of the Prosecutor. In this regard, the Commission's conditioned approach was itself a novelty. As Muthoni Wanyeki notes, "This [approach] was … in contrast with the recommendations of previous commissions of inquiry [in Kenya], which had been only partially implemented, if at all, often preferring to focus on more straightforward legal, policy or institutional reforms rather than on more contentious and pressing matters of legal and political accountability."[394]

2.3.1 Special Tribunal for Kenya: January 2008-February 2009

Unlike Uganda or the DRC, the ICC's intervention in Kenya was not by state choice. According to the Prosecutor's submissions, the situation in Kenya formally came under preliminary examination "[once] the violence erupted in the context of national elections held on 27 December 2007," and remained in this posture for approximately two years. In the interim, the OTP undertook many of the same measures to cajole Kenyan authorities into action as those identified in its policy paper. Following the formal declaration that President Kibaki had been re-elected and the attacks that followed, Prosecutor Moreno-Ocampo issued a public statement on 5 February 2008, recalling that Kenya was both a state party to the Statute and that the Office would "carefully consider all information" related to alleged crimes within the Court's jurisdiction.[395] From this time onward, communications channels existed between state-level actors in Kenya and the OTP. The Prosecutor actively sought additional information, including a copy of the 2008 report on the post-election violence undertaken by the Kenya National Human Rights Commission (a state human rights body).[396] OTP submissions also indicate that letters dated March 2008 sought additional

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[392] Ibid., 472-473.
[393] Ibid., 473 (paragraph 5).
[394] L. Muthoni Wanyeki, "The International Criminal Court's cases in Kenya: origin and impact," Institute for Security Studies, Paper No 237 (August 2012), 8, at http://www.issafrica.org/uploads/Paper237.pdf.
[395] "OTP Statement in Relation to Events in Kenya," 5 February 2008.
[396] The KNHRC report, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence" (August 2008) was referenced in the OTP's Article 15 request and controversially, was relied on significantly by the Office in bringing its charges against the six officials initially accused. See *Situation in the Republic of Kenya*, Request for authorization of an investigation pursuant to Article 15, ICC-01/09, PTC II, 26 November 2009, paras. 29-31 ("Kenya Article 15 Request"); see further the discussion on OTP investigations below.

information from the government, the Kenya Human Rights Commission (a prominent NGO), and the Waki Commission.[397]

The coercive dimension to the ICC's involvement in Kenya lent political urgency to the establishment of the STK. Indeed, while the proposed tribunal raised unique constitutional challenges, work on preparing a draft statute began promptly after the government (unanimously, and without amendment) adopted the Waki Commission's report on 16 December 2008. Martha Karua, Kenya's then Minister for Justice, National Cohesion and Constitutional Affairs took the lead in its drafting, with the support of the Attorney Genera's office and the Law Reform Commission, the body responsible for amendments to Kenyan legislation.

Known as the "Iron Lady" of Kenyan politics, Karua enjoyed significant influence but her style—criticized by many in civil society as imperial and insufficiently consultative—led to criticisms of the bill for its perceived concessions to the executive, including, the power of presidential pardon.[398] Nevertheless, notable features of the proposed tribunal included its primacy over local courts for the crimes under its jurisdiction (not only crimes against humanity, but also genocide, gross human rights violations, and other crimes committed in relation to the 2007 elections); a significant effort to internationalize the court's judicial composition; and, borrowing heavily from the ICC Statute, attempts to incorporate the participation of victims within domestic proceedings.[399]

Significant pressure was placed on parliamentarians to approve a constitutional amendment that would establish the STK. Both Kibaki and Odinga lobbied for the legislation's passage, while opponents of the bill included then Eldoret North MP Minister William Ruto. The latter formed a bloc of MPs who favored the ICC in part because it was seen to be less of a threat: it would prosecute fewer suspects and the proceedings, it was believed, would undoubtedly last longer than the next Kenyan election cycle.[400] Thus, the failure of Karua's bill was largely the product of an "unholy alliance" between those MPs who opposed it because they feared being implicated and those who favoured accountability in principle, but lacked faith in the idea of a domestic process, particularly one that would displace the ICC.[401] While the phrase "Don't be vague, go to The Hague" emerged as part of Kenya's political lexicon to ostensibly indicate a preference for the ICC's involvement, it also signalled that many saw the Court as a more limited threat.

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[397] Kenya Article 15 Request, para. 7.

[398] See Godfrey M. Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions," *International Journal of Transitional Justice* 3 (2009). Musila notes, "The few members of civil society who were contacted by the author suggested that it was too late for them to make any input, having been given less than two days to respond before the bill was presented to parliament," 452.

[399] See The Special Tribunal for Kenya Bill, 2009, at http://www.kenyalaw.org/Downloads/Bills/2009/The_Special_Tribunal_for_Kenya_Statute_2009.pdf. The provisions on victim participation in the proposed Bill are found in Article 50 ("Rights of Victims") and are nearly identical to Article 68(3) of the Rome Statute. Notably, victim participation is not a feature otherwise available in Kenya's judicial system.

[400] This view was expressed by several interlocutors in Kenya. For a similar analysis, see Lydia Kemunto Bosire, "Misconceptions II – Domestic Prosecutions and the International Criminal Court" (18 September 2009), at http://africanarguments.org/2009/09/18/misconceptions-ii-–-domestic-prosecutions-and-the-international-criminal-court/.

[401] See Wanyeki, "The International Criminal Court's cases in Kenya," 9-10; Stephen Brown and Chandra Lekha Sriram, "The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya," *African Affairs* 111 (2012), 244-260.

Against this backdrop the February 2009 debate in the National Assembly on the STK was contentious, particularly as compared to the welcoming debate on domestication of the Rome Statute (discussed further in chapter six), which had taken place only several months before.[402] At the outset, MP Gitobu Imanyara, a noted advocate for accountability but one who had favored "The Hague option," argued that the CIPEV's confidential findings should already be turned over to the ICC, because the "45 days period within which the Government had to comply with [its] recommendations" had lapsed.[403] While he was joined by several MPs in this view, other STK advocates, notably Mutula Kilonzo (later Karua's successor as justice minister), insisted on greater time for Parliament to act, noting that the Commission's timeline should not "tie the hands of this august House."[404]

As Kilonzo's comments suggest, the protection of Kenyan sovereignty loomed large in the discussions: supporters and opponents of a domestic tribunal alike summoned it. As the Bill's sponsor, Karua presented the amendment as recognition that Kenya had "not been able, up to now, to deal with the issues arising from the post election violence," but also as an opportunity for domestic ownership and agency.[405] In her words:

> Mr. Deputy Speaker, Sir, this Bill is coming about because we, as a nation, are accepting that there are inherent weaknesses in our national institutions … [It] is time to take responsibility. We are the Assembly as national leaders of this country, and that is why this is a National Assembly. It is our duty to take responsibility to ensure that we put an end to impunity, to ensure that election violence ends once and for all, and that we hold each other to account whenever such things arise.[406]

MP James Orengo, who seconded the Bill, likewise cast the STK as an affirmation of Kenya's sovereign powers. He stated:

> I am happy that in Kenya, we have not allowed a foreign institution, or power, to either establish a court through some instrument, for example through the UN Security Council, or through some arrangement, regional or otherwise; we are doing it through this sovereign Parliament, which has the authority to establish the tribunal. To that effect, we were saying in the beginning that we cannot allow

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[402] The National Assembly is the lower house of the Parliament of Kenya, while the Senate is the upper house. Prior to the structural reforms laid out in the 2010 Constitution, the Assembly served as the country's unicameral legislature; hence, the debate on the STK only took place there.

[403] Hansard records of this debate now appear to be unavailable on-line, though can be accessed through the website "Mzalendo," which describes itself as a non-partisan project whose mission is to "keep an eye on the Kenyan parliament," at http://info.mzalendo.com. Reference herein, however, is to Kenya National Assembly Official Record (Hansard), The Constitution of Kenya (Amendment) Bill, Second Reading, 3 February 2009 ("STK Amendment Bill"), 27 (MP Gitobu Imanyara).

[404] Ibid., 30. Other MPs similarly saw the amendment as a matter of parliamentary supremacy. For instance, MP Peter Mwathi stated that he would vote against the amendment, "so that the final decision to take those people to the Hague, or wherever it will be, will arise from the recommendations of the Waki Commission, not here!," 49. On whether a debate on the constitutional amendment could proceed, Imanyara's procedural concerns over the lapsing of the Waki Report's 45-day deadline were overruled. The Deputy Speaker issued a "considered ruling" that, " An external body [CIPEV] cannot dictate how Parliament conducts business." Ibid., 35.

[405] Ibid., 36.

[406] Ibid.

> ourselves to be guided, or managed by other institutions of government which are not part of the instruments of power in Kenya as a whole.[407]

Other parliamentarians, by contrast, argued that the tribunal was itself a concession to foreign interference, characterizing it as a "house we want to build with foreign materials."[408]

Notably, even with the promise of international involvement, concerns about a domestic tribunal's ability to penetrate the higher ranks of the Kenyan political class motivated opposition to the STK amongst those (like Imanyara) who favored an accountability process in principle. One parliamentarian, for instance, noted that, while he "strongly believed[ed] that the Waki Report [was] correct," he nevertheless objected to the recommendation that "we should have the tribunal in our country." In his view:

> Our interest is not in the proposals of the magistrates courts and the other issues. Our interest is in the leaders. Who are these people who caused pain to this country? Suppose the investigations point, God forbid, at His Excellency the President, do you want to tell me that this country has the capacity to try him? Suppose the investigation points at the Prime Minister, do you want to convince the Republic of Kenya that we have the capacity to try him?[409]

He concluded, "[This] tribunal is being set up for the small people. This country has a history of punishing the small people when the big ones have committed the crimes!"[410]

Despite the criticisms of the bill, the legislation that Karua proposed was the only one that would ever come close to receiving parliamentary assent.[411] In continued exercise of the ICC's oversight function, the Prosecutor publicly reaffirmed on the eve of Parliament's vote that the OTP was monitoring the situation in Kenya, but that proved insufficient to alter the votes. Ultimately, the STK amendment failed to command a constitutional majority: on February 12, 2009, it was defeated in a vote of 101(in favor) to 93 (opposed).[412]

2.3.2 Subsequent Efforts: March-November 2009

Following the government's failure to establish the STK, more direct and frequent contact between the OTP and national-level actors took shape; however, as Lionel Nichols notes, the Office's engagement was still largely conducted "through press statements and media interviews, rather than through face-to-face meetings."[413] The

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[407] Ibid., 38. MP Kilonzo invoked a similar call to sovereignty, noting, "I want as a country, to respect our sovereignty by acknowledging that we are signatories to the International Criminal Court Charter. … Let the citizens of other failed states go to the Hague," 46.
[408] Ibid., 43 (MP Danson Mungatana).
[409] Ibid., 48 (MP Cyrus Khwa Shakhalaga Jirongo).
[410] Ibid.
[411] Musila, "Options for Transitional Justice in Kenya," 452.
[412] While a majority of parliamentarians in fact voted in favour of the tribunal (101 to 93), passage of the Bill required a 2/3 majority given that it required a constitutional amendment. See Francis Mureithi, "How MPs rejected the Proposed Special Tribunal for Kenya Bill," *The Star*, 12 March 2011. A full breakdown of the votes is recorded at Kenya National Assembly Official Record (Hansard), The Constitution of Kenya (Amendment) Bill, Second Reading, 12 February 2009, 30-34.
[413] Lionel Nichols, *The International Criminal Court and The End of Impunity in Kenya* (Switzerland: Springer International Publishing, 2015), 80-81. See, e.g., 9 July 2009, OTP Press Release; 16 July 2009, OTP Press

Kenyan government subsequently promised to reintroduce improved legislation but a second attempt to do so was rejected in June 2009.[414] After two successive extensions lapsed, Annan forwarded the Waki envelope and evidence to the OTP in July 2009. Thereafter, the Prosecutor met with a formal delegation form Kenya (including then Minister of Justice and Constitutional Affairs, Mutula Kilonzo), which resulted in an agreement stating that the government would provide him, by the end of September, with a report on the current status of investigations and prosecutions. Furthermore, if no "modalities for conducting national investigations and prosecutions" were put in place within a year's time, it was agreed that the government would refer the matter to the ICC in accordance with Article 14.[415]

Following Annan's hand over of the envelope and more frequent interactions with the OTP, the government made renewed efforts at establishing domestic accountability process, but to no avail. Kilonzo, for instance, reintroduced an STK bill that sought to ameliorate some of the criticisms of the first draft; however, the Cabinet was unable to come to a political agreement and eventually opted to abandon the idea of a hybrid tribunal. Ultimately, after a series of meetings, Kibaki announced at a press conference (attended by the entire Cabinet) that all suspects would be dealt with through regular national courts as well as the TJRC (even though the latter had no prosecutorial authority),[416] and that the government would first focus its efforts on reforming the judiciary and the police.[417]

During this time, the OTP ensured that the examination maintained a public profile. It held a roundtable discussion in The Hague with Kenyan civil society representatives in September 2009 and, in October, Moreno-Ocampo requested another meeting with national authorities. A letter was also sent to the Kenyan authorities later that month, informing them that the Office's preliminary examination was complete and reiterating that two options were available: either for an Article 14 referral by the government, or an independent decision of the Prosecutor to request judicial authorization to start an investigation. On 5 November 2009, the Prosecutor met with Kibaki and Odinga in Nairobi, and announced in a joint press conference his intention to request such authorization. Six months later, in a divided opinion of Pre-Trial Chamber II, it was granted.[418]

2.3.3 Catalytic Effect? The Kenyan Examination Reconsidered

The Waki Commission's report and its unique use of the ICC as a self-enforcement mechanism "brought Kenya closer than it had ever been before to

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Release; 18 September 2009, OTP Press Release. See also Kenya Article 15 Request, paras. 13-14, 16, 18-20.

414 This bill was introduced by Karua's successor, Justice Minister Mutula Kilonzo. It never reached Parliament as it was rejected at the cabinet level.

415 Agreed Minutes of Meeting of 3 July 2009 between the ICC Prosecutor and Delegation of the Kenyan Government (3 July 2009, The Hague).

416 Notably, the TJRC commissioners also rejected this proposal, as it would have significantly involved amending its mandate.

417 In November 2009, MP Gitobu Imanyara also sought to introduce a private members' bill, but it did not advance on formal grounds as parliamentary quorum was not met. Brown and Sriram note that "a boycott by MPs, allegedly with support their party leaders, prevented the Assembly from reaching quorum whenever the bill was due to be discussed." Brown and Sriram, 254. See further Kenya National Assembly Official Report, The Constitution of Kenya (Amendment) Bill, Second Reading (2 December 2009).

418 Kenya Article 15 Decision; see, however, dissenting opinion of Judge Hans-Peter Kaul.

achieving any judicial accountability for the abhorrent election-related violent crimes."[419] It also created great interest in and demand for accountability across Kenya, pushing the government closer than it had ever before come to setting up a domestic judicial process. Two commentators have also suggested that the preliminary examination "raised international concern about sexual violence during the post-election violence, giving unprecedented exposure to these issues and, for the first time, allowing Kenyans to talk about being victims of sexual violence."[420] Yet the history of the ICC's preliminary examination in Kenya underscores several points that merit closer reflection.

First, the examination procedure did not succeed in producing its desired outcome, which was the establishment of a domestic tribunal (later referred to more obliquely as "modalities") for the prosecution of election-related violence. The difficulty of such a task should not be overlooked: such a tribunal would have effectively functioned outside of the Kenyan "regular" criminal justice system and would have, by design, been insulated from a judiciary that had long been criticized for its susceptibility to executive influence.[421] The defeat of the STK Bill thus largely owed to a political calculus on the part of many parliamentarians who saw the prospect of such a tribunal, at the time, as a greater threat than the ICC itself.[422] Whereas the ICC, by its own admission, could only pursue a handful of perpetrators at the highest level, an STK could likely have pursued a significantly greater number of individuals; therefore, MPs "who were implicated but who were not among the 'big fish' had little to fear from the ICC."[423] Indeed, they may have had much to gain if the Court proved successful in removing senior political rivals from the domestic electoral arena. In short, although key factions of the Kenyan political elite feared the ICC, it was not feared enough.[424]

The two-year period of the Kenyan examination also underscores the importance of timing, both in terms of duration but also the domestic political environment in which the OTP acts. In Kenya, the power of the examination procedure was arguably at its peak during the January 2008-February 2009 period, buttressed as it was by the ongoing CIPEV investigation and the active role of Annan, who had yet to hand the Commission's envelope over to The Hague. Yet the OTP became the most publicly active and engaged in the examination procedure following the STK Bill's defeat, by which point the Court's coercive power (having already failed to ensure the setting up of a domestic mechanism) had diminished considerably. This dynamic continued and deepened ever the course of 2009 such that, by the time Annan handed the Commission's envelope to the OTP in July, it was clear that a domestic tribunal was a political impossibility. Retrospectively, then, the wisdom of continuing to engage with the government (whose proposals had become increasingly incoherent) should be questioned. As Muthoni Wanyeki, writing in late 2009, noted, "The state has done just enough, the bare minimum, to maintain the masquerade that it intends to pursue criminal justice for the organised violence on both sides of the political divide as well as

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[419] Brown and Sriram, 257.
[420] Christine Bjork and Juanita Goebertus, "Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya," *Yale Human Rights and Development Journal* 14 (2011), 218.
[421] See, e.g., Makau Mutua, "Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya," *Human Rights Quarterly* 23 (2001), 96-118.
[422] For a more detailed discussion of these dynamics, see Wankeyi, "The International Criminal Court's Cases in Kenya: Origin and Impact," Institute for Security Studies Paper (No. 237, August 2012), 8-9.
[423] Brown and Sriram, 253.
[424] See, e.g., Dayo Olopade, "Who's Afraid of the International Criminal Court? In Kenya, the answer is no one at all," *New Republic* (9 March 2013).

the state violence last year."[425] The length of the ICC's preliminary examination may well have prolonged this masquerade.

Finally, a paradox lay at the heart of the Kenyan experiment. Whereas the Waki Commission sought to use the threat of the ICC's intervention as leverage for the establishment of a domestic process, many victims and advocates in Kenya, in fact, saw the Court's involvement as a necessary condition of such a process. Kenyan civil society, in particular, while not a monolith, took an exceedingly dim view of the government's willingness to pursue accountability absent the assurance of external proceedings, one that political leaders could not control. It is precisely because of this distrust in a judicial system that was "heavily compromised and 'beholden to the executive'"[426] that the core features of the proposed tribunal— located outside of the domestic justice system, with international judicial participation—were seen as non-negotiable, and why the perceived compromises in Karua's legislation (for instance, with respect to presidential immunity) were viewed with suspicion.

In short, trust in the Kenyan government and faith in its institutions was so low that most within the civil society sector were reluctant to support any domestic legal reform efforts until *after* the ICC intervened. In the words of two prominent Kenyan advocates:

> In tandem with the ICC's intervention, civil society groups have been at the forefront of advocating for [a judicial mechanism], *though such advocacy had to take place after the commencement of the Kenyan cases*. Given the pervasive climate of impunity, many organisations feared that any domestic accountability processes might be hijacked to justify an admissibility challenge before the ICC.[427]

Similarly, in their study of the advocacy strategies of Kenyan NGOs during the ICC's preliminary examination, Christine Bjork and Juanita Goebertus conclude that, "in most cases, even the NGOs that actually had the power to impact national criminal justice system reform were inclined, instead, to encourage ICC intervention at the time that the preliminary examination was being conducted."[428] This was because they "feared that improvements of the criminal justice system or installment of transitional justice mechanisms would avert ICC intervention and create impunity for the main perpetrators."[429]

The presumptions thus driving Kenya's preliminary examination—that Kenyan politicians would necessarily prefer a domestic mechanism to international judicial intervention; that the latter would be a sufficient threat to create such a mechanism; and that accountability advocates would support a domestic process in lieu of (rather than in addition to) the ICC—demonstrate again how legalism informs the complementarity-as-

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[425] L. Muthoni Wanyeki, "Kenya: We Remember, and Have Evidence," *The East African*, 9 November 2009. Brown and Sriram likewise conclude that, "While performing sham compliance, the government dragged its feet and delayed and undermined the process as much as it could, without repudiating it," 258.
[426] Musila, "Options for Transitional Justice in Kenya," 456.
[427] Njonjo Mue and Judy Gitau, "The Justice Vanguard: Kenyan Civil Society and the Pursuit of Accountability," in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015) (emphasis added).
[428] Christine Bjork and Juanita Goebertus, "Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya," *Yale Human Rights and Development Journal* 14(1) (2011), 218.
[429] Ibid., 223.

catalyst vision. They reflect, in McEvoy's words, "a capacity to disconnect from the real political and social world of transition through a process of 'magical legalism."[430] In actuality, legal formations in Kenya were subordinated to a dynamic politics of transition, one that saw MPs on both sides of the accountability divide effectively uniting to defeat the STK amendment (if for very different reasons.) Moreover, given the pervasive distrust in Kenya's institutions, most supporters of accountability were unwilling to accept complementarity's catalytic potential without the engagement of the very institution the preliminary examination sought to avoid: the ICC itself.

3. Investigations

3.1 OTP Framework

While the Rome Statute is silent as to how evidence collection is to be carried out, the OTP adopted early on a policy of "focused investigations."[431] As articulated by the former head of the JCCD, "The ICC prosecutor's policy is to carry out investigations in a few months, involving as few witnesses and incidents as possible."[432] Related to this policy is the Office's use of small teams of rotating investigators to carry out its investigations.[433] Bernard Lavigne, who oversaw the ICC's early investigations in the DRC, testified that his investigation teams never consisted of more than twelve people for the entire country, which he considered to be "insufficient."[434] Similarly, in the case against former Ivory Coast President Laurent Gbagbo eight investigators reportedly worked on the ground "in rotating teams of two."[435] According to the OTP's proposed 2012 budget, only 44 professional staff were requested for the "Investigations Teams" section of the ID, to be dispersed among its (then) active eight situation countries.[436]

The pursuit of this early strategy meant that ICC investigators spent relatively little time in the field. Although Moreno-Ocampo indicated in 2004 remarks that some investigators would "be based in headquarters and others will be deployed in the field,"[437] in practice all ICC investigators have been Hague-based and travel "on mission." Moreover, they have only been deployed in the field for limited periods of time,

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[430] McEvoy, "Letting Go of Legalism," 25-26. For a similar conclusion, see Thomas Obel Hansen and Chandra Lekha Sriram, "Fighting for Justice (and Survival): Kenyan Civil Society Accountability Strategies and Their Enemies," *International Journal of Transitional Justice* (2015). Hansen and Sriram quote several Kenyan activists as having "now learned that approaches dominated by legal language and influenced by international norms may be flawed in facing a government that … can draw upon a range of political, historical and ethnic language in a divided society to build counter-narratives," 20-21.

[431] See ICC-OTP, "Report on Prosecutorial Strategy," 14 September 2006, 5, para. 2(b); "Prosecutorial Strategy 2009-2012," para. 20. The Office has also developed an Operational Manual as a framework for its investigations; however, it is not available to the public.

[432] Katy Glassborow, "ICC Investigative Strategy on Sexual Violence Crimes Under Fire," *Institute for War & Peace Reporting*, 27 October 2008. Glassborow quotes Beatrice Le Fraper du Hellen, who headed the JCCD from 2006-2010.

[433] An early OTP policy paper noted that its "operations are informed by three basic principles', one being that 'it functions with a variable number of investigation teams." See ICC Paper on Policy Issues, 8.

[434] Lavigne Deposition, 16:11-16.

[435] John James, "Ivory Coast – Who's Next After Laurent Gbagbo?," *International Justice Tribune* No. 146, 29 February 2012.

[436] Ibid. The report further notes that the number of professional staff employed in the investigations division "has *decreased* since 2007, despite the increase in the number of situations in which the Court is active." Ibid., 30-31 (emphasis in original); see also "Proposed Programme Budget for 2012 of the International Criminal Court," ICC-ASP/10/10, 21 July 2011, at 47.

[437] "Statement of the Prosecutor Luis Moreno-Ocampo to Diplomatic Corps" (12 February 2004), 2, at www.iccnow.org/documents/OTPStatementDiploBriefing12Feb04.pdf.

undertaking repeated, short-term trips. In the DRC, the OTP reported that, as of 2006, members had "conducted more than 70 missions inside and outside the DRC, interviewing almost 200 persons."[438] The same report noted that since opening its investigation in July 2004, the Ugandan joint team had conducted "[i]n just ten months … over 50 missions to the field," Darfur investigators have 'conducted more than 50 missions in 15 countries," although, significantly, not in Darfur itself.[439]

The OTP's approach to investigations is closely linked to limited resources and financing. Indeed, the number of small missions conducted in a relatively short period was extolled in a 2009 document on "efficiency measures" as part of the "Court-wide efficiency drive."[440] The report noted that the Office's strategy "of having a small, flexible office," as well as "lean and flexible" investigation teams had "enabled [it] to perform more investigations and prosecutions simultaneously, with the same number of staff."[441] Yet while the commitment to small investigation teams has been praised for its cost efficiency, the Office's "lean and flexible" approach has been criticized for its effectiveness and the strain it places on Court staff. In a private 2008 letter that Human Rights Watch sent to the OTP Executive Committee (later made public), the organization expressed concern with the high attrition rate of ICC investigators and noted that there were "simply not enough of them to handle the rigorous demands for conducting investigations."[442]

3.2 Investigating from Afar

3.2.1 Limited Field Presence

Perhaps the most notable aspect of investigations has been the OTP's failure to locate any investigators or analysts in country on a permanent (or semi-permanent) basis, or to engage on a more sustained basis with national-level interlocutors. According to testimony, investigators working in the DRC spent only an average of ten days in the field,[443] making it difficult for them to interview witnesses, much less develop the sort of long-term connections that a more sustained field presence would enable. Preliminary examination analysts have faced similar limitations: according to Seils, "analysts are rarely in a country under [ICC] examination for more than one week."[444] Consequently, a 2008 report by Human Rights Watch noted that,

> The opportunities for Hague-based investigators to interact and develop strong contacts with witnesses are limited in number and timeframe… [E]ven when key witnesses agree to a specified time to meet with investigators, circumstances may change, rendering them unavailable by the time that the Hague-based members of the investigative teams travel to the field.[445]

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[438] ICC-OTP, "Report on the Activities Performed During the First Three Years (June 2003-June 2006)" (12 September 2006), 11.
[439] Ibid., at 15, 19.
[440] "Second Status Report on the Court's Investigations in to Efficiency Measures," ICC-ASP/8/30, 4 November 2009, para. 4.
[441] Ibid.
[442] Human Rights Watch, Letter to the Executive Committee of the Prosecutor, 15 September 2008, at www.article42-3.org/Secret%20Human%20Rights%20Watch%20Letter.pdf.
[443] Lubanga Judgment, para 165; Lavigne Deposition, 75:7-8.
[444] Seils, "Making complementarity work," 999.
[445] Human Rights Watch, "Courting History: The Landmark International Criminal Court's First Years" (2008), 55.

This small-team approach makes the possibility of a permanent presence in the field impossible. As summarized by the Lubanga trial chamber in *Lubanga*, "because there were only a few investigators it was not possible to have someone in the field permanently," even though, according to Lavigne, "This would have been the correct approach."[446]

Pascal Kambale, formerly the DRC Country Director for the Open Society Initiative for Southern Africa, followed the ICC's investigations in the DRC closely and has argued that the OTP's failure to bring charges against other, higher-ranking commanders in the DRC situation was "a direct result of the … strategy of conducting quick investigations with the lowest cost possible."[447] In his view, the investigative teams assigned to Ituri "were too undersized and too short-term to generate good analysis of the intricately entangled criminal activities" taking place in the region.[448] Kambale further recalls a meeting in December 2003, at which Moreno-Ocampo reportedly told a group of international NGOs that the investigative teams deployed to the field "would be composed almost entirely of temporary staff."[449] Although this plan was later reconsidered, the "cost-efficient approach" still meant that investigators were "sent to the field for short periods of time." The Prosecutor's minimal field presence in the Kivus region of eastern DRC—which has been even more limited than its presence in Ituri—has led to similar results. In December 2011, a majority of Pre-Trial Chamber I declined to confirm any of the charges against Callixte Mbarushimana (a Rwandan national residing in France) for crimes committed by FDLR troops in the DRC.[450]

In its judgment acquitting Ngudjolo Chui, Trial Chamber II also drew attention to the OTP's lack of field presence in assessing deficiencies in the evidence presented. While acknowledging the difficulty of conducting investigations in a "region still plagued by high levels of insecurity," the chamber emphasized the importance of "mak[ing] as many factual findings as possible, in particular forensic findings … in *loci in quo*."[451] The chamber noted that it would have been "beneficial for the Prosecution to visit the localities where the Accused lived and where the preparations of the attack in Bogoro allegedly took place, prior to the substantive hearings."[452] The chamber had itself travelled to these localities—Bogoro, Aveba, Zumbe, Kambutso—in early January 2012 as part of a judicial site visit, the first (and only) time an ICC chamber has done so.[453]

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[446] Lubanga Judgment, para. 166; Lavigne Deposition, 75:16-18.
[447] Pascal Kambale, "The ICC and Lubanga: Missed Opportunities" (16 March 2012), at http://forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities/.
[448] Ibid.
[449] Ibid. According to local NGOs and UN staff in Bunia, "Investigators never spent more than a few days," n.21.
[450] Mbarushimana Decision. The chamber, by majority, expressed "concern" over the OTP's apparent attempt to "keep the parameters of its case as broad and general as possible," pleading certain charges with insufficient specificity and "in such vague terms," seemingly "in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure [governing amendments to the charges]," paras. 82, 110. In the case against FDLR commander Sylvestre Mudacumura, a separate pre-trial chamber denied the OTP's first request for an arrest warrant for a similar "lack of specificity." It later granted the warrant but excluded all of the requested counts of crimes against humanity, while noting that the application bore "some similarities" to the case brought against Mbarushimana. See *The Prosecutor v. Sylvestre Mudacumura*, Decision on the Prosecutor's Application under Article 58, ICC-01/04-01/12, PTC II, 13 July 2012, paras. 20, 22-29.
[451] Ngudjolo Judgment, paras. 115-17.
[452] Ibid., para. 118.
[453] Ibid., paras. 22, 68-69.

Its visit was described as enabling the Chamber to "gain a better understanding of the context of the events," as well as to "conduct the requisite verifications *in situ* of certain specific points and to evaluate the environment and geography of locations."[454] The judgment refers repeatedly to the Chamber's visit, providing examples of how such knowledge would have provided it with a clearer appreciation of the evidence.[455]

Notably, the OTP's approach to investigations (at least its early approach) departs from the practice of predecessor tribunals like the International Criminal Tribunal for Rwanda, which had several investigators based in country.[456] Moreover, while tribunals like the ICTY have also adopted a mission-based approach to investigations, unlike the ICC's small team arrangement, investigation teams at the ICTY "consisted of up to twenty members," with "up to ten separate teams operational at a given time, even though the geographic jurisdiction of the Tribunal was limited to the territories of the former Yugoslavia."[457] OTP leadership also prioritized field investigations. Louise Arbour, the tribunal's former Prosecutor, "made it an organizational priority during the Kosovo period to get as many OTP employees into the field 'on mission' as possible."[458] Another ICTY investigator recalled fieldwork being an "all-consuming" enterprise, where it was "common to work through ten at night, every day, for three, four weeks."[459]

The security question Trial Chamber II raised is also one that has informed the OTP's "light-touch" approach, yet it bears noting that the Office has also been criticized for being too risk-averse in assessing its ability to operate on the territory of situation-countries. For instance, although Moreno-Ocampo defended his decision not to investigate in Darfur on security grounds, he was sharply criticized by Professor Antonio Cassese, chair of the United Nations Commission of Inquiry on Darfur, whose report helped, in part, spur the referral of the situation to the Court. Cassese criticized the "[e]xceedingly prudent attitude of the ICC Prosecutor"[460] and, in an invited *amicus curiae* brief, the failure to pursue even "targeted and brief interviews" in Darfur, noting that the UN Commission had successfully insisted upon such access during the course of its investigations.[461]

Andrew Cayley, the ICC's first senior trial attorney for Darfur, concurs with Cassese's assessment. Reflecting on the Darfur investigation, Cayley notes:

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454 Ibid., para. 70.
455 Ibid.,para. 118.
456 Gideon Boas and Gabriel Oosthuizen, "Suggestions for Future Lessons-Learned Studies: The Experience of Other International and Hybrid Criminal Courts of Relevance to the International Criminal Court" (January 2010), para. 47.
457 WCRO Report, 29-30; see also *ICTY Manual on Developed Practices*, 16.
458 John Hagan, *Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal* (Chicago: The University of Chicago Press, 2003), 137.
459 Ibid., 154.
460 Antonio Cassese, "Is the ICC Still Having Teething Problems?," *Journal of International Criminal Justice* 4 (2006), 438.
461 *Situation in Darfur*, Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending Before the ICC, ICC-02/05-14, PTC I, 25 August 2006, at 5. Louise Arbour, then the UN's High Commission for Human Rights was also invited to submit a brief to the Court, in which she similarly called for 'an increased visible presence of the ICC in Sudan', insisting that it 'is possible to conduct serious investigations of human rights during an armed conflict in general, and Darfur in particular, without putting victims at unreasonable risk'. See *Situation in Darfur*, Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-02/05, PTC I, 10 October 2006, para. 64.

> It was a mistake that the court did not establish a presence on the ground in Darfur. ... It is not to say that establishing an office in Darfur would have been easy but it should be emphasized that the OTP was extremely risk averse when I worked there. By encouraging some risks I am not proposing recklessness. The reality, as we all know, is that you have to take risks and you have to have courage to do this work. Professor Cassese … personally went to Khoba prison in Khartoum and interviewed very sensitive witnesses. He demanded access with nothing more than a Security Council resolution in his hand. The OTP ICC got no further than the Hilton Hotel in Khartoum.[462]

More recent cases conducted by the Court suggest that little has changed with respect to the OTP's strategy. During the confirmation of charges proceedings against the suspects in Kenya—where security risks were considerably less than in DRC or Darfur—submissions by both defence and victims' counsel raised questions about the OTP's lack of in-country investigations.[463] Similarly, while arrest warrants were issued against the three Libyan suspects in May 2011 (just three months after the Security Council's referral), the Office only began conducting *in loci* investigations in November of that year.[464]

3.2.2 Absence of National Investigators

In addition to a minimal field presence, none of the ICC's investigators have been nationals of countries where cases are under investigation; indeed, only a limited number are African.[465] While other OTP staff members have supported such a proposal—which was, consistent with "positive" complementarity, identified as an early goal of the Office's plan for investigations[466]—it was never implemented during Moreno-Ocampo's tenure. Kambale's notes from a 2004 meeting with OTP staff indicate that the choice not to seek out experienced national investigators was deliberate. Part of the "short and focused" investigative strategy, as articulated by the then Prosecutor, was "the fact that it would minimize the need for having local people in the investigative teams, thus helping avoid situations where impartiality is questionable."[467] Unlike predecessor tribunals the OTP has also hired no country experts as either permanent or temporary

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[462] Andrew Cayley, "Witness Proofing—The Experience of a Prosecutor," *Journal of International Criminal Justice* 6 (2008), 779-80. In 2010, all of the OTP charges against Bahr Idriss Abu Garda—one of only three accused in the Darfur situation to have actually appeared before the ICC—were dismissed. The pre-trial chamber unanimously found that the evidence presented was 'so scant and unreliable' that it could not find substantial grounds to confirm the allegations. See Abu Garda Decision.

[463] See, e.g., *The Prosecutor v. William Samoei Ruto, et al.*, Request by the Victims' Representatives for Authorisation to Make a Further Written Submission on the Views and Concerns of the Victims, ICC-01/09-01/11, PTC II, 9 November 2011, paras. 10-12; *The Prosecutor v. William Samoei Ruto, et al.*, William Samoei Ruto Defence Brief Following the Confirmation of Charges Hearing, ICC-01/09-01/11-355, PTC II, 24 October 2011, paras. 24-29.

[464] See "Third Report of ICC Prosecutor to UN Security Council Pursuant to UNSCR 1970" (16 May 2012), para. 11.

[465] Personal interview with member of ICC Investigations Division, July 2012.

[466] The OTP's 2003 policy paper states that, "Investigation teams will include staff members who are nationals of the countries targeted by the investigations." This "inclusive strategy" would "help the OTP have a better understanding of the society on which its work has the most direct impact, and will allow the team to interpret social behavior and cultural norms as the investigation unfolds," 9.

[467] Kambale, "Missed Opportunities," n.22.

staff.[468] In the DRC, it appears that there was only Congolese national who served for a brief period of time, in a formal capacity, as a country expert and advisor to investigators.[469]

The pursuit of impartiality, or at least its appearance, undoubtedly damaged the quality of OTP investigations. As articulated by one intermediary in Ituri:

> [T]he Court faces difficulties in assessing places and [it] was unfamiliar with the socio-political context [in the DRC.] It did not understand the complicated war-time alliances, and did not grasp the subtleties of "who was close to who" in a toxic environment nor "who could do what," etc.[470]

Similarly, a study conducted by the International Refugee Rights Initiative (IIRI), in consultation with the Congolese NGO Aprodivi, notes that, "[T]he fact that Court staff was … dominated by internationals did little to diminish the sense that the Court could have done more to understand the local context. … Failure to ['verify the information that they got'], and to engage the 'real community leaders,' left the ICC 'looking ridiculous a large percentage of the time.'"[471] The judgment in *Ngudjolo Chui* suggests that the chamber would have similarly appreciated attention to local context: the judges expressed interest, for instance, in questions of "socio-cultural framework," so as to "prompt a more informed debate from the outset."[472]

The OTP's decision not to locate any of its investigators in the field, or to hire nationals of the country being investigated, stands in contrast with others organs of the Court. The Registry, for instance, though performing a different function than the OTP, has hired Congolese and Ugandan nationals to conduct outreach on behalf of the Court in situation countries.[473] The role and participation of victims in ICC proceedings further provides an interesting counter-example to the Prosecutor's approach. During the pre-trial stage of the Kenya cases, the two counsels who were assigned to represent victims each had a staff of three, country-based field assistants. Kenyan nationals all, these individuals had long associations with Kenyan civil society and human rights organizations in the country. Based in Nairobi, they travelled regularly to other conflict-affected regions of the country, while another was based in the Rift Valley Province, a key site of the post-election violence.[474]

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[468] In contrast, both Louise Arbour and Carla del Ponte, former Prosecutors of the ICTY, hired specialists to act as political advisors in dealing with governments and key figures within the former Yugoslavia. See Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008).
[469] Personal interview with member of ICC Investigations Division, The Hague, July 2012.
[470] Gaelle Carayon, "Increased Use of Intermediaries: Increased Discontent," *ACCESS: Victims' Rights Working Group Bulletin* (Spring 2012), 4, at http://www.vrwg.org/ACCESS/ENG20Rev.pdf.
[471] IRRI and Aprodivi-ASBL, "Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri" (January 2012), 20.
[472] Ngudjolo Judgment, para. 123. The chamber expressed particular interest in testimonies that allowed it "to appreciate the special significance of the local customs and the function of family relationships in Ituri," as "notions of hierarchy and obedience were likely to be interpreted very differently." Ibid., para. 122.
[473] Personal interviews with ICC Field Office Staff in Kampala, Uganda and Kinshasa, DRC, June 2011.
[474] Personal interview with legal assistants to victims' representatives, Nairobi, January 2012.

While the model adopted in Kenya represented a more directed, streamlined approach to the ICC's victim participation regime that some have criticized,[475] the victims' counsels and their assistants played an active role in exposing early gaps in the OTP's case and pushing it (if unsuccessfully) to investigate further. One filing from the victims' representative in the case against William Ruto and Joseph Sang, in particular, sought to make further submissions to the Court about their views and concerns with respect to the Prosecutor's case. The motion stated that the OTP had not conducted a "meaningful investigation into eyewitness experiences" and that the victims—who numbered nearly 300 at the time—had reportedly not been interviewed by the OTP, were not aware of anyone in their locality having been interviewed, nor were they aware of the Prosecutor having ever come to their localities to conduct on-site investigations.[476] The victims' representative further observed that some victims "felt that the failure of the OTP to conduct on-site investigations or to interview victims could explain why the case as presented … did not fully accord with [their] own personal experiences."[477]

3.2.3 Intermediaries: Quasi-Investigators?

While country nationals have not formally been a part of OTP investigations teams, the Office has nevertheless made extensive use of intermediaries. Intermediaries are not ICC employees as such, but may assist the Office (and other organs of the Court) in a volunteer capacity; in certain cases, intermediaries have also been hired on a short-term, contract basis.[478] No definition of "intermediary" is found in the Rome Statute or the Rules of Procedure and Evidence; however, the Court defines an intermediary as "someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or unit of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more broadly on the other."[479] In short, intermediaries are locally based actors who, "[b]ecause of their long-term presence," carry out important functions for the Court.[480] As summarized by the Trial Chamber in *Lubanga*, they "undertake tasks in the field that staff members cannot fulfil without creating suspicion; they know members of the community, and they have access to information and places that are otherwise unavailable to the prosecution."[481]

Although intermediaries were also a feature of the ad hoc tribunals, the ICC's limited resources, combined with the multiple countries in which it must carry out its operations, means that they are a more permanent part of the Court's practice. Indeed,

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[475] See, e.g, Maina Kiai, "Despised and Neglected, PEV Victims are Now Being Abandoned by ICC," *Daily Nation*, 8 June 2012, at http://www.nation.co.ke/oped/Opinion/-/440808/1423430/-/lr0avoz/-/index.html.

[476] Victims' Representatives Request, paras. 10-11.

[477] Ibid., para 10. More recently, the victims' new legal representative, Fergal Gaynor, filed a motion requesting judicial review of the OTP's decision to suspend its investigation into President Kenyatta's role in the post-election violence; the motion accuses the Office of being "ineffective" and of "prosecutorial surrender and inaction." *Situation in the Republic of Kenya*, Victims' request for review of Prosecution's decision to cease active investigation, ICC-01/09, PTC II, 3 August 2015.

[478] Testimony from the Lubanga proceedings indicate that the term intermediary "began to be used in the summer of 2004, but intermediaries only received contracts much later." See Lubanga Judgment, para. 194. Furthermore, while travel expenses for intermediaries were generally reimbursed, "the majority of the intermediaries were not paid and did not request payment," para. 198.

[479] Draft Guidelines Governing the Relations Between the Court and Intermediaries (August 2011), 5.

[480] Lubanga Judgment, para. 167.

[481] *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, ICC-01/04-01/06, TC I, 31 May 2010, para. 88.

reliance on intermediaries attracted particular attention in the wake of the Lubanga trial, where the chamber determined early on that their role, together with the manner in which they discharged their functions, had become "an issue of major importance."[482] In its judgment, the chamber ultimately found that the "essentially unsupervised actions of three of the principal [Prosecution] intermediaries [could not] safely be relied upon," a determination that, in turn, led to the exclusion of the testimony of witnesses who claimed to have served as child soldiers in Lubanga's rebel army.[483]

The uncertain relationship of intermediaries to the OTP (and to the Court at large) underscores the crucial, but potentially destabilizing, role that they can play in investigations. On the one hand, as the trial chamber concluded, the OTP inappropriately "delegated" its investigative responsibilities to intermediaries, relying on them, in some cases, to not only contact, but also propose potential witnesses. At the same time, the role of intermediaries was apparently "limited, in the sense that [they] were excluded from the decision-making process."[484] As it was explained to the Court, intermediaries "were not supposed to know the objectives of the investigation team," nor were they "given any substantive information about the case" because it would have been "too complicated to enable discussions with anyone who was not a member of the investigation division."[485]

Despite recognizing that intermediaries are often better placed to gather evidence than many Hague-based investigators, it would appear that, as a matter of policy, they remain at the margins of the OTP's decision-making process.[486] Kambale, for instance, notes that local Congolese NGOs and activists, "had more raw intelligence on the crimes than any other entity, [but] were deliberately sidelined and their invaluable expertise not fully integrated into the investigative process."[487] Similarly, IIRI, which has worked extensively with intermediaries in the DRC, Uganda, and Sudan, notes that, in the context of the DRC, the Prosecution did not know enough about who was giving it information and why. This "lack of expertise … was viewed as reducing the capacity of the office [in The Hague] to navigate the complex local politics." Simply put, ""They trusted anyone who called themselves civil society.""[488] The trial chamber in *Lubanga* drew a similar conclusion, finding that, "There was no formal recruitment procedure for selecting intermediaries. An intermediary was simply someone who could perform this role; there was no process of candidacy or application and instead it was a matter of circumstance."[489]

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[482] Ibid., paras. 135-138; see also Christian De Vos, "'Someone Who Comes Between One Person and Another': Lubanga, Local Cooperation and the Right to a Fair Trial," *Melbourne Journal of International Law* 12 (2011).
[483] Lubanga Judgment, para. 482.
[484] Ibid., para. 181.
[485] Ibid., para. 183.
[486] See, e.g., Elena Baylis, "Outsourcing Investigations," *UCLA Journal of International Law and Foreign Affairs* 14 (2009), 121; Emily Haslam and Rod Edmunds, "Managing a New 'Partnership': 'Professionalization,' Intermediaries and the International Criminal Court," *Criminal Law Forum* 24 (2013), 49.
[487] Kambale, "Missed Opportunities."
[488] IRRI and Aprodivi-ASBL, "Steps Towards Justice, Frustrated Hopes," 20.
[489] Lubanga Judgment, para. 195. The Prosecutor also drew heavily on evidence gathered from confidential agreements with intermediaries in its cases against Katanga and Ngudjulo Chui, leading the pre-trial chamber to similarly lament 'the reckless investigative techniques during the first two years of the investigation into DRC'. *Prosecutor v. Katanga*, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, ICC-01/04-01/07, PTC I, 20 June 2008, para. 123.

Some strides have been made in this area. Draft Guidelines—described as an attempt to "provide a framework with common standards and procedures in areas where it is possible to standardize the Court's relationship with intermediaries"[490]—were first circulated in 2010 and later revised. Importantly, the Guidelines address the existing legal and policy framework governing the ICC's relationship with intermediaries and seek to provide greater clarity as to the rights intermediaries may expect from the ICC, including their selection, payment (where appropriate) of their expenses, and their protection when placed at risk. Text for these guidelines was agreed upon in April 2012; however, they were not formally promulgated for two more years. Initially, it was understood that the Guidelines required the consent of the ASP; however, at both the Assembly's 2012 and 2013 sessions, delegates only "took note" of them. As Deirdre Clancy notes, "While a fiscally sensitive ASP was clearly wary of institutionalising the intermediary role, reports by the Court to the ASP at the same time indicated that use of intermediaries was 'ultimately cost effective.'"[491] Eventually, in April 2014, the Guidelines (including a Model Contract and the Code of Conduct) appeared on the ICC's website, preceded, with little fanfare, by the appointment of a facilitator/focal point on intermediaries. Although the Guidelines are now formally in effect, the text accompanying the website notably describes them simply as "standards" to which the organs of the Court will "aspire."[492]

4. Linking Preliminary Examinations and Investigations

Reflecting on investigatory practices underscores the degree to which the ICC's ability to function as a credible threat depends on the quality of its investigations and prosecutions. Indeed, if one part of complementarity is its sword—the Prosecutor's ability to wrest cases away from member states, or to initiate proceedings where there are none—then the ICC's record of convictions must itself be convincing. The OTP's failings in this respect, with only two convictions to date in trials that were both heavily criticized, suggests that it has not sufficiently guarded the Court's own catalytic potential and that, at an institutional level, investigative practices have been marginalized.[493] This lack of prioritization appears to have been premised, at least initially, on a presumption that distancing the Court from local contexts would better preserve its impartiality and efficiency, although, in fact, it appears to have hobbled both.

Furthermore, this approach rests uneasily with the OTP's rhetorical commitment to the guiding ethos of "positive" complementarity: responsible, cooperative engagement

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[490] Notably, while many organizations (for, instance local NGOs) can also serve as intermediaries, the Guidelines only govern the ICC's relationships with individuals. In addition to the Guidelines, a draft "Code of Conduct for Intermediaries" and a "Model Contract for Intermediaries" have also been created. See "ICC adopts Guidelines on Intermediaries," at www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Pages/default.aspx.

[491] Deirdre Clancy, "'They Told Us We Would Be Part of History': Reflections on the Civil Society Intermediary Experience in the Great Lakes Region," in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015). See "Second Report on the draft Guidelines" (30 October 2013), which states that, "while there are unavoidable costs for the Court in implementing the draft Intermediaries Guidelines … the use of intermediaries is ultimately cost effective for the Court. Intermediaries undertake work that would be extremely costly for the Court to perform," para. 19.

[492] The ICC's webpage notes that, "[W]ith the exception of the model contract, Intermediaries guidelines are not legally binding, but represent standards for the Organs of the Court to aspire to in their interactions with intermediaries." See "ICC adopts Guidelines on Intermediaries."

[493] For similar criticism, see Human Rights Watch, "Unfinished Business: Closing Gaps in the Selection of ICC Cases" (September 2011).

with national-level actors.[494] This dimension of complementarity, extolled by scholars like Burke-White and ratified by the Office itself, underscores the importance of cultivating meaningful relationships between prosecutorial authorities in The Hague and in-country actors. Such an orientation to the field would offer important opportunities to build the sort of beneficent relationship imagined for the Court and national jurisdictions, one in which the judicial intervention becomes a site for knowledge transfer and capacity building. It would also benefit the Court in the long run, providing greater opportunity to understand the political, social, and cultural contexts in which its examinations unfold. As one ICC senior analyst has noted, "Local expertise is indispensable to interpret the relevant information in its authentic social context, including aspects of culture, politics, economy and linguistics."[495]

Like investigations, preliminary examinations are also an area where the potential of "positive" complementarity could be better realized. In particular, examinations are crucial because they provide a potentially greater dialogic space between the Court and national authorities, one that narrows substantially once the OTP moves from "situation" to "case." Whereas investigations might necessarily initiate a more adversarial relationship with the state it does not appear that anything prohibits the OTP (assuming the state in question consents) from locating staff on the territory of countries under preliminary examination. Seils has advocated such an approach, noting that, "A longer presence on the ground should allow analysts to improve their understanding of the institutions that are of interest, both in terms of those providing information and those conducting national proceedings."[496] The Office's Policy Paper likewise notes that, "for the purpose of analysing the seriousness of the information" it receives, it "may also undertake field missions to the territory concerned in order to consult with the competent national authorities, the affected communities and other relevant stakeholders, such as civil society organisations."[497]

The Kenyan experience, where the failed prosecutions have done great damage to the Court's credibility, illustrates the important link between these stages. For instance, it would appear that the OTP did not use the extended preliminary examination period to conduct more thorough independent inquiries in Kenya or, as discussed above, to develop a meaningful presence within the country or amongst affected communities. (The Prosecutor's Article 15 request, for instance, makes no mention of any in-country inquiries that the Office undertook, relying instead entirely on the CIPEV and KNHRC reports, as well as those of other UN and NGO offices.) Nor does this approach appear to be unique to the Kenyan situation.[498] In Seils' words, "most of the preliminary analysis [is] carried out at the OTP's headquarters in The Hague by very small teams." This "prolonged distance from the country," he argues, "may inhibit potential positive

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[494] I was surprised to learn, for instance, that it was not until after the 2010 Rome Statute Review Conference in Kampala that the appropriate members of the Ugandan DPP came to even be aware of the ICC investigators acting in-country, and subsequently initiated contact with the Office. Interview with a senior DPP official, Kampala, December 2011.

[495] Xabier Agirre Aranburu, "Methodology for the Criminal Investigation of International Crimes3," in A. Smeulers (ed.), *Collective Violence and International Criminal Justice* (2010), 359.

[496] Seils, "Making complementarity work," 1000.

[497] OTP Policy Paper, para. 85.

[498] Speaking in 2005, Jane Odwong, a former Ugandan parliamentarian, criticized the ICC's investigations for "operating in a clandestine manner." In her words, "Nobody knows the issues of the ICC even within our communities, and the country." Jane Odwong (Kitgum), 23 March 2005.

impacts that could occur as the result of preliminary examinations."[499] By contrast, developing closer relationships with national-level interlocutors, particularly intermediaries, could better ensure that the Office "knows the lie of the land well enough to identify reliable and credible counterparts to begin the investigation."[500] Indeed, while the OTP's missteps with respect to ill-intentioned intermediaries have dominated discussions about the topic, most intermediaries are committed advocates who have sought to help the ICC, often at great personal risk.

5. Conclusion

If the ICC is to serve as a credible threat to states, greater capital must be invested in preserving the two areas where its catalytic effect on domestic proceedings is greatest: preliminary examinations and investigations. The OTP's record of successful prosecutions to date, and the increasing dissatisfaction amongst affected communities with its performance, belies the desirability of the "light touch" approach to the field that Prosecutor Moreno-Ocampo once championed.[501] While deliberate, this approach has elided with larger constraints, ranging from a limited appetite by member states to appropriately resource the Court, to an institutional reluctance to assume the greater risks that a long-term ground presence might present.[502] Such reluctance is more understandable in the context of coercive interventions (where the prospect of state cooperation is uncertain or unlikely) yet, as has been seen even in states that have invited the ICC in, the OTP's field presence has been minimal; the composition of its staff predominantly, if not exclusively, international; and its relationships with local actors damaged by a unilateral approach to evidence gathering.

There have been promising policy changes under Prosecutor Bensouda's leadership, though it is unclear the extent to which they have taken shape in practice. Notably, the Office's 2012-2015 strategic plan announced a departure from the policy of "focused investigations" in favour of a principle of "in-depth, open-ended investigations," and explicitly committed the Office to ensuring that its "cases at the confirmation hearings … are as trial-ready as possible."[503] In line with this reorientation, Bensouda promisingly noted in her inaugural speech to the ASP that the OTP is "sending longer

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[499] Seils, "Making complementarity work," 999. Phil Clark makes a similar point, arguing based on his extensive ethnographic research in the DRC that, "the Court has generally failed to foster meaningful relations with … ground-level institutions that are vital to its cause. … [T]he ICC has not always sought this collaboration and often perceived itself as the lead organisation to which all others are answerable." Phil Clark, "If Ocampo Indicts Bashir, Nothing May Happen," 13 July 2008, at http://www.csls.ox.ac.uk/documents/Clark_Final.pdf.

[500] Seils, "Making complementarity work," 1000. The War Crimes Research Office similarly concludes that, the "selection of suspects and crimes that will be the focus of an investigation" would benefit from improving the OTP's "understanding of the context in which ...crimes took place and its ability to gain the trust of those who may be in a position to provide useful information." See WCRO Report, 6.

[501] By contrast, for a defense of ICC investigations, see Alex Whiting, "Dynamic Investigative Practice at the International Criminal Court," *Law & Contemporary Problems* 76(3-4), 163-189.

[502] See, e.g., Sara Kendall, "Commodifying Global Justice: Economies of Accountability at the International Criminal Court," *Journal of International Criminal Justice* 13(1) (2015).

[503] 2012-2015 strategy. Perhaps drawing on the lessons of the Kenyan experience and the criticisms of the Lubanga case, the Office also announced a departure form its previously stated policy of prosecuting only those "most responsible" for crimes in favor of a strategy of "gradually building upwards," wherein it "first investigates and prosecutes a limited number of mid-and high-level perpetrators in order to ultimately have a reasonable prospect of conviction for those most responsible."

investigative missions with less frequent travel."[504] The Office's proposed 2016-2018 strategic plan maintains this approach, while also adopting a new strategic goal of developing "with partners a coordinated investigative and prosecutorial strategy to close the impunity gap."[505]

It would therefore seem that the Office acknowledges some of the problems inherent in its earlier approach. To that end, it has actively sought greater budgetary assistance to support its expanding workload (including the hiring of additional situation analysts) and has increasingly endorsed the potential value of more open-ended preliminary examinations and investigations as a form of maintaining leverage on states.[506] If implemented effectively, such an approach could better capitalize on both the cooperative dimension of "positive" complementarity—working with national authorities to provide technical assistance or advice, for instance—as well as its coercive potential. As the Kenyan experience suggests, however, "open-ended" examinations can also harbor risks, particularly where the threat of an ICC investigation is conditioned on the establishment of particular domestic benchmarks.

These changes suggest that, as with the more recent turn in the Court's admissibility jurisprudence, the ICC may yet evolve into an institution that is more responsive to the domestic contexts in which it operates and, as a result, better able to capitalize on complementarity's catalytic properties. At the same time, the unique dynamics of each ICC situation country underscores the fact that the leverage (or support) the prosecutorial function may bring to bear is necessarily limited. Notwithstanding the OTP's evident missteps in Kenya, in retrospect it is unlikely that the threat of the Court alone was sufficiently great for the STK to receive the domestic political support it needed. Nevertheless, the failure of the Kenyan state to comply with this particular desired outcome does not mean that the ICC's intervention there has been without effect. On the contrary, as the 2009 STK debates and those in the following chapters illustrate, the Court remains deeply alive in the Kenyan political landscape.

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[504] Bensouda ASP Address. In the same speech, however, it was made clear that "there shall be no structural changes in the Office, neither shall there be a departure from established policies and methods of operation," paras. 3, 6.

[505] International Criminal Court, Office of the Prosecutor, Strategic Plan, 2016-2018 (6 July 2015).

[506] As Bensouda has noted, "One of the main challenges faced not only by the Office but by the Court as whole is the question of resources. Over the years, the number of preliminary examinations, investigations and prosecutions has increased and yet resources are not matched to respond to this growing demand. There is therefore a real challenge in maintaining and ensuring high quality work without the necessary resources." See "Interview with Fatou Bensouda," *New African Magazine* (28 January 2014), at http://newafricanmagazine.com/interview-with-fatou-bensouda/.

CHAPTER FIVE
Competing, Complementing, Copying: Domestic Courts and Complementarity

This chapter examines the emergence of specialized domestic courts or chambers for international crimes as one of the most frequently cited effects catalyzed by the principle of complementarity. Because a fundamental "rule" of the complementarity-as-catalyst framework is that national-level actors investigate and prosecute international crimes themselves, ensuring domestic venues for their prosecution is a key preoccupation for civil society state and non-state actors alike. The attendant focus of much complementarity discourse has thus been on the establishment of institutions at the national level that are capable of accommodating such prosecutions. As Human Rights Watch puts it, "The ICC's authority to act only where national authorities are unable or unwilling … encourages the development of credible and independent judicial systems within national jurisdictions."[507]

Similarities and differences mark the domestic judicial arrangements of the three countries examined in this dissertation. In Uganda, the establishment of a special division within the High Court in which to adjudicate Rome Statute crimes, now called the International Crimes Division, has been the key domestic institution whose creation was catalyzed by the threat of ICC intervention. In Kenya, efforts to create a Special Tribunal for the post-election violence represented a high-water mark in the establishment of a domestic accountability process in lieu of ICC proceedings. As the previous chapter argued, the failure to establish the STK suggests the limits of the Court's catalytic potential; however, more recently, discussions in Kenya have also turned towards the establishment of an ICD within Kenya's High Court system.

In both cases, these divisions have been created or proposed to satisfy perceived obligations under the ICC's complementarity regime, although there has been only one attempted domestic prosecution to date before the Ugandan ICD related to the LRA conflict. By contrast, in the DRC, domestic military courts have undertaken a far greater (if still limited) number of prosecutions. Significantly, however, these courts were not created in response to the ICC's involvement in the country; rather, they have had longstanding jurisdiction over international crimes. A more recent turn to domestic prosecutions through the use of so-called "mobile" courts in the eastern DRC region represents a novel invocation of the complementarity principle; however, most of these efforts have been undertaken by international donors and NGO actors, who have deliberately sought to characterize the courts as an extension of and "complementary" to the ICC's work.

This chapter's aim is two-fold. First, it offers a descriptive account of these various domestic judicial institutions, highlighting the shifting ways and competing purposes in which complementarity has been invoked as a basis for their establishment. Here again the central premise is that the ICC's role as catalyst rests on different conceptions of the complementarity principle. In certain cases, the threat of the Court's jurisdiction has been used to prompt the setting up (or attempted setting up) of domestic legal bodies. In this sense, the ICC's catalytic potential has been largely coercive. By contrast, recent descriptions of these bodies depict them more literally as institutional extensions of the ICC: rather than displacing the Court, they are meant to complement,

[507] Human Rights Watch, "Establishing a Special Tribunal for Kenya and the Role of the International Criminal Court: Questions and Answers" (25 March 2009), 3.

and even "complete," its work. A related depiction has been of complementarity as a cooperative venture, wherein a managerial, division-of-labor approach between The Hague and national institutions is meant to facilitate the pursuit of accountability at the domestic level.

But while the establishment of national courts specialized in the adjudication of serious crimes is typically presented as a normative good, their depiction as part of complementarity "in practice" has been largely directed towards an international audience of donors, norm entrepreneurs, and other states. In its second half, then, the chapter identifies several concerns that these institutions have produced at the domestic level. It focuses specifically on the manner in which these courts have evolved at the national level (located within the existing structures of state but often, given their exceptional status, standing apart from the broader judicial system), the donor economies that surround them, and the institutional tensions that are produced through this arrangement. A related concern is an apparent insistence on "international standards" as the means by which "compliance" with complementarity should be assessed. Finally, through a case study of the sole attempted trial before the Ugandan ICD, the chapter considers how the domestic invocation of complementarity also accommodates to state power, leading, in certain instances, to outcomes that are themselves at odds with fundamental principles of a fair criminal process.

1. Uganda

The first country in which the ICC intervened, Uganda was also the first situation country to set up a specialized judicial forum for the prosecution of Rome Statute crimes. Established in 2008 as the War Crimes Division (and later rebranded as the International Crimes Division), the forum is a specialized division of the Ugandan High Court with jurisdiction to try war crimes, genocide, and crimes against humanity, as well as other serious transnational crimes, including human trafficking, piracy, and terrorism. Although it has yet to convict any individuals related to the LRA conflict, the court to date has received a great deal of attention. As Nouwen notes, it is "[p]ossibly the most visible effect indirectly catalyzed by complementarity in Uganda," one that "has become the focus of donors' transitional-justice interest."[508]

1.1 Complementarity as Coercion: The ICC and Juba

Although the establishment of the War Crimes Division (WCD) has often been depicted as a product of the ICC's investigations,[509] the history of the WCD's establishment is more appropriately traced to the Juba peace talks that sought to bring a negotiated settlement to the government's long running conflict with the LRA.[510] The

[508] Nouwen, *Complementarity in the Line of Fire*, 179.
[509] See, e.g., Wes Rist, "Why Uganda's New War Crimes Court Is a Victory for the ICC," JURIST (29 May 2008), at http://jurist.org/forum/2008/05/why-ugandas-new-war-crimes-court-is.php. Rist argues that, "the ICC has been the key player in using the threat of international criminal responsibility to create a judicial body that can address the same issues of war crimes and crimes against humanity at the domestic rather than international level."
[510] A detailed history of the Ugandan conflict is not offered here, however, texts that were particularly useful in offering background context include Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006); Matthew Green, *The Wizard of the Nile: The Hunt for Arica's Most Wanted* (London: Portobello Books, 2009); Tim Allen and Koen Vlassenroot (eds.), *The Lord's Resistance Army: Myth and Reality* (London: Zed Books, 2010); Aili Mari Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime* (Boulder: Lynne Rienner Publishers, 2010); Adam Branch, *Displacing Human Rights:*

Ugandan government formally announced the referral of the "situation concerning the Lord's Resistance Army" in January 2004.[511] At the time, as many commentators have noted, the ICC referral suited the interests of both the ICC and Uganda. For the Museveni government, it was an opportunity to "rally international assistance for the arrest of the government's military opponents," as well as a savvy "international relations campaign."[512] Furthermore, it was a low-risk approach given the unlikelihood that the OTP, despite having re-characterized the referral as concerning the situation in northern Uganda (rather than the LRA alone), would pursue investigations against Ugandan military officials (UPDF). Meanwhile, for the ICC, the "voluntary referral of a compelling case by a state party represented both an early expression of confidence in the nascent institution's mandate and a welcome opportunity to demonstrate its viability."[513] This view was endorsed by Pre-Trial Chamber II, which accepted the government's contention that the ICC was the "most appropriate and effective forum" for investigating those bearing the greatest responsibility in the conflict, and its assertion that it was "unable" to arrest the LRA leadership.[514]

For these reasons, cooperation between the ICC and Uganda was the dominant logic in the early phase of the Court's intervention. This logic began to change, however, in mid-2006 when, for the first time, the Ugandan government and the LRA entered into an internationally mediated peace negotiation. Although previous attempts at a negotiated settlement had proven unsuccessful, the Juba peace talks benefited from a changed political calculus on both sides: the Ugandan government was under increasing pressure to ameliorate the humanitarian situation in the north (and appeared no closer to apprehending Kony following the ICC referral), while the LRA had lost the support of the government of Sudan, its primary benefactor.[515] The talks were thus seen as a credible attempt to find a peaceful solution to the conflict.[516] After signing a cessation of

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War and Intervention in Northern Uganda (Oxford: Oxford University Press, 2011). Sverker Finnström's *Living with Bad Surroundings: War, History, and Everyday Moments in Northern Uganda* (Durham: Duke University Press, 2008) is an excellent anthropological account of the conflict in northern Uganda; see also Sverker Finnström "Reconciliation Grown Bitter? War, Retribution, and Ritual Action in Northern Uganda," in Rosalind Shaw and Lars Waldorf, with Pierre Hazan (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford: Stanford University Press, 2010), 135-156.

511 OTP Press Release, "President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC," 29 January 2004.

512 Nouwen and Werner, "Doing Justice to the Political," 949. The government's previous attempts at defeating the LRA had chiefly been through unsuccessful military campaigns and a policy of forced displacement, resulting in a growing humanitarian crisis that was weakening the government's (faltering) international standing. These campaigns included Operation North (Operation Simsim) in 1991, Operation Iron Fist in 2002, and Operation Iron Fist in 2004. While President Museveni had always favored a military approach, he had on occasion allowed peace initiatives, such as the one undertaken by Betty Bigombe, then Ugandan Minister for the Pacification of the North, in 1994. For a detailed history, see Branch, *Displacing Human Rights*.

513 Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," *American Journal of International Law* 99(2) (2005), 404. See also Clark, "Chasing Cases," 1198-1202.

514 *Situation in Uganda,* Warrant of Arrest for Joseph Kony, ICC-02/04-01/05-53, PTC II, 8 July 2005 (as amended on 27 September 2005), para. 37 (citing government letter from Uganda's Solicitor General)..

515 See International Crisis Group, "Northern Uganda: seizing the Opportunity for Peace," Report No. 124 (2007).

516 Refugee Law Project, "Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda," Working Paper No. 22 (October 2012), 7.

hostilities agreement in August 2006,[517] four additional agreements were concluded over the course of the next 18 months.[518]

In the shadow of these negotiations stood the ICC's arrest warrants for Kony and four other senior LRA members, which had been unsealed in October 2005.[519] Despite the progress being made in Juba, one of the key points of contention was the question of accountability, as the LRA had demanded from the outset that the ICC's warrants be withdrawn. It was in response to this point of contention—a desire to displace the ICC in order to secure Kony's support for a negotiated peace—that the Court, by reference to the principle of complementarity, catalyzed the creation of what would become the WCD. As Nouwen notes, "The closest thing the [government of Uganda] could offer the LRA was to conduct domestic proceedings so that it would be for it or the ICC suspects successfully to challenge admissibility on the basis of articles 17, 19, and 20 of the Rome Statute."[520]

The "Agreement on Accountability and Reconciliation (A&R) between the Government of Uganda and the Lord's Resistance Army," signed in June 2007, laid the legal framework for these arrangements.[521] This was followed by the signing of an Annexure in February 2008, which set out a framework for the A&R Agreement's implementation.[522] The Agreement states at the outset that its purpose is to "promote national legal arrangements … for ensuring justice and reconciliation with respect to the conflict."[523] Point 6.1 further reads:

> Formal courts provided for under the Constitution shall exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes, during the course of the conflict."[524]

Notably, the language of the A&R Agreement did not restrict itself to formal criminal justice mechanisms alone: it also acknowledged "reconciliation proceedings," while the Annexure provided for a national truth-telling process, reparations, and a role for traditional justice mechanisms.[525]

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[517] Agreement on Cessation of Hostilities between the Government of the Republic of Uganda and Lord's Resistance Army Movement (Agenda Item No. 1), 26 August 2006.
[518] Other agreements focused on comprehensive solutions; the disarmament, demobilization and reintegration of LRA forces; and on a permanent cease-fire. See Comprehensive Solutions Agreement (Agenda Item No. 2), 2 May 2007; Permanent Ceasefire Agreement (Agenda Item No. 4), 23 February 2008; Agreement on Disarmament, Demobilization and Reintegration of the LRA Forces (Agenda Item No. 5), 29 February 2008. All documents available at http://www.beyondjuba.org/BJP1/peace_agreements.php.
[519] The other warrants of arrest were for Vincent Otti, Raska Lukwiya (deceased), Okot Odhiambo and Dominic Ongwen.
[520] Nouwen, *Complementarity in the Line of Fire*, 133.
[521] Accountability and Reconciliation Agreement (Agenda Item No. 3), 29 June 2007 ("A&R Agreement").
[522] Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008 ("Annexure"), at http://www.iccnow.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf
[523] A&R Agreement., Clause. 2.1.
[524] Ibid., Clause 6.1.
[525] For instance, Clause 3.1 of the Agreement states: "Where a person has already been subjected to proceedings […] or has been subjected to accountability *or reconciliation proceedings* for any conduct in the course o the conflict, that person shall not be subjected to any other proceedings with respect to that conduct" (emphasis added).

Although the A&R Agreement does not invoke the principle of complementarity by name, the Annexure does. In it, the parties recalled "their commitment to preventing impunity and promoting redress in accordance with the Constitution and international obligations and recalling, in this connection, *the requirements* of the Rome Statute of the [ICC] and in particular the principle of complementarity."[526] The Annexure further provided for the establishment of a "special division of the High Court of Uganda … to try individuals who are alleged to have committed serious crimes during the conflict," as well as "a unit for carrying out investigations and prosecutions in support of trials and other formal proceedings."[527] In the end, however, the Final Peace Agreement (FPA)—a collection of the agreements reached over the course of the negotiations—was never signed. Kony, unconvinced that the A&R Agreement would indeed keep the ICC at bay, ignored the government's ultimatum that the FPA be signed by the end of November 2008. Shortly thereafter, the Ugandan military renewed its military offensive against the LRA, which continues to operate today outside of the country, largely in remote eastern regions of the DRC.[528]

1.2 International Crimes Division

Despite not being signed, the Ugandan government expressed its intention to unilaterally implement the FPA agreement to the extent that it could. Of these, implementation of the provision for the proposed special division has advanced the furthest. Indeed, while the ICD is already operational, the other transitional justice measures foreseen under the A&R Agreement have developed only haltingly.[529] (According to Stephen Oola, the formal policy "has dragged on for eight years and, despite being now on its sixth draft, has yet to be finalised, let alone operationalized."[530]) The court, however, was formally established as the WCD in July 2008 pursuant to an administrative notice issued by then Chief Justice James Ogoola, who ordered it staffed with judges and a registrar. This notice—an act of administrative fiat—effectively served as the statutory basis for the court. In 2011, by a similar act of fiat, the WCD was rebranded the ICD, with an expanded jurisdiction that includes the transnational offenses of piracy, human trafficking and terrorism.[531] Its current docket has largely encompassed terrorism-related cases, notably the Kampala bombings of 2010. As discussed below, only one case related to the LRA conflict has actually come before the Division, although it has yet to advance beyond the pre-trial stage.

Structurally, the ICD sits as a panel minimally comprised of three judges, although the total Division consists of five judges. Uganda's principal judge appoints them, in consultation with the High Court Chief Justice. One of the ICD judges serves as head of the Division, and is responsible for its administration, in cooperation with the registrar.[532] Judges periodically rotate out of the Division since it is "common for judges,

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526 Annexure, Fifth Recital (emphasis added).
527 Ibid., Clauses 7 and 10.
528 See Branch on ongoing, joint military operations between the UPDF and AFRICOM, 216-239.
529 Interview conducted with Uganda Law Reform Commission, Kampala, 13 December 2011. The government released a draft "Transitional Justice Policy" in mid-2013, but it has still not been finalized or adopted.
530 Stephen Oola, "Will LRA Victims Get Justice?," *Saturday Monitor* (11 August 2015).
531 The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 (2011), Section 6.
532 Interview with ICD judge, Kampala, 13 December 2011. Attached to the ICD are a series of relevant units. A unit of Uganda's Directorate of Public Prosecutions (DPP) oversees the ICD's prosecutorial function, although the prosecutors appointed to that unit may also be responsible for crimes not heard by

registrars, prosecutors, and investigators in Uganda to be frequently rotated on and off work relating to specific divisions."[533] The ICD is headquartered in Kampala (where the courtroom sign still reads "War Crimes Courts"), although it is mobile in the sense that the judges can travel; indeed, the proceedings related to Thomas Kwoyelo have to date taken place at the Gulu High Court in northern Uganda. Decisions of the ICD can be appealed to Uganda's Constitutional Court and, in the final instance, to the Supreme Court.[534]

The ICD receives technical assistance through the Justice Law and Order Sector (JLOS), which is a government mechanism operating a "sector-wide approach" (SWAp") to donor-driven judicial reform. A document prepared by JLOS describes SWAp as "bring[ing] together institutions with closely linked mandates of administering justice and maintaining law and order and human rights."[535] In 2008, JLOS established a high level Transitional Justice Working Group to "give effect to the provisions of the Juba Peace Agreement."[536] JLOS oversees the budgetary allocation of the ICD, a substantial portion of which, as discussed further below, relies on international donor support.

1.3 Shifts in Complementarity

The creation of Uganda's ICD initially placed the ICC and the Ugandan government in an antagonistic relationship. As the ICD has developed, however, its origins as an outcome of the A&R Agreement have evolved away from a competition-based model of complementarity—a way to displace the ICC—towards a more harmonious, cooperative vision of the principle. The ICD's website states that, "While originally meant to be part of a comprehensive peace agreement with the LRA, the International Crimes Division has come to be viewed as a court of 'complementarity' with respect to the International Criminal Court, thus fulfilling the principle of complementarity stipulated in the preamble and Article 1 of the Rome Statute."[537] A 2010 publication of the Uganda Law Society likewise notes that, "the War Crimes Division of the High Court of Uganda has been set up as a complementary institution to the ICC," while the Ugandan Victims Foundation's legal advisor has suggested that a "running and well equipped WCD of Uganda has the potential of becoming a regional criminal tribunal which may complement well the work of the ICC."[538] And in the words of one judicial spokesperson, "[T]his court now complements the [International Criminal Court]. We now have the equivalent of Geneva or The Hague in Africa."[539]

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the ICD. A similar unit resides within the Criminal Investigations Department and is responsible for investigating crimes that may be tried before the Division.

[533] Human Rights Watch, "Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division" (2012), 19.

[534]JLOS, "Frequently Asked Questions on the International Crimes Divisions of the High Court of Uganda," 5, at http://www.judicature.go.ug/files/downloads/ICD_FAQs.pdf .

[535] See JLOS, "Annual Performance Report 2009/2010" (September 2010), 9.

[536] ""The Dust Has Not Yet Settled': Victims' Views on the Right to Remedy and Reparation, - A Report from the Greater North of Uganda," United National Human Rights Office of the High Commissioners (Kampala, 2011), 59. The Transitional Justice Working Group is comprised of five thematic sub-committees including: (1) war crimes prosecutions; (2) truth and reconciliation; (3) traditional justice; (4) Sustainable funding; and (5) integrated systems.

[537] International Crimes Division, available at www.judicature.go.ug.

[538] "Does the High Court of Uganda Have a Wider Jurisdiction than the ICC?," *Lawyers' Voice* (July-September 2010), 5; Jospeph A. Manoba, "First Trial before the War Crimes Division of the High Court in Uganda," *VRWG Bulletin* 17 (Winter 2010), 6.

[539] Nouwen, *Complementarity in the Line of Fire,*181 (quoting Cyprian Musoke, "Uganda: nation ready to try Col. Gaddafi," *New Vision*, 11 June 2011).

Burden-sharing thus appears to now define complementarity in Uganda, wherein the ICD and ICC are positioned as partners in a cooperative, joint enterprise. This shift is particularly striking when one considers the Ugandan government's response to a 2008 request by the ICC Pre-Trial Chamber for information on the implication of the Division's establishment, where it averred that "those individuals who were indicted by the [ICC] will have to be brought before the special division of the High Court for trial."[540] The ICC never opined on this admissibility question given its prematurity; however, now, the government indicates that—notwithstanding the substantial investment of resources into the now functioning ICD—it does not intend to challenge the admissibility of the ICC cases, should Kony or other LRA members be captured.[541] Speaking at a 2012 conference, Uganda's State Minister for Justice and Deputy Attorney General, Freddie Ruhindi, even indicated that while he was confident the Ugandan courts could try the LRA leader, Kony would nevertheless be sent to the ICC for trial.[542] The January 2015 arrest and transfer of LRA commander Dominic Ongwen to The Hague confirms Ruhindi's statement. Questions about Uganda's primary duty to investigate and prosecute Rome Statute crimes have thus become, as Nouwen notes, "increasingly detached from the possibility of actually using the right in order to challenge admissibility."[543]

2. Kenya

2.1 From Special Tribunal to Special Division

As chapter four explained, a key recommendation of the Commission of Inquiry on Post-Election Violence was that a special tribunal be established to "seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity."[544] Much like the A&R Agreements in Uganda, then, complementarity's coercive dimension was the dominant logic behind the CIPEV's recommendation. If a Special Tribunal was not established within a specified time frame, and if the government proved unwilling or unable to investigate and prosecute, the ICC might intervene. As noted, however, the rejection of the STK owed largely to the "unholy alliance" amongst those MPs who supported a domestic accountability process but had substantive objections to the bill put forward by then Minister for Justice Karua, and those who "considered the ICC card a bluff," one that would take "too long to

[540] See Letter from Jane F.B. Kiggundu, Solicitor General, Reply to Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest, ICC-02/04-01/05-285-Anx2, Government of Uganda, 27 March 2008; aee also Uganda Admissibility Decision.The letter further clarified that the government referred the situation to the ICC "because the leadership of the Lord's Resistance Army was beyond the borders of Uganda and the international community was not being helpful," not because of "the competence of its courts to handle cases connected with the situation."
[541] See Florence Ogola, "Uganda Victims Question ICC's Balance," Institute for War & Peace reporting (14 June 2010). A similar assessment was made in the course of my interview with a senior DPP official, Kampala, December 2011.
[542] See Mark Kersten, "Outsourcing Justice to the ICC – What Should Be Done?" (31 October 2012), at http://justiceinconflict.org/2012/10/31/outsourcing-justice-to-the-icc-what-should-be-done/.
[543] Nouwen, *Complementarity in the Line of Fire*, 237
[544] CIPEV Report, 472-473.

act."[545] Thus, by publicly calling for the ICC, the government "could look good yet not push the accountability issue."[546]

The defeat of the STK, in turn, laid the seeds for current discussions around the establishment of an ICD in Kenya. Muthoni Wanyeki notes that the possibility of establishing a special division of the High Court was floated "half-heartedly" by the subsequent Minister for Justice, Mutula Kilonzo, as an alternative to a private members' bill for a special tribunal that had been put forward in the wake of the STK's defeat.[547] This proposal was "vigorously opposed," however, by the governance, human rights and legal sectors of civil society groups who argued that, the investigative and prosecutorial arms of the judiciary were too compromised to be credible.[548]

Discussions around an ICD did not seriously reemerge until the appointment in 2011 of Willy Mutunga as Chief Justice and President of the Supreme Court. A dedicated human rights advocate, Mutunga's reformist credentials in Kenyan politics are well-known: his appointment was widely seen as a victory for the Kenyan left, and a promising step in the country's new constitutional dispensation.[549] (By contrast, the appointment of Keriako Tobiko as Director of Public Prosecutions was considered a major defeat.[550]) In this capacity, Mutunga also chairs the Judicial Services Commission (JSC), whose mandate encompasses the appointment of judges and advising on "improving the efficiency of the administration of justice."[551] In May 2012, at Mutunga's request, the JSC appointed a Working Committee to "look into modalities of establishing an international crimes division in the High Court, to hear and make determination on the pending post-election violence cases and deal with other international and transnational crimes."[552]

2.2 Proposed Structure

Chaired by the Reverend Samuel Kobia, the JSC's Working Committee published an extensive report in October 2012 setting forth six recommendations, the first of which called upon "the Chief Justice to establish the International Crimes Division as a division of the High Court, to prosecute the pending post-election violence cases, international and transnational crimes."[553] As with the Ugandan ICD, the legal framework for such a Division would be rooted in the unlimited original jurisdiction of the High Court, while appeals would lie with the Kenyan Court of Appeal, and in the

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[545] Maina Kiai, "Using International Justice to End Impunity and Prevent Further Atrocities in Kenya," Consultative Conference on International Criminal Justice," September 2009, 4, at http://www.internationalcriminaljustice.net/experience/papers/Maina_Kiai_Speech_Sept10_09.pdf.
[546] Ibid.
[547] Wanyeki, "The International Criminal Court's cases in Kenya: origin and impact," 9-10.
[548] Interview with Kenyan NGO director, Nairobi, 3 December 2012.
[549] Mutuma Ruteere, "Dr. Willy Mutunga: Why they fear him," *The Nairobi Law Monthly* 2(6) (June 2011), 31-39.
[550] Interview with Muthoni Wanyeki, Nairobi, 16 June 2011.
[551] "Judicial Service Commission – The Judiciary," at http://www.judiciary.go.ke/portal/the-judicial-service-commission.html
[552] The Judicial Service Commission, "Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in The High Court of Kenya" (30 October 2012), 32 ("JSC Report") (on-file).
[553] Ibid.,146. Section 8(2) of the International Crimes Act No. 16 of 2008 grants Kenya's High Court jurisdiction to conduct trials over persons responsible for international crimes committed locally or abroad by a Kenyan, or committed in any place against a Kenyan as of January 2009. See chapter six for further discussion.

final instance, the Supreme Court. The Division's proposed subject matter jurisdiction would include Rome Statute crimes (domesticated under the Kenyan International Crimes Act 2008), but could be expanded to include transnational crimes as well: money laundering, cyber-laundering, human trafficking, terrorism, and piracy. Other recommendations include the establishment of an independent prosecution unit with the DPP "to deal exclusively with international crimes," fully funding the country's existing (if underfunded) Witness Protection Agency, and setting up a "special fund to help victims."[554]

The Commission's recommendation that an ICD be formed for "international-scale crimes"—including but not limited to the post-election violence—was partially endorsed in a May 2013 report by Kenyans for Peace Truth and Justice (KPTJ), an influential coalition of NGOs that came together following the disputed presidential election. Although KPTJ expressed a firm preference for a Special Tribunal option, it acknowledged that, "[g]iven the lack of political will …, the Special Division option is more feasible, if not the only viable option in the near future."[555] The report recommended that "the overall structure of the accountability model take the form of a Special Division of the High Court," although it went further than the JSC's report, advocating as well for the establishment of a Special Prosecutor for the post-election violence cases and for the participation of international staff.[556] To date, however, there is no indication that these proposals are under serious consideration.

Despite the focus of the JSC's report on the post-election violence and the prosecution of international crimes in particular, it was chiefly Mutunga's influence that led to the proposed expansion of the ICD's jurisdiction to include other transnational crimes.[557] This expansion has been of particular concern to civil society advocates who fear that the court may be more active as a forum for adjudicating transnational crimes, rather than post-election violence cases; in KPTJ's words, "the proposed ICD could end up being a white elephant, with no cases to prosecute."[558] Many human rights advocates have also been skeptical of the proposed division, seeing it as yet another attempt to obstruct ICC proceedings in The Hague through the "appearance" of complementarity.[559] As of 2014, support for the JSC's proposal had appeared to further dim. Many civil society actors boycotted a February consultation convened by the government on the grounds that the process was not genuine, while statements attributed to DPP Tobiko at the same meeting "suggest his office does not believe the ICD is appropriate or necessary to prosecute post-election crimes."[560]

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[554] Ibid., 149.

[555] KPTJ, "Securing Justice: Establishing a domestic mechanisms for the 2007/8 post-election violence in Kenya" (May 2013), 49.

[556] Ibid., 51-53.

[557] The JSC report notes that, "The Chief Justice … prevailed on the Committee to, during its conceptualization and design of the architecture of this court, devise mechanisms of vesting on the court [an] expansive mandate to deal with other international crimes and transnational crimes other than having jurisdiction only limited to international crimes as proscribed in Kenya's International Crimes Act, 2008," 31.

[558] KPTJ, "A Real Option for Justice? The International Crimes Division of the High Court of Kenya," 9.

[559] See further the discussion in chapter four.

[560] Amnesty International, "Crying For Justice: Victims' Perspectives on Justice for the Post-Election Violence in Kenya" (July 2014), 26. According to the same report, "as of June 2014, no concrete steps had been taken towards establishing the ICD," 25-26. Additionally, in December 2013, President Kenyatta temporarily suspended six JSC members after the National Assembly requested an investigation into allegations of misconduct and misappropriation of funds. Although a subsequent High Court ruling reinstated the six members pending the outcome of their legal challenge against the investigation, the

2.3 From Coercing to Complementing

Whereas the threat of ICC intervention was clearly a catalyst for the attempted Special Tribunal in Kenya, the predominant driver behind the push for an ICD has been Chief Justice Mutunga. Following the STK's defeat, domestic leadership on the issue of accountability for electoral violence has migrated almost totally to Kenya's judicial branch, particularly in the wake of the 2013 election of Kenyatta and Ruto, former political rivals who aligned, under the banner of the Jubilee Alliance, in opposition to the ICC proceedings.[561] The establishment of an ICD is also more feasible than any attempt to revisit the failed special tribunal as that would require parliamentary assent, a political impossibility at this point.

While the ICD remains a distant prospect in Kenya, the discourse there, as in Uganda, has shifted away from a threat-based model of complementarity to one that instead sees the Division as an extension of the ICC's work, rather than an alternative to it. The JSC report appears to endorse, for example, a burden-sharing model of complementarity, wherein the ICD would "try middle and lower perpetrators of crimes against humanity as related to the post-election violence period," while the ICC deals with those "who bear the highest responsibility for crimes against humanity that were perpetrated against citizens."[562] Aimee Ongeso of the Nairobi-based NGO Kituo cha Sheria, similarly writes that, "The ICD should be seen as complementary to the International Criminal Court that only holds those who bear the greatest responsibility to account."[563] The ICC's outreach coordinator in Kenya has also said that the division would "serve the important role of complementing the ongoing ICC work." In her words, "It is not a question of comparing the ICD and the ICC. It is a question of the complementing role the two institutions can play to bring about justice to victims. It is our hope that the ICD will meet international standards."[564]

3. Democratic Republic of Congo

Like the A&R Agreement in Juba and the National Accords in Kenya, the Sun City Accords—the 2002 peace agreement that brought a nominal end to the DRC's long-running conflict—also foresaw the creation of accountability mechanisms for atrocity crimes.[565] In December 2002, participants in the Inter-Congolese Dialogue (I-CD),

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allegations have further stalled steps that the JSC might take towards establishing the Division. See Mathews Ndanyi, "Setbacks for Kenya's Special Court," *Institute for War & Peace Reporting* (23 December 2013), at http://iwpr.net/report-news/setback-kenyas-special-court.

[561] See JSC Report, 32, 40. The report notes that, "The JSC now finds itself in the position of having to play a gigantic and momentous historic role of putting in place mechanisms to deal with and eliminate the culture of impunity that has for years been deeply ingrained in the socio-political fabric of the Kenyan society."

[562] JSC Report, 98.

[563] Aimee Ongeso, "An International Crimes Division in Kenya's High Court: Meaningful justice or a white elephant?," VRWG Bulletin 22 (Spring 2013), 3.

[564] Nzau Musau, "ICC welcomes international crimes court in Kenya," *The Star*, 7 February 2014 (quoting Maria Mabinty Kamara).

[565] There is a vast literature on the conflict in the DRC, which is not recounted here. Useful texts consulted for this dissertation are Filip Reyntjens, *The Great African War: Congo and Regional Geopolitics, 1996-2006* (Cambridge: Cambridge University Press, 2009); Jason K. Stearns, *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa* (New York: PublicAffairs, 2011); Michael Deibert, *The Democratic Republic of Congo: Between Hope and Despair* (London: Zed Books, 2013); and David van Reybrouck, *Congo: The Epic History of a People* (London: Fourth Estate, 2014). Notably, the ICC's presence in the DRC is

meeting in Sun City, South Africa, reached a Global and Inclusive Accord (*Accord Global et Inclusif*) that included recommendations regarding the establishment of a truth and reconciliation commission and an international special tribunal for war crimes in the DRC.[566] Subsequently, in September 2003, the transitional government approved a decision to refer the situation in the DRC to the ICC, and to request the creation by the UN Security Council of an international special tribunal to deal with crimes that fell outside the Court's jurisdiction.[567] Little is known about the DRC's truth commission other than that its mandate ended in controversy in 2007, having opened no enquiries during its tenure and awarded no reparations.[568] One commentator has noted that, the "presence of belligerents" in the TRC and the "lack of public engagement" in its creation, "fundamentally undermined it from the start."[569]

3.1 Complementarity as Cooperation

In 2004, President Kabila formally referred the situation to the ICC, initiating an engagement that has produced the greatest amount of prosecutorial and judicial activity for the Court to date.[570] Yet whereas complementarity had an important coercive dimension in both Uganda and Kenya, this was not the case in the DRC. Indeed, from the outset, both the OTP and the Congolese government envisaged the ICC's intervention as a burden sharing arrangement between international and domestic jurisdictions. As Kambale has argued, the Court's intervention in the DRC was premised on a "clear division of labour whereby the ICC would prosecute a handful of individuals among those bearing the greatest responsibility, while the Congolese justice system, with the support of the international community, would take on other cases."[571]

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barely mentioned (or mentioned only in passing) in most of these texts; of them, Deibert engages most with Court developments in the context of the continued fighting in eastern DRC.

[566] The Commission on Peace and Reconciliation—one of the five commissions established under the ICD—had been tasked with "recommending measures to ensuring lasting peace within the national borders and security in the region." The Commission's recommendations were adopted by all I-CD delegates. See P. Bouvier and F. Bomboko, *Le Dialogue intercongolais, anatomie d'une négociation à la lisière du chaos*, Cahiers africains No 63-64, (Paris: L'Harmattan, 2004), 177-78.

[567] Ibid.

[568] Very little has been written about the DRC's truth commission although its performance was deeply criticized in the UN's Mapping Report's in 2010. See "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003" (August 2010), paras. 1063-1072, ("UN Mapping Report") at http://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf.

[569] Laura Davis, "Power shared and justice shelved: the Democratic Republic of Congo," *The International Journal of Human Rights* 17(2) (2013), 302. Notably, the Kenyan truth commission was met with similar criticism over the initial appointment of Ambassador Bethuel Kiplagat as its chair. Many human rights groups argued that Kiplagat was himself linked to human rights violations that the truth commission was expected to investigate, damaging its credibility from the outset. See Kimberly Lanegran, "The Kenyan Truth, Justice and Reconciliation Commission: The Importance of Commissioners and Their Appointment Process," *Transitional Justice Review* 1(3) (2015), 42.

[570] Letter of Referral from President Joseph Kabila to Prosecutor of the ICC (Kinshasa, 3 March 2004), ICC-01/04-01 /06-32-US-Exp-AnxAl 12-03-2006 1/1UM (letter reproduced as Appendix I in Godfrey Musila, "Between rhetoric and action: The politics, processes and practice of the ICC's work in the DRC" (Institute for Security Studies Monograph 164, July 2009), 79-80).

[571] Pascal Kalume Kambale, "A Story of Missed Opportunities: The Role of the International Criminal Court in the Democratic Republic of Congo," in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015).

The elements of such an arrangement were outlined in the letter that the OTP sent to President Kabila to seek his referral of the situation in the DRC in September 2003:

> Since the International Criminal Court will not be in a position to try all the individuals who may have committed crimes under its jurisdiction in Ituri, a consensual division of labor could be an effective approach. We could prosecute some of those individuals who bear the greatest responsibility for the crimes committed, while national authorities, with the assistance of the international community, implement appropriate mechanisms to deal with others. This would send a strong sign of the commitment of the Democratic Republic of the Congo to bring to justice those responsible for these crimes. In return, the international community may take a more resolved stance in the reconstruction of the national judiciary and in the re-establishment of the rule of law in the Democratic Republic of the Congo.[572]

The referral echoed Prosecutor Moreno-Ocampo's speech to the Assembly of States Parties earlier that month, where he noted that the Court and the DRC "may agree that a consensual division of labour could be an effective approach." He added:

> The Office could cooperate with the national authorities by prosecuting the leaders who bear most responsibility for the crimes. National authorities with the assistance of the international community could implement appropriate mechanisms to deal with other individuals responsible.[573]

The OTP's announcement of the formal opening of investigations in June 2004—in which Moreno-Ocampo stated that his office would target only those "people that bore the highest responsibility"—reinforced the intention to pursue a joint approach.[574]

As a catalyst for accountability, then, complementarity in the DRC was envisioned less as a coercive arrangement than a cooperative one. Other benefits were also seen to accrue from this relationship, including the promise of state cooperation and a "positive" role for the Court in helping to build the state's own capacity and will to undertake prosecutions. Unfortunately, as has been noted, this vision of the OTP's role largely failed to materialize: little of the skills or knowledge transfer that was envisioned took place. One official in Kinshasa (responsible for overseeing requests between the DRC and the ICC) characterized the Court's approach as "a one-way street," with

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[572] "Letter from Prosecutor Luis Moreno-Ocampo to H.E. Joseph Kabila, President of the Democratic Republic of Congo," 25 September 2003 (quoted in Kambale, "The ICC and Lubanga: Missed Opportunities.") Kambale notes that former Minister of Justice Ngele Masudi articulated this vision as well. In opening remarks at a meeting on the ICC in October 2002, he "indicated that the government's strategy to address war crimes was based on the principle of complementarity, by which he meant that the DRC would leave to the ICC the task of prosecuting those in the top leadership of armed groups who bore the greatest responsibility for crimes under the ICC jurisdiction, whereas the Congolese justice system would deal with the lower ranking perpetrators and the less complex crimes." Ibid. Clark likewise argues that, "the Prosecutor and other OTP personnel engaged in lengthy discussions with the President's office in Kinshasa, outlining the domestic political benefits of ICC investigations into serious crimes." See Clark, "Chasing Cases," 1188.

[573] Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, 8 September 2003, at http://www.icc-cpi.int/NR/rdonlyres/C073586C-7D46-4CBE-B901-0672908E8639/143656/LMO_20030908_En.pdf.

[574] OTP Press Release, "The Office of the Prosecutor of the International Criminal Court opens its first investigation," ICC-OTP-20040623-59, 23 June 2004.

information flowing to The Hague but not in reverse.[575] Similarly, as noted in chapter three, the OTP took a strong line against cooperation in the *Katanga* litigation, stating that, "the ICC was not created to be an international investigative bureau with resources to support national authorities."[576] Finally, over time, it became clear that the individuals for whom the Court had issued warrants were far from those who bore the highest responsibility.[577] Amidst pressure to begin bringing cases, the promise of a division-of-labor between the Court and the DRC proved difficult to implement in practice.

3.2 Special Chambers/Court

The attempted creation of a special tribunal for the DRC for crimes committed dating back to 1993 reached a political turning point in late 2010, six years after the ICC began its investigations. The political momentum for what later came to be called the "Special Court" proposal owed largely to the publication in August 2010 of a long-awaited "mapping" report on crimes committed between 1993-2003 in the DRC by the UN Office of the High Commissioner for Human Rights, which explicitly endorsed the creation of a "mixed judicial mechanism – made up of national and international personnel – [as] the most appropriate way to provide justice for the victims of serious violations."[578] More generally, the report lent renewed interest and impetus for the establishment of a domestic accountability mechanism, and prompted increasing pressure from international actors as well. The United States, in particular, put significant political weight behind the idea, building upon the momentum of a visit by former Secretary of State Hillary Clinton to the eastern Congo in 2009.[579] To that end, in November 2010, the Ministry of Justice circulated a government-sponsored bill (*projet de loi*) for the creation of so-called *chambres specialises* ("Special Chambers").[580]

The chief architect of the *projet de loi* was the DRC's then Minister of Justice, Luzolo Bambi Lessa, although it was heavily influenced by the input of a number of international organizations. Though "clearly unfinished" when it was first circulated, the Ministry signaled unusual openness to external actors, convening a multi-sector conference of international and national NGOs to discuss improvements shortly after the bill was circulated.[581] The initial draft prepared by the government made clear that the chambers were intended to function within the existing court systems, although it

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[575] Interview with Colonel Muntanzini, Kinshasa, 27 June 2011. The Colonel noted in particular that one request for information had been made (in writing) to the OTP but, after an initial exchange, it was not followed up on.

[576] OTP Response to Katanga Admissibility Challenge, paras. 100-101.

[577] See, e.g., Clark, "Chasing Cases," who argues that, "Lubanga is at best a middle-ranking perpetrator, with more senior regional actors responsible for the crimes committed," 1191. Indeed, the Pre-Trial Chamber appeared to raise similar concerns when, following Lubanga's confirmation hearing, it stated that the OTP's charges failed to recognize the international nature of the conflict in eastern DRC, given the involvement of Rwanda and Uganda in arming opposition groups. See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision sur la Confirmation des Charges, ICC-01/04-01/06-806, PTC I, 5 February 2007.

[578] See UN Mapping Report, paras. 61-63.

[579] Interviews in the DRC confirmed that U.S. support for the mechanism was the most aggressive, in spite of persistent concerns about harmonization of the proposed *projet de loi* with Rome Statute implementing legislation.

[580] In the DRC, a *projet de loi* is a government supported draft law endorsed in most cases by by the Ministry of Justice. A *proposition de loi* is, by contrast, brought before Parliament by one or more parliamentarians, usually without government support (and occasionally with its explicit disapproval.) The Special Chambers legislation was a *projet de loi*, while the Rome State implementation legislation (discussed in chapter six) was a *proposition de loi.*

[581] Interview with EUPOL official, Kinshasa, 23 June 2011.

contemplated the possibility of appointing foreign judges and other international staff; hence, the proposal for "mixed" chambers. Following extensive input from international and Congolese human rights NGOs, a three-member drafting committee that was appointed to collate the proposals of the stakeholders submitted a report that recommended the establishment of such a mechanism.[582] This proposal was later endorsed in the final version of the bill drafted by the Congolese Law Reform Commission, which submitted it to the National Assembly in April 2011.[583]

While non-state actors and donor states invoked complementarity in a literal sense in support of the Special Chambers proposal, government documents do not use the term at all. Instead, the Ministry of Justice's rationale for the proposal (*exposé des motifs*) as presented to the National Assembly is a litany of the ICC's failings and an indictment of the international community.[584] Of the latter, the Ministry's note recalls the I-CD's support for a UN Security Council-sponsored tribunal to deal with crimes that fell outside of the ICC's jurisdiction. It states that President Kabila "pleaded" for the creation of such a tribunal but that his "request was ignored by the United Nations and the international community," leaving the DRC government to "give up" on the proposal for reasons of "feasibility, resources and finances, notably in the absence of support for the international community."[585] Having observed the international community's "reticence" for the creation of international criminal tribunals, and in light of these tribunals' "mitigated results," the proposal further stated that the responsibility to prosecute grave crimes now "returns to Congolese jurisdictions, through the establishment of specialized chambers within [those] jurisdictions."[586] It also referenced the publication of the UN's mapping report as indicating a new, "positive international dynamic, which the DRC intends to support for the repression of international crimes."[587]

The government's characterization of the ICC is more scathing. The Ministry's proposal states that the Court's engagement in the DRC could not produce "the desired results," and that the cases it has pursued "do not realize the magnitude of the [impunity] deficit."[588] To that end, a separate document prepared for donor states in June 2011 presented the *projet de loi* as a necessary alternative to the ICC, which, despite "nine years of cooperation with the DRC, has only realized three or four prosecutions, while the violence continues."[589] The document further criticized the ICC for entertaining the

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582 Ibid.

583 Patryk Labuda, "The Democratic Republic of Congo's Failure to Address Impunity for International Crimes: A View from Inside the Legislative Process 2010-2011," International Justice Monitor, 8 November 2011, at http://www.ijmonitor.org/2011/11/the-democratic-republic-of-congos-failure-to-address-impunity-for-international-crimes-a-view-from-inside-the-legislative-process-2010-2011/. The DRC Parliament is bicameral: the National Assembly is the lower house and was established by the 2006 Constitution; the Senate is the upper house.

584 "Projet de Loi Relative Aux Chambres Spécialisées pour la Répression des Violations Graves du Droit International Humanitaire: Organisation, Fonctionnement, Droit Applicable, Compétence et Procédure" (11 April 2011) ("Projet de Loi") (on-file).

585 Ibid., 1 (author's translation).

586 Ibid.

587 Ibid., 2

588 Ibid., 1. The note concludes: "The ICC cannot, and is not intended, to judge all of these crimes; other mechanisms must be put in place."

589 Comite Mixte de Justice, "Compte Rendu de la Réunion Politique du Comite Mixte de Justice," 28 June 2011, 3 ("CMJ Note") (on-file). Like JLOS, the Comite Mixte de Justice was established in an effort to coordinate government and international donor priorities and management. Interview with CMJ official, Kinshasa, 28 June 2011.

asylum petitions of three Congolese nationals who were transferred to The Hague to serve as defense witnesses in the Lubanga and Katanga/Ngudjolo Chui trials.[590] In doing so, "the Court encroached on the jurisdiction of the DRC in its role as state party despite its exemplary cooperation with the ICC." In its only (indirect) reference to complementarity, the government noted that, while it still maintains a "wise policy" towards the ICC despite "the treatment inflicted upon it," in the coming days it would appear "before Parliament to present its views on the jurisdiction of the ICC in relation to Congolese national jurisdiction."[591] The government also noted that the proposed hybrid court would "be a good accompaniment to the [forthcoming] electoral process," in order to "prevent the disturbances" that could arise as a result of "certain political ambitions."[592]

Notwithstanding the executive branch's support for a national approach to accountability and its withering critique of the ICC, most parliamentarians were deeply wary of the *projet de loi*. In addition to the political implications, they were unsettled by the swiftness with which the proposed legislation was being pushed, as well as the outsized role of external actors in amending it.[593] Moreover, important questions about the structure of the chamber, its scope of jurisdiction, and the applicable law—including its proposed relationship to Rome State implementation legislation, which was being considered at the same time through a separate bill—had yet to be resolved. Indeed, although the *projet* was being increasingly presented as a rival to the implementation legislation that had been proposed, it was clear that both bills complemented each other.[594] Amidst these continued concerns, substantive debate was tabled until the last day of the Assembly's spring session.[595]

In the face of these criticisms and in a desire to push the legislation through, Kabila's government adopted a series of extraordinary measures. It first opted to have Minister Luzolo present a different authorization law (*loi de habilitation*) directly to the Senate, effectively bypassing the Assembly.[596] This law asked the Senate to grant the executive exceptional powers to legislate in a number of areas of "heightened importance," of which the proposed court was part, in advance of the presidential elections later in the year. This effort failed, but the Ministry of Justice then made a renewed effort at passage by putting the legislation on the agenda of a special summer session of Parliament.[597] A moderately revised version of the bill—rather than Special

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[590] On the applications of these three witnesses and the ensuing proceedings, see Jennifer Easterday, "Asylum Applicants Must be Returned to the DRC, Trial Chamber Orders" (8 December 2011), at http://www.ijmonitor.org/2011/12/asylum-applicant-must-be-returned-to-the-drc-trial-chamber-orders/.
[591] CMJ Note, 4.
[592] The government also presents the non-execution of ICC arrest warrants in explicitly political terms, noting Uganda's failure to arrest LRA members (the failure of which has "harmed the credibility of Congolese political governance") and the non-arrest of Bosco Ntaganda ("not because of the Congolese government but because the international community decided in 2006 that he could not be pursued") in the face of its own "exemplary" cooperation. Ibid.
[593] Interview with PGA consultant, Kinshasa, 27 June 2011.
[594] See, e.g., Human Rights Watch, "DR Congo: Commentary on Draft Legislation to Establish Specialized Chambers for Prosecution of International Crimes" (11 March 2011). HRW notes that, "the draft legislation creating the specialized chambers refers to the implementing legislation a number of times, as if it had already been passed, which is obviously not the case. These passages must be amended to avoid any possibility of legal gaps or inconsistency." Chapter six discusses the proposed implementation legislation in further detail.
[595] Interview with EUPOL official, Kinshasa, 23 June 2011.
[596] See Labuda, "The DRC's Failure to Address Impunity for International Crimes."
[597] Ibid.

Chambers, the proposal now called for a stand-alone "Special Court"—was thus presented in August 2011.

The Senate rejected the proposed *Court Spécialisée* in strong terms, characterizing it as an intrusion by the international community in the DRC's internal affairs.[598] Notwithstanding this opposition, the President of the Senate, Leone Kengo wa Dondo, forced the bill through to the Senate's Political, Administrative and Judicial (PAJ) Committee.[599] The senators there rebelled as well, objecting to the attempted circumvention of established parliamentary procedure. In strong words, the Committee rejected the bill outright, recommending that any such legislation should be merged with the Rome Statute implementing legislation.[600] (That bill, whose deadline for parliamentary approval had since lapsed, was absent from this agenda.) Committee members also voiced serious concerns about the potentially unsettling impact that the bill would have on the Congolese judiciary, raising questions about the compensation of foreign judges, the treatment of international magistrates alongside Congolese magistrates, and the orientation of resources and attention around a select number of crimes to the detriment of the legal system as a whole.[601]

The exceptional powers invoked by the executive in its attempt to force legislative assent of the Special Court bill underscores the degree to which Kabila's government saw its establishment as a necessary concession to demands for accountability, particularly with presidential elections looming. Concerns articulated by a number of national actors and NGOs that the legislation needed further refinement were largely ignored, however, and the legislation was generally seen as a rushed effort driven by outside actors. In Kambale's words, "a number of senators felt that the campaign amounted to an international conspiracy against Congolese sovereignty."[602] The failure to connect the Special Chambers bill with Rome Statute implementing legislation, explored further in the following chapter, was also a concern, making it appear "as if the government was acting precipitously and only because the international community was demanding action."[603]

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[598] Press Release FIDH/ASADHO/GL/LE, "RDC: Les sénateurs torpillent le projet de loi dur la Court spécialisée mixte," 23 August 2011 (on-file).
[599] Interview with EUPOL official, Kinshasa, 23 June 2011. Kengo wa Dondo reportedly stated that, "If you don't approve it now, the UN will force you to do so anyway."
[600] République Démocratique do Congo Senat, Commission Politique, Administrative et Juridique, Session extraordinaire d'aout 2011, "Rapport Relatif a l'Examen du Project de Loi Portant Création, Organisation et Fonctionnement de la Court Spécialisée Chargée de la Répression des Crimes de Génocide, Crimes de Guerre et des Crimes Contre l'Humanité" (August 2011) ("Rapport Relatif au Projet de Loi") (on-file).
[601] Ibid. (author's translation).
[602] Pascal Kambale, "Mix and Match: Is a hybrid court the best way for Congo to prosecute international crimes?," *Openspace* (February 2012), 65. In May 2014, the National Assembly rejected another proposal that envisaged setting up special chambers within the DRC's existing court system. Despite a less intrusive approach by many international NGOs to this proposal, concerns over sovereignty again loomed large, as "MPs [remained] increasingly wary of any suggestion of external influence in the management of Congolese internal affairs, including in [the] justice sector." Lack of consultation between the government and MPs was also an issue, amidst concerns by MPs that they "not be taken for granted." For helpful analysis of this period, see Nick Elebe ma Elebe, "Why DRC Lawmakers Again Rejected Special Chambers to Prosecute International Crimes" (23 May 2014), at http://www.ijmonitor.org/2014/05/drc-a-bill-on-special-chambers-rejected-for-the-second-time/.
[603] Ibid., 66.

3.3 Military/Mobile Courts

In the absence of a special tribunal or mixed court, military courts remain the sole arbiter of international crimes in the DRC. In 2002, the government ordered an overhaul of the legal framework for its military court system, granting its courts exclusive jurisdiction over international crimes. Military courts have a long history in the DRC, however, dating back to the founding of the Congolese colonial state.[604] The system has undergone numerous transformations since that time, including the introduction of a *code de justice militaire* (code of military justice) in 1972. This code, Marcel Wetsh'okonda Koso notes, "organized the military courts for the first time into a complete judicial system, distinct from that of ordinary courts."[605]

Military justice thus became increasingly normalized in the post-1972 period. Efforts to reform the system—recognizing, for instance, its independence from the prosecutor's office—were attempted in the early 1990s with the onset of a democratic opening in Congolese society, but were largely ignored following Mobutu's fall from power.[606] Indeed, in 1997, the new regime of then President Laurent Kabila established a single court, the *Court d'Ordre Militaire* (COM), "which reduced the independence of magistrates and wrecked the organization, procedures and jurisdiction of the military justice system."[607] During this time, the courts' jurisdiction was progressively extended to encompass, in certain cases, civilians as well.

Growing criticism of the COM's abuses helped augur further change in 2002, when the Inter-Congolese Dialogue adopted a resolution on reform of the system. This led, in turn, to the adoption of the new *code de justice militaire* and *code penal militaire* (military criminal code). The DRC ratified the Rome Statute that same year as well, providing the ICC with the possibility of prosecutions for grave crimes committed post-2002. Notably, the *code penal militaire* incorporates, in large part, the Rome Statute's crimes (discussed in further detail in chapter six), but none of these crimes have yet been incorporated into the country's civil criminal code.[608] Military courts therefore retain exclusive subject matter jurisdiction over international crimes, even as deep criticism about their lack of independence from the executive remains. It is particularly noteworthy that, since 2002, the system has "extended its material and personal jurisdiction to a degree unprecedented in its history," including over civilians.[609]

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[604] "The Democratic Republic of Congo: Military Justice and Human Rights – An urgent need to complete reforms," A Review by AfriMAP and Open Society Initiative for Southern Africa (OSISA, 2010), 17.
[605] Ibid., 18.
[606] The *Conférence nationale souveraine* (Sovereign National Conference) that took place from 1991-1992 focused on the military justice system in particular, and made several recommendations for reform, including abolishing the "double supervision of military courts by both the Defense and Justice ministries," as well as ensuring the independence of military magistrates from the high command. Ibid., 19; see also Deibert, 39-40.
[607] Ibid.
[608] Code Penal Militaire, Arts. 164-66, 173-75. In June 2015 (with presidential elections again looming), the National Assembly/Chamber of Deputies voted for the adoption of a "Law to Implement the Rome Statute" in the domestic legal order, following a re-tabling of the 2008 draft legislation in September 2012 by Prof. Balamage MP. At the time of writing, the bill has not yet passed the Senate. See Patryk Labuda, "Whither the Fight Against Impunity in the Democratic Republic of Congo?" (24 June 2015), at https://justicehub.org/article/whither-fight-against-impunity-democratic-republic-congo.
[609] "The Democratic Republic of Congo: Military Justice and Human Rights – An urgent need to complete reforms," 17. Jurisdiction over civilians was justified, for instance, by broad, vaguely defined clauses that include civilians accused of ordinary crimes committed merely with "weapons of war." See Amnesty

It is difficult to ascertain how many military trials have been conducted in the DRC to date; no official record is kept. A study published by Avocats Sans Frontiers in 2009 identified 13 atrocity-related trials held by military courts between 2004 and early 2009, concerning a total of 188 defendants belonging either to the DRC's regular army or to non-state armed groups.[610] Wetsh'oknda Koso suggests a similar figure,[611] although a more recent article notes that, since 2011, "military courts have tried some 8,000 cases of sexual violence committed by soldiers."[612] Most of these proceedings have been by so-called "mobile courts" (*chambres foraines*), meaning that the courts themselves travel to remote jurisdictions to conduct trials.[613]

Mobile courts have received increasing attention as a rule-of-law intervention amongst international donors, leading some commentators to wrongly suggest that they are a recent innovation. In fact, Congolese law specifically provides for their operation and has long done so.[614] The Open Society Justice Initiative, which provided financial support for mobile courts operating in the DRC's Kivu region, describes the courts as "not new in Congo; they have long been used by the central government to administer justice in its remote interior."[615] Wetsh'okonda Koso further notes that because the jurisdiction of the basic military courts (*tribunaux militaires de garnison*) is set at district level, accessing them is often difficult: they are typically situated far from the places where offenses are committed. Thus, "practically all the trials for international crimes recorded up to this point have been arranged as a result of hearings in the mobile courts."[616]

To date, the courts largely operate in the eastern part of the DRC, where intense fighting has continued despite the 2002 power-sharing agreement. One of the largest programs to date has been run by the American Bar Association's Rule of Law Initiative (ABA-ROLI).[617] Operating principally in the North and South Kivu regions of the

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International, "The Time for Justice is Now: New Strategy Needed in the Democratic Republic of Congo: Summary," AFR 62/007/2011 (August 2011).

[610] See Avocats Sans Frontieres, "The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo" (2009), 100-112.

[611] Marcel Wetsh'okonda Koso, "La contribution de la justice militaire reformée a la lute contre l'impunité en République démocratique du Congo dix ans après: essai de bilan et perspectives d'avenir" (on-file).

[612] Louise Jones, "The rape trial of Colonel 106: a test for Congo's military justice," *International Justice Tribune* No. 165, 10 September 2014; Stephanie van den Berg, "Praise for historic Congo rape conviction," *International Justice Tribune* No. 170, 11 December 2014.

[613] While mobile courts can also sit as civilian tribunals, they have largely been convened as military proceedings. Interview with Marcel Wetsh'okonda Koso, Kinshasa, 21 June 2011.

[614] Article 67 of the Code d'Organisation et de Compétence Judiciaire. An interlocutor active in one mobile court program noted that provisions for such courts exist in other African Francophone countries as well, and that the concept "gave rise" to the existence of circuit court in the United States. Interview with ABA-ROLI staff member, Washington, D.C., 12 February 2014.

[615] "Fact Sheet: DRC Mobile Gender Courts," at http://www.opensocietyfoundations.org/sites/default/files/mobile-court-20110725.pdf.

[616] "The Democratic Republic of Congo: Military Justice and Human Rights," 33.

[617] In a published paper, the ABA notes that the program initially began in January 2008 and was funded by the U.S. Department of State's Bureau of Human Rights, Democracy and Labor. Tessa Khan and Jim Wormington, "Mobile Courts in the DRC: Lessons from Development for International Criminal Justice," Oxford Transitional Justice Research Working Paper Series, 19. 18, n.93. US AID is no longer the primary grantmaker: ABA-ROLI now sub-partners (or has partnered) with a number of other organizations, including the Open Society Foundations (for a program begun in South Kivu in late 2009), as well as USAID, the Norwegian Ministry for Foreign Affairs, and The Netherlands. These programs focus on the provinces of Maniema and North and South Kivu. Ibid., n.84. For an overview of various donors engaged in mobile courts, see also *Putting Complementarity in Practice: Domestic Justice for International Crimes in DRC,*

country, two ABA-ROLI attorneys write that the courts "are deployed to remote locations to enable access to justice for victims unable to travel to courts in town and cities."[618] They add:

> Everything about the courts is temporary: the court is housed in a community centre or town hall, with magistrates, a registrar, a bailiff, defence attorneys and lawyers brought in from the closest towns and cities. Mobile courts remain in a given location for a period of between one and two months, hearing as many cases as possible. While the mobile courts are primarily established to hear cases relating to sexual violence, they do deal with other matters affecting the community.[619]

Informational material by donor organizations further describes the need for a "specialized approach" to the endemic sexual violence in the DRC region. However, while the courts' specialization in gender issues is what "distinguishes" them, they also have "discretion to hear other cases," such as murder and torture.[620]

The mobile courts have achieved some notable convictions and they have also, in certain instances, applied provisions of the Rome Statute directly.[621] One of the most prominent cases to date was the trial in February 2011 of Colonel Kibibi Mtware, who was sentenced, along with ten of his commanding soldiers, to lengthy jail terms for their involvement in a mass rape (as a crime against humanity) in the town of Fizi, in South Kivu province, on New Year's Day in 2011.[622] Kibibi was the first commanding officer in the DRC to be so convicted; in so doing, the court applied the Congolese military criminal code. Another trial to receive significant attention was the conviction of Lieutenant Eliwo Ngoy and his co-defendants for crimes against humanity, for mass rapes committed in the town of Songo Mboyo in 2003. Sitting in Mbandaka, the capital of Équateur province, the court chose, in a novel development, to apply the Rome Statute directly in convicting the defendants, rather than Congolose national law.[623] A 2014 judgment of a military court sitting in Goma, North Kivu similarly applied the Rome Statute in the convictions of 26 (out of 39) members of the Congolese armed forces for acts of looting and pillaging committed in the town of Minova in November

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Uganda, and Kenya (Open Society Foundations, 2011), 55-56; see also Passy Mubalama, "Roving Courts in Eastern Congo," *Institute for War & Peace Reporting* (13 February 2013).

618 Khan and Wormington, 19.

619 Ibid.

620 "Mobile Gender Justice Court," Women's UN Report Network. In informational material, OSF similarly writes that, "The court, which is staffed entirely by Congolese and functions within the Congolese judicial system, also has flexibility—it has the discretion to hear other serious crimes, including murder and theft." See "Justice in DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo."

621 For an invaluable account of several such judgments, see Elena Baylis, "Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks," *Boston College Law Review* 50(1) (2009), 72. Amongst international NGOs, Avocats sans Frontières has worked perhaps most closely with the DRC's military justice system, conducting extensive trainings for judges and prosecutors of the military tribunals on the ICC and the Rome Statute. See, e.g, Avocats Sans Frontières, "Promoting Complimentarity [sic] in the Democratic Republic of Congo (document prepared for the 2010 Rome Statute Review Conference); see also "Recueil de Décisions de Justice et de Notes de Plaidoiries en Matière de Crimes Internationaux" (on-file).

622 Kelly Askin, "Fizi Mobile Court: rape verdicts," *International Justice Tribune* No. 123, 2 March 2011.

623 For the full Songo Mboyo judgment, see ASF, "The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo."

2012, following their expulsion from Goma by M23 rebel groups.[624] Notably, while widespread rape and sexual assault were perpetrated upon local civilians as well, the court delivered only two rape convictions.

As with courts in Uganda and Kenya, the ICC and complementarity loom large in descriptions of the DRC's mobile courts program. The courts are typically depicted as completing and "complementing" the work of the ICC, even if, as elsewhere, there is little to any coordination or cooperation between them.[625] Mark Ellis writes (incorrectly) that the courts were created to "prosecute persons who committed crimes under the ICC's jurisdiction," while Khan and Wormington describe the mobile courts as unfolding "alongside" the ICC's efforts."[626] In a similar vein, the Open Society Justice Initiative explains that the mobile court was "designed … to support the concept of 'complementarity'—the principle that domestic courts have the primary responsibility to investigate and prosecute serious crimes—and hence to complement the work of the International Criminal Court in The Hague, which is tasked with prosecuting high level suspects otherwise outside the capacity of the domestic court system."[627] Kelly Askin, senior legal officer at the Justice Initiative, also suggests a burden-sharing relationship between the ICC and the mobile courts, with the former "going after the highest level accused often out of reach of domestic jurisdictions - and the local courts, including mobile courts, going after lower level suspects."[628]

4. Three Concerns

The attempted transformation of domestic judiciaries for the prosecution of atrocity crimes highlights the shifting, protean nature of complementarity. As the histories of Uganda and Kenya suggest, an initially threat-based relationship with the principle—spurred by the potential of ICC intervention—catalyzed efforts to establish credible bodies that could potentially displace the Court's jurisdiction. Over time, however, complementarity has become a harmonious principle—a way to narrate the ICC's influence on domestic jurisdictions even when the Court is itself absent. Many criminal justice and human rights advocates welcome the development of such specialized domestic fora, seeing their establishment as a step towards accountability, as well as an opportunity to invest in the successful functioning of the broader national

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[624] Milli Lake, "After Minova: Can War Crimes Trials Overcome Violence in the DRC?" (8 May 2014), at http://africanarguments.org/2014/05/08/after-minova-can-war-crimes-trials-overcome-violence-in-the-drc-by-millie-lake/.

[625] Interview with Congolese magistrate at High Military Court, Kinshasa, 28 June 2011; interview with ABA-ROLI staff member, Washington, D.C., 12 February 2014. As an example of this descriptive tendency, see Mubalama, "Roving Courts in Eastern Congo" ("The mobile courts complement the work of the International Criminal Court, ICC, in The Hague … In parallel with its own investigation, the ICC has a policy of encouraging local judicial systems to develop their ability to try cases of this kind.")

[626] Ellis, *Sovereignty and Justice*, 247 ("In 2010, the [DRC] created mobile courts in the eastern part of the country to prosecute persons who committed crimes under the ICC's jurisdiction, particularly crimes involving sexual violence"); Khan and Wormington, 18. For a similar description, see Michael Maya, "Mobile Courts in the Democratic Republic of Congo: Complementarity in Action?", in Juan Carlos Botero, Ronald Janse, Sam Muller, and Christine Pratt (eds.), *Innovations in Rule of Law: A Compilation of Concise Essays* (HiiL and The World Justice Project, 2012), 33-36.

[627] "Fact Sheet: DRC Mobile Gender Courts."

[628] Askin, "Fizi Mobile Court: rape verdicts." A recent publication by the Southern African Litigation Centre is also representative: the DRC mobile courts are highlighted as a case study of "Complementarity in Action: The Mobile Gender Courts," in *Positive Reinforcement: Advocating for International Criminal Justice in Africa* (May 2013), 79-83.

legal system.[629] Yet tensions also beset these arrangements. In particular, the attention paid to initiatives like the ICD or the mobile courts—both of which are typically presented as extensions of the ICC's work, or even as legacies of its intervention—reflect a preference by some actors to focus more on the Court's purported "demonstration effects," rather than on the equal development of national judicial institutions overall.[630]

4.1 Special Courts for Special Crimes?

Exceptionalism—treating or giving something the status of being unique or special—has both positive and negative connotations in the context of criminal justice. Understood as the former, seeking criminal accountability for mass violence has typically required exceptional responses by the international community. Notable examples include the establishment of international ad hoc and/or hybrid tribunals, as well as the creation of "high risk courts" or even the exercise of military jurisdiction.[631] Exceptionalism may also be justified as an antidote: the failures of the "ordinary" criminal justice system necessitate the establishment of independent structures or, indeed, supra-national jurisdiction. As articulated by Wilfred Nderitu, former chair of ICJ-Kenya, in his testimony before the Waki Commission:

> We find that depending on who is heading a particular unit within the security agencies – then just by looking at him or by knowing what his name is in 90% of the cases you will be able to know what kind of decision he would make with regard to which particular community or you will be able to know whether he will turn a blind eye to something that is happening. So the issue of getting people who are not unduly affected by the politics behind the violence coming to help us, I think that … is very important.[632]

Nderitu's testimony illustrates the need for erecting mechanisms that function outside the normal structures of state. The creation of specialized institutions, personnel, and regulations can help inoculate transitional justice measures from the corrosive influence of a compromised justice sector but, more ambitiously, they also hold the potential to positively influence the development of the rule of law domestically.[633] Indeed, it was on this basis that the UN's "mapping" report recommended that a special mechanism in the

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[629] See, e.g., Jane Stromseth, "Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies," *Hague Journal on the Rule of Law* 1 (2009), 87-97; Victor Peskin and Eric Stover, "A hopeful future for Kenya," *Los Angeles Times* (7 June 2010) ("A fair and effective [domestic] tribunal will open the way to an independent judiciary, which is a cornerstone of the proposed constitution.").

[630] On "demonstration effect," see Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (Cambridge: Cambridge University Press, 2006), 259-261. For a through exploration of tensions between/among "transitional justice" practitioners and rule-of-law/development actors, see Padraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A contentious relationship* (Routledge Press, 2013). Bringing development and rule-of-law actors together in support of "implementing the complementarity principle" has been a topic of increasing focus in recent years, see, e.g., "Greentree Principles" of 2010.

[631] The creation of special jurisdictions is nevertheless understood to require the satisfaction of certain conditions under international law, in order to ensure equal and impartial proceedings. See, e.g., UN Human Rights Committee, General Observation No. 32, "Article 14: right to equality before courts and tribunals and to a fair trial," CCPR/C/GC/32, 23 August 2007.

[632] Record of Evidence Taken Before the Commission of Inquiry into Post-Election Vioelnce (CIPEV), 24 July 2008 (verbatim recording) (on-file). The historian Daniel Branch makes a similar point about the ICC's intervention: "The only way that Kenyans could expect to check the abuses of power of those in high office and find justice was through external intervention." Branch, *Kenya: Between Hope and Despair,* 288.

[633] For a fuller discussion of this debate, see Stromseth, Wippman and Brooks, *Can Might Make Rights?*.

DRC should also contribute to strengthening and rehabilitating the national justice system.[634]

Yet in each of the country contexts described, the institutional forms that have emerged (or been proposed) in the wake of the ICC's intervention raises concern about what several Congolese interlocutors called *la pérennisation*: the structure, resourcing, and functioning of these forms relative to the well-being of the broader domestic criminal justice system. As articulated by MP Danson Mugatana in his opposition to the proposed STK:

> We are going to have another court for the ordinary *mwananchi* who was sent to go and actualize the ideas of these bigger crime suspects … entrenching a system where we have a special procedure for those who are going to be eminent people or suspects and a different procedure for the ordinary.[635]

As institutions that are rooted, to varying degrees, within the domestic structures of the state, the ICDs of Kenya and Uganda, the proposed Special Chambers in the DRC, and the mobile military courts reflect broader tensions over the role of external actors in their design, as well as the priorities of donor benefactors vis-à-vis those of domestic actors.

4.1.1 DRC

The failed creation of the Special Chambers/Court in the DRC illustrates perhaps most directly the tension between the need for specialized jurisdiction and the concern for *la pérennité* of the broader justice system. The reasons enumerated by the Senate in its August 2011 rejection of the Ministry's bill illustrate the divergent views held by international and domestic actors over the benefit of such a mechanism. As noted, Committee members voiced serious concerns about the potentially unsettling impact that a Special Court would have on the Congolese judiciary and the risk that it would "lead to a duplication of jurisdictions."[636] The incorporation of international staff also appears to have been one of the main reasons for the Senate's rejection of the bill. In the Committee's words:

> The integration of foreign judges in this national jurisdiction, under the pretext of ensuring the effectiveness and independence of the judiciary, would appear to be an admission of powerlessness on the part of the Government, which itself has the duty to strengthen the capacities of Congolese judges and would be an insult to them.[637]

The Committee also noted that, "the adoption of a special status for the judges of this [Special] Court is likely to create discrimination between them on the one hand and the

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[634] UN Mapping Report, paras. 1038, 1044, 1055. Notably, the DRC's *projet de loi* also noted the ability of a "hybrid composition" to "reinforce the independence integrity and capacity of Congolese magistrates."
[635] STK Amendment Bill, MP Danson Mungatana.
[636] Rapport Relatif au Projet de Loi ("la creation d'une Cour specialisee avec les memes competences entrainerait un dedoublement de juridictions, avec risqué de litispendance") (author's translation).
[637] Rapport Relatif au Projet de Loi ("l'intégration des magistrats étrangers au sein de cette juridiction nationale, sous prétexte d'assurer l'efficacité et l'indépendance de la justice, apparaitrait comme un aveu d'impuissance de la part du Gouvernement charge de renforcer les capacités des magistrats congolais et serait une injure pour ces derniers") (author's translation).

other judges in other jurisdictions, on the other."[638] Opponents of the proposed STK raised similar concerns during parliamentary debates.[639]

In some respects, concerns about the Special Court's potentially distorting impact have been realized in the functioning of the DRC's mobile courts, where international donor influence looms large. Here, exceptionalism extends in particular to the predominant focus on sexual violence crimes. Severine Autesserre, a political scientist who has conducted extensive fieldwork in the DRC, argues that the sexual abuse against women and girls is one of several dominant narratives that have "dominated the discourse on the Congo and oriented the interventions strategies … of some of the most powerful states and organizations," such that other forms of violence are increasingly overlooked.[640] She further notes that, "according to donors and aid workers, sexual violence is such a buzzword that many foreign and Congolese organizations insert references to it in all kinds of project proposals to increase their chances of obtaining funding."[641] A 2012 study of the DRC mobile courts by two Dutch academics similarly warns of the deleterious effects that such a singular focus can have. They argue that, "Although mobile courts should see all kinds of cases, they are almost uniquely organized around sexual violence cases and, linked with the predominant perception that sexual violence is caused by armed perpetrators, they are mostly targeting military justice."[642]

Furthermore, while observers of the courts (many of whom are also funders) have noted that the mobile court proceedings meet fair trial standards, significant concerns remain about the independence of the Congolese military justice system. As a report of the Open Society Initiative for Southern Africa notes:

> [The] mobile court hearings are … sometimes not held in conditions that allow military judges to issue rulings in a faithful and conscientious way, and with complete freedom. This is the case when these hearings draw a significant crowd, and there is public pressure for the accused to be sentenced. Judges are then very strongly tempted to make decisions that will satisfy public opinion.[643]

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[638] Ibid. ("l'adoption d'un statut special en faveur des magistrats de cette Cour est de nature a creer une discrimination entre eux, d'une part et entre ceux-ci et les magistrats de autres juridictions, d'autre part") (author's translation).

[639] MP Danson Mungatana, for instance, spoke out against the 2009 Bill in similar terms:

> First and foremost, if you look at this tribunal, it is a huge monolith that is going to set up a parallel legal system in this country. If you look at the Bill that has been circulated, we are going to have several offices created. There is going to be the office of the public prosecutor, office of the defender, office of the registrar, a trial chamber, special prosecution court and an appeals chamber. This is a very big parallel structure to the legal system of Kenya that already exists (STK Amendment Bill, 40).

[640] Séverine Autesserre, "Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences," *African Affairs* (2012), 13. Autesserre argues further that these dominant narrative have "diverted attention from much more needed policy actions, such as the resolution of grassroots antagonisms, the fight against corruption, and the reform of the state administration," 11. For a similar argument in the context of the need for "local peacebuilding," see also Séverine Autesserre, *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding* (Cambridge: Cambridge University Press, 2010).

[641] Ibid.

[642] Nynke Douma and Dorothea Hilhorst, "Fond de Commerce? Sexual violence assistance in the Democratic Republic of Congo," Disaster Studies, Occasional Paper No. 2 (Wageningen University, 2012), 11, at http://www.wmm.com/filmcatalog/study/justice_report.pdf.

[643] "The Democratic Republic of Congo: Military Justice and Human Rights – An urgent need to complete reforms," 34-35.

The effective "sponsoring" of mobile courts by non-state actors, presumably eager to see the impact of their own investments, also raises questions about the influence of donor money on due process. As the 2012 study notes, "NGOs pay for lawyers on the side of victims, while suspects are usually left with unpaid, and hence unmotivated, public defenders. This enhances the possibility for suspects to be convicted regardless of the evidence that is presented."[644]

Finally, domestic advocates have expressed concern about the displacing effects of the mobile courts. One Congolese jurist noted that "ordinary" justice institutions are effectively stalled when the mobile courts are in session, as they draw personnel "from the closest towns and cities" away from those institutions for the duration of the time that the court is sitting.[645] Another publication refers explicitly to the courts as "palliative," noting their high cost and the fact that they depend almost entirely on the logistical assistance provided by MONUC, the UN's mission to the DRC.[646] Of their (relative) high cost, similar concerns have been expressed about the distortions such interventions can visit on the local economy, where the per diem offered for three days travel often well exceeds the compensation that a public court official would otherwise receive.[647] A 2009 needs assessment of the DRC's justice system similarly noted that, "since more international actors get involved in mobile courts initiatives, magistrates have started to demand additional pay before agreeing to participate."[648] While the *chambres foraines* are thus part of the Congolese system, the resources necessary to activate them may well come at the price of other rule of law building efforts.

4.1.2 Uganda

The permanence of a structure like Uganda's ICD is, in part, a response to concerns that the benefits of transitional justice mechanisms would not accrue to domestic justice systems. As Human Rights Watch describes it, "As a division of Uganda's High Court, the ICD is a fully integrated part of Uganda's domestic system, operating according to standard judicial procedure and practice."[649] Yet even such specialized divisions can produce tensions between and amongst other justice sector actors. In Uganda, for instance, the perception that the ICD is a "prized" Division,

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[644] Douma and Hilhorst, "Fond de Commerce?,"11. The authors further note that, "legal personnel receive compensation (*primes*) during mobile hearings from the NGOs."

[645] Interview with Congolese jurist, Kinshasa, 21 June 2011.

[646] "The Democratic Republic of Congo: Military Justice and Human Rights – An urgent need to complete reforms," 34-35.

[647] Interview with MONUSCO official, 23 June 2011. The Open Society Justice Initiative likewise notes, "Judges who are usually reluctant to accept remote postings have eagerly participated in mobile courts for the per diem payments." *Putting Complementarity into Practice*, 56.

[648] "Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo," An International Legal Assistance Consortium and International Bar Association Human Rights Institute Report (August 2009), 27. The report concludes that having mobile courts "run by the government, under specific and consistent guidelines, would contribute to solving the problem." Similar tensions are described in a2004 report of Human Rights Watch, concerning a joint effort, known as REJUSCO, spearheaded by the DRC government and the European Commission to restore the criminal justice system in Bunia, Ituri. The report notes that, judges and investigate judges' monthly stipend was " 'worse than meaningless'" as it did " 'not even cover 30% of … monthly needs.'" It recommends that all parties involved "should reaffirm the principle that the burden of paying the salaries of judicial personnel should be borne by the government." Human Rights Watch Briefing Paper, "Making Justice Work: Restoration of the Legal System in Ituri, DRC" (1 September 2004), 10.

[649]Human Rights Watch, "Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division" (January 2012), 18.

attracting not only the interest of international NGOs, advocates, and academics, but also donor money, has contributed to a sense that it enjoys a special status within the High Court structure.

What this status confers ranges from the level of the seemingly mundane to the potentially constitutional.[650] Several Ugandan jurists, for instance, pointed to the fact that ICD judges were receiving a paid legal assistant (something Ugandan judges do not traditionally use) as a form of patronage. Donors were in fact asked to consider supplemental funding for legal assistants for ICD judges in 2011, although this request was not funded (at the time).[651] Judicial "training" has been another site of institutional tension, as ICD judges have received extensive training on a variety of topics in international law.[652] The Institute for Security Studies, a think tank based in South Africa notes that, since March 2011, it 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 International Criminal Tribunal for Rwanda."[653] Given the resources invested in such trainings, concern has been expressed that the possible rotation of judges off of the ICD—an otherwise common practice within the High Court system—will now cause "a loss of developed knowledge and expertise in a specialized legal area."[654]

Funding is again intimately intertwined with these tensions. JLOS is ostensibly meant to serve as the Ugandan government's coordinating body for justice issues, but the interest in its transitional justice mandate, for which a working group was established in 2008, has attracted particular attention. Stephen Oola notes that JLOS "received significant donor money" in support of expediting the ICD's first trial (that of Thomas Kwoyelo, discussed further below) and, "with it, pressure to abandon its earlier roadmap towards a more comprehensive transitional justice process."[655] Nouwen concludes that the establishment of a division specialized in ICC crimes is yet another iteration of Uganda's expensive patronage system. In her words, "International donor money for such special bodies guarantees income outside the ordinary national budget," while

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[650] For instance, the JSC proposal that would vest jurisdiction for piracy and other transnational crimes with the Kenya's ICD would likely face a constitutional challenge at some point (or require a change in legislation), as currently such cases are handled at the magistrate's court level. Second interview with Kenyan NGO director, Nairobi, 3 December 2012. Similar constitutional issues are raised with special tribunals as well, as was the case in both Kenya and the DRC.

[651] In its recommendations to donors, Human Rights Watch included that they "consider prioritizing funding of legal assistants to support ICD judges." See "Justice for Serious Crimes Before National Courts," 27.

[652] See, e.g., *Putting Complementarity into Practice*, which notes that ICD judges, "have requested extensive additional trainings, including in plea-bargaining, as well as on-going trainings that address other particular challenges," 72.

[653] Max du Plessis, Antoinette Low, and Ottilia Maunganidze, "African efforts to close the impunity gap: Lessons for complementarity from national and regional actions," ISS Paper No. 241 (November 2012), 17, at https://www.issafrica.org/uploads/Paper241.pdf. Other trainings—by the Public International Law and Policy Group, International Criminal Law Services, the Institute for International Criminal Investigations, and the International Center for Transitional Justice—have likewise been offered to investigators and prosecutors.

[654] Human Rights Watch, "Justice for Serious Crimes Before National Courts," 20.

[655] Stephen Oola, "In the Shadow of Kwoyelo's Trial: The ICC and Complementarity in Uganda," in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015).
The sector secured over UGX 400m (apx. $115,000 USD) to initiate the Kwoyelo trial alone. See JLOS, "Annual Performance Report 2010/2011," 72.

domestic patronage networks are rewarded by "secondment to a body that promises training with sitting allowances, access to international networks and travel abroad as fringe benefits."[656] The repeated recommendation of international organizations that the ICD is "under-staffed and under-resourced"[657] arguably adds to the patronage potential of such bodies.

4.2 Mimicry and "International Standards"

While the creation of specialized judicial divisions invests them with an exceptional status in the domestic legal sphere, they also demonstrate a striking uniformity with the institutional form of justice that the ICC represents, promoting in Mark Drumbl's words, "the iconic status of the courtroom and the jailhouse as the best practice to promote justice in the aftermath of grave mass violence."[658] As chapter three argues, the ICC has abetted this process through a line of admissibility jurisprudence that privileges the "mirroring effect" of its procedures at the national level. Academics and policy makers have also encouraged this development, seeing it as salutary, an elevation of domestic criminal justice through greater adherence to "international standards." Ellis, for instance, posits that the "importance of stressing *international standards of justice* is paramount," while George Fletcher argues that "the long range-value of the ICC is that it will teach countries of the world how to do justice as they seek to apply repressive measures in the name of social protection."[659] Similarly, the European Commission, in assessing "whether impunity has been properly addressed," asks: "Is the existing normative framework [constitution, penal code, procedural code…) in line with international standards on justice?"[660]

The suggestion that ICC practice is to be copied, coupled with the message of mediating organizations that "international standards" and "best practices" must be met, has been effectively transmitted to influential actors in both Uganda and Kenya (by contrast, this message was largely rejected by domestic political elites in the DRC). In 2010, Principal Judge Ogoola, the first presiding judge of the Ugandan ICD, wrote:

> The Court's standards and procedures—including a trial bench of three Judges, Prosecution, Investigation, and Defence Office, and in-house translation service—all mirror those of the modern international criminal courts such as the Hague, Arusha, Bosnia, Yugoslavia, Sierra Leone, etc. In the legislation, we have sought to go even further by, for instance, providing the opportunity for an International Criminal Court observer at the hearings of cases by the [Ugandan

656 Nouwen, *Complementarity in the Line of Fire,* 182.
657 See, e.g., ISS at 18. Writing of the Kenyan ICD, one NGO also describes the costs of operationalizing the court as "enormous"; the Kenyan government is "expected to fund the ICD adequately in additional to international donor funding." Ongesco, 3.
658 Drumbl, *Atrocity, Punishment, and International Law*,198.
659 *Sovereignty and Justice*, 8-10 (emphasis in original); George Fletcher and Jens David Ohlin, "Reclaiming Fundamental Principles of Criminal Law in the Darfur Case," *Journal of International Criminal Justice* 3 (2005), 540.
660 European Commission, "Toolkit for Bridging the gap between international [and] national justice: Joint Staff working Document on Advancing the Principle of Complementarity," SWD(2013), 1 January 2013, 11.

> War Crimes Chamber]—let alone the use of international experts to assist the Court's proceedings.[661]

Ugandan Justice Akiki Kiiza, who later presided over the Division, has likewise stated that, "war crimes trials held in the country will function in a similar fashion to those in The Hague, with three judges officiating each case."[662] (Whereas single judges typically preside over judicial matters in Uganda, the ICD employs a three-judge bench in keeping with ICC practice.) These messages are furthered by key domestic NGOs. The Uganda Victims Foundation, for instance, has stated that, "Given the special international nature of the crimes coming before the WCD, a structure similar to the ICC should be upheld and adhered to."[663]

The proposals for Kenya's ICD mirrors the emerging practice in Uganda. Justices Ogoola and Kiiza's remarks are nearly identical to those of Reverend Samuel Kobia, who, speaking at the annual Assembly of States Parties in November 2013, said that Kenya's proposed ICD would be established "modeled on standards of the ICC – the same standards… with the same rules, with the same practice and with the same procedures."[664] To that end, the sub-committee proposed that the ICD sit "in panels of three judges with one extra judge in case one of the judges cannot sit."[665] The JSC's report on the Kenyan division further concludes that:

> Special rules of procedure and evidence should be formulated to provide the procedure on the prosecution of crimes in this division. This is so because, this division will be dealing with criminal matters with significant international character and needs to be modeled in accordance with international standards of the International Criminal Court and tribunals."[666]

Kenya's nascent Witness Protection Agency, which has become a critical focus of "positive" complementarity-related efforts, describes its mission—to be "the leading Witness Protection Agency in the World"—in similarly ambitious terms.[667]

Procedural provisions are also considered part of "proper" adjudication. The ICC's victim participation regime, for instance, has been frequently summoned as a necessary corollary of criminal proceedings in Kenya and Uganda, even though such participation is otherwise foreign to their common-law systems.[668] Punishment, explored

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[661] Justice James Ogoola, "Lawfare: Where Justice Meets Peace," *Case Western Reserve Journal of International Law* 43 (2010), 184. Justice Ogoola references the work here of the Public International Law & Policy Group.
[662] Florence Ogola, "Uganda Victims Question ICC's Balance," *Institute for War & Peace Reporting* (14 June 2010).
[663] Uganda Victims Foundation, "Statement on the International Crimes Bill of 2009" (4 November 2009).
[664] Simon Jennings and Thomas Bwire, "Kenyan Chief Justice Announces Special Court," *Institute for War & Peace Reporting* (10 December 2012); Nzau Msua, "Kenya: Mutunga to Establish ICC Model Court," *The Star* (26 February 2013).
[665] JSC Report, 144
[666] Ibid., 96. Because of the nature of crimes to be tried, the report recommends that, "before the court commences its trials, all measures should be put in place to ensure that the court room has modern ICT facilities e.g. cameras, videos etc.," 145.
[667] The Witness Protection Agency, Republic of Kenya Service Charter (brochure on-file).
[668] See, e.g., UVF, "Statement on the International Crimes Bill of 2009," which states "Whilst it is recognized that the Ugandan legal system does not normally provide for victims to participate in criminal proceedings (other than as witnesses) or to be legally represented, the UVF is of the firm belief that the special nature of the crimes coming before the WCD merits significantly greater involvement of victims in

further in the following chapter, has been another area of ICC mirroring, where a false understanding that the Rome Statute requires domestic prohibition of the death penalty further demarcates international crime adjudication from the broader criminal justice system. For instance, the Kenyan JSC report calls upon the government to "give an undertaking through a memorandum of understanding to the International Community and the ICC that any person charged, prosecuted and convicted for committing an international crime shall not be sentenced to death," even as Kenya retains the death penalty for other criminal offenses.[669] A similar disparity is evident in Uganda, which, despite a *de facto* ban on the death penalty, retains criminal punishment for certain ordinary crimes.[670]

Paradoxically, this insistence on conformity with standards can serve to stymie domestic proceedings, rather than catalyze them. As Elena Baylis notes, "the common approach has been to hold constant as an irreducible, unnegotiable value our commitment to trials that meet international due process standards and to do what it takes to achieve that commitment in the immediate term: that is, to hold trials on the international level insofar as possible and to discourage and criticize national trials that do not meet international standards."[671] Uganda's ICD illustrates this tendency. Whereas a 2011 needs assessment of the Division concluded that, "the JLOS institutions are closer to being ready for war-crimes proceedings than some within those institutions believe,"[672] a July 2012 speech by the ICD's Registrar highlighted its ongoing deficiencies. In his words:

> Positive Complementarity presupposes that national institution[s] like the ICD in Uganda should have the necessary and vital tools to effectively and efficiently handle investigations and prosecutions of International Crimes under the Statute. Many countries, Uganda inclusive, have problems in fulfilling these obligations. This therefore, calls for the ICC and other International Organisations, as well as governments of the other State Parties to facilitate the young national institution to cope with the expected standards.[673]

The pressures of accommodating a unique set of crimes within a permanent domestic judicial structure thus oscillate between a mutually reinforcing rhetoric of exceptionalism (special crimes require special treatment) and conformity (to ICC rules and procedures).

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the process"; see also *Prosecutor v. Joseph Kony et al.*, Observations on Behalf of Victims pursuant to Article 19(1) of the Rome Statute with 55 Public Annexes and 45 Redacted Annexes, ICC-02/04-01/05-349, Office of Public Counsel for Victims, 18 November 2008.

669 JSC Report, 150.

670 On the "growing paradox" of excluding the death penalty for international crimes before international jurisdictions while national jurisdictions maintain it, see Boctor, "The Abolition of the Death Penalty in Rwanda."

671 Baylis, "Reassessing the Role of International Criminal Law," 8. For a similar conclusion in the context of Uganda, see Phil Clark, "'All these Outsiders Shouted Louder Than Us': Civil Society Engagement with Transitional Justice in Uganda," Working Paper SiT/WP/03/15, 13.

672 "Final Report and Recommendations of Needs-Assessment Mission Experts," 4 March 2011 (on-file).

673 Remarks by His Worship Asiimwe Tadeo, "Effecting Complementarity: Challenges and Opportunities: A Case Study of the International Crimes Division of Uganda," paper presented at regional forum on international and transitional justice organized by ASF-Uganda Mission and the UCICC (20 July 2012).

4.3 *Uganda v. Thomas Kwoyelo*: Complementarity and State Power

Commentators have already drawn attention to the fact that the "self-referrals" in situations such as Uganda and the DRC were themselves concessions to state power, resting on an implicit understanding that the referring government would not be a focus of the Court's investigations.[674] While the OTP's choice of cases in these situations (to date) would appear to vindicate this criticism, less remarked upon has been the way in which the exercise of complementarity has likewise served to shore up existing domestic power structures. Uganda's case against Thomas Kwoyelo is perhaps the most dramatic illustration of this phenomenon.

4.3.1 Procedural History

Kwoyelo, a former LRA fighter and child soldier who himself had been abducted by Kony's forces when he was 13, became the first war crimes suspect to face trial before Uganda's ICD.[675] Captured in March 2009, he was charged under the Geneva Conventions Act as well as Uganda's Penal Code Act. The government alleged that he "committed his offences in the context of an international armed conflict that existed in Northern Uganda, Southern Sudan and North Eastern Democratic Republic of Congo between the LRA (with the support of and under the control of the government of Sudan), fighting against the government of the Republic of Uganda as by law established, between 1987 and 2008."[676]

Kwoyelo was initially charged in June 2009 but applied for amnesty under Uganda's Amnesty Act in January 2010.[677] As the Act prescribed, the Amnesty Commission sent Kwoyelo's application to the DPP for certification that he was not charged with offenses unrelated to the LRA activity (a condition of receiving amnesty); however, in this instance, the DPP failed to respond to the Commission's request.[678] Whereas thousands of other combatants like Kwoyelo had received amnesty, the DPP's refusal on this occasion to certify his application suggests that the ICD's establishment, coupled with the swift passage in 2010 of long delayed Rome Statute implementing legislation and the forthcoming ICC Review Conference (for which Uganda was the host

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[674] See, e.g., Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford: Oxford University Press, 2011); Schabas, "'Complementarity in Practice': Some Uncomplimentary Thoughts."
[675] Kwoyelo was captured in March 2009 in Ukwa, a northeastern part of the DRC during a joint military operation and as part of "Operation Lightning Thunder," which was launched in December 2008, following the failed Juba peace process. See Uganda v. Thomas Kwoyelo alias Latoni, Constitutional Court of Uganda, Petition No. 036/11, 22 September 2011 ("Kwoyelo Constitutional Court Decision"), 3-4.
[676] Director of Public Prosecutions, International Crimes Division of the High Court of Uganda at Kampala, HCT-00-ICD-Case No. 02/10, Amended Indictment, 5 July 2011, para. 1.
[677] Interview with Amnesty Commission official, 13 December 2011. In January 2000, Uganda adopted an Amnesty Act (subsequently amended in 2002 and 2006) that provided amnesty for anyone who had engaged in armed rebellion against the government since the "26th day of January 1986" and who agreed to renounce and abandon such rebellion. The conditions for amnesty were broadly conceived, with the declaration that "amnesty means a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State." See Amnesty Commission, "The Amnesty Act: An Act of Forgiveness" (August 2009), 26 (on-file). To date, more than 26,000 former combatants have received amnesty under the Act (approximately half of whom were former LRA members.) Ibid.
[678] Interview with Amnesty Commission official, 13 December 2011. My interlocutor indicated that the DPP typically certified within one month of the Commission sending the file, which it had done in March 2010. The Department did not respond, however, instead filing its initial indictment against Kwoyelo in August of that year. See also, "The Amnesty Act: An Act of Forgiveness," 12 ("The Role of the DPP").

state), signaled a decision to make him an "example" of Uganda's commitment to complementarity.[679]

Kwoyelo's legal team raised several challenges in the first instance before the ICD (which sat in Gulu rather than Kampala for the proceedings), including whether the armed conflict between the LRA and the government was international in the sense of the Geneva Conventions, as well as his alleged torture during the time that he was held in pre-trial detention. The central question, however, was whether Kwoyelo was entitled to amnesty and whether the Commission under the Ugandan Constitution had accorded him equal treatment.[680] Faced with these constitutional questions, the ICD referred the matter to the Constitutional Court in July 2011. In a turnabout from its previous position, the government responded that Kwoyelo was not entitled to amnesty because the Amnesty Act, which had been in existence for the previous ten years, was unconstitutional as it compelled Uganda to violate its "international legal obligation to punish grave breaches of the Geneva Conventions on war crimes."[681]

In November 2011, the Constitutional Court halted Kwoyelo's trial. In a unanimous decision, it dismissed the Attorney General's arguments and upheld the Act's constitutionality; further, it found that Kwoyelo had been unequally treated. The Court also rejected the argument that Uganda's Rome Statute obligations implied a duty not to grant amnesties, finding that it had "not come across any uniform international standards or practices which prohibit states from granting amnesties."[682] Upon remanding the case to the ICD, the Amnesty Commission sought renewed certification from the DPP to issue Kwoyelo's amnesty, which it again refused to issue.[683] Instead, the Attorney General appealed to the Ugandan Supreme Court (a higher appellate court), challenging the Constitutional Court's decision. The Supreme Court had no quorum at the time, however, thus adding additional delay to the proceedings.

Subsequent successful attempts by Kwoyelo to apply for bail (as an interim remedy) and for a writ of mandamus (to compel his release) in light of the Constitutional Court's decision were likewise ignored by the DPP.[684] Instead, the Attorney General sought to stay the orders of these lower courts by appealing to the Supreme Court, which convened, without quorum, a special one-hour sitting and then granted the government's

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679 See, e.g., Samuel Egadu Okiror, "Ugandan Supreme Court ruling fuels debate over double standards in war crimes prosecution," *International Justice Tribune* No. 180, 21 April 2015.

680 Uganda v. Thomas Kwoyelo alias Latoni, Constitutional Reference No. 36 of 2011, Reference to the Constitutional Court, 25 July 2011.

681 Uganda v. Thomas Kwoyelo alias Latoni, Constitutional Reference No. 36 of 2011, Attorney General's Legal Arguments, 16 August 2011.

682 Kwoyelo Constitutional Court Decision, 24. The court did not address another argument put forward by the government: that the Amnesty Act violates Uganda's international treaty obligations under the Rome Statute.

683 Interview with Amnesty Commission official, 13 December 2011. My interlocutor shared a copy of the DPP's reply to the Commission (dated 17 November 2011), which stated that, "The grave breaches of the Geneva Conventions for which the accused is charged with constitute international crimes for which amnesty cannot be granted." (Notably, Kwoyelo was not charged under the Geneva Conventions but rather the Geneva Conventions Act, which, like the Penal Code Act, would appear to fall within the Amnesty Act's ambit.)

684 Thomas Kwoyelo alias Latoni v. Attorney General, High Court (Civil Division), HCT-00-CV-MC-0162-2011, 25 January 2012 (Hon. Zehurikize) (on-file). The DPP issued a press release explaining its contempt, stating, "This office maintains the position that under the principles of international law, no amnesty can be granted to persons accused of committing war crimes under the Geneva Convention. The war crimes he is charged with include killings and infliction of grave injuries." See Edward Anyoli, "DPP rejects Kwoyelo amnesty," *New Vision* (5 February 2012).

motion.[685] The appeal against the Constitutional Court's decision was finally heard on the merits in April 2014. In April 2015, the Supreme Court overturned the decision on the grounds that any crimes committed against innocent civilians or communities (including crimes under Article 8(2)(e) of the Rome Statute) cannot be categorized as "crimes committed in furtherance of the war or rebellion"; thus, Kwoyelo was not entitled to amnesty.[686] More controversially, the Court also ruled that the DPP's decisions as to whether or not to certify future amnesty requests were not entitled to judicial review, effectively granting the government unfettered discretion in such determinations.[687]

As he awaits yet another return to the ICD, Kwoyelo has been kept in pre-trial detention since his proceedings began five years ago. In October 2012, facing no other domestic avenues for relief, he petitioned the African Commission on Human and Peoples' Rights, challenging his continuing detention as arbitrary and a violation of his rights under the African Charter on Human and Peoples' Rights.[688] That petition remains pending.

4.3.2 Hijacked Justice?

Kwoyelo's proceedings point to a dark side to complementarity, particularly when domestic accountability is pursued by a state eager to be seen as making good on the investments of donor bodies and "compliant" with international norms. As a member of Kwoyelo's legal defense team explained, "There is so much international pressure for [Uganda] to deal with the LRA."[689] In response to such pressure, many of the same "international standards" to which domestic systems must ostensibly comply have been violated: Kwoyelo has now spent five years in pre-trial detention, in defiance of repeated orders by Uganda's own courts that he be released.

Such defiance of the domestic judiciary is not new in Uganda,[690] but it is noteworthy that many of the same international NGOs that are otherwise champions of due process have said so little about the Kwoyelo trial or his treatment.[691] Complementarity's disciplinary dimensions can also be seen in the reaction of JLOS to the Constitutional Court's decision, when it (incorrectly) insisted that the "principle would require those responsible for serious human rights violations to be excluded from

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[685] See Oola, "In the Shadow of Kwoyelo's Trial."
[686] The Republic of Uganda in the Supreme Court of Uganda at Kampala, Constitutional Appeal No. 1 of 2012, *Uganda v. Thomas Kwoyelo*, 8 April 2015, 41-42.
[687] Ibid. Notably, the judgment's lead opinion also suggests a sequential approach to justice that would pursue accountability first before resorting to other "alternative" measures. See Sharon Nakandha, "Supreme Court of Uganda Rules on the Application of the Amnesty Act" (16 April 2015), at http://www.ijmonitor.org/2015/04/supreme-court-of-uganda-rules-on-the-application-of-the-amnesty-act/.
[688] Bill Oketch, "Rights body to assist Kwoyelo," *Daily Monitor* (2 January 2013).
[689] Alexis Okeowo, "Thomas Kwoyelo's Troubling Trial," *The New Yorker* (21 July 2012).
[690] See, e.g., Mari Tripp, *Museveni's Uganda*, 86-91; Kasaija Phillip Apuuli, "The ICC's Possible Deferral of the LRA Case to Uganda," *Journal of International Criminal Justice* 6 (2008), 808. Mari Tripp recounts a notorious scene from November 2005, when opposition leader Kizza Besigye was arrested (on charges of treason and rape) and brought to the High Court to be released on bail, only be to surrounded by members of the Black Mamba Squad, a paramilitary unit, in the courtroom and arrested extralegally; Apuuli notes similar acts were repeated in March 2007.
[691] Rather than drawing attention to the government's failure to release Kwoyelo on bond, Amnesty International described the Constitutional Court's decision as a "setback" for international justice. Amnesty International Public Statement, "Court's decision a setback for accountability for crimes committed in northern Uganda conflict" (23 September 2011).

the amnesty process, and instead, be investigated by the national courts."[692] In its words, "The Amnesty Act presents challenges to Uganda's ability to *comply* with the principle of complementarity."[693] In a "special report" issued following the decision, JLOS likewise stated that Uganda's ratification of the Rome Statute represented an "international commitment to seek justice and accountability" and that its domestication "reinforces Uganda's good reputation in ratification and domestication of international laws and its duty to apply the law."[694]

Kwoyelo's trial thus presents vexing questions about the ways in which complementarity may be used in the interests of state power. Jelena Subotic's work on what she calls "hijacked justice" is instructive here, as she argues that the rise in popularity of transitional justice institutions (including courts) and their increasing ubiquity are such that "states use these mechanisms to achieve goals quite different from those envisaged by international justice institutions and activists."[695] In Kwoyelo's case, and as the Supreme Court's decision suggests, the goal appears to be making him the public example of Uganda's evolution from an earlier period wherein amnesty largely held sway as state policy to an increasingly retributive model, wherein criminal accountability is now the guiding norm. Yet this evolution has not been executed in a manner consistent with Kwoyelo's own rights. Similar concerns animate the Kenyan ICD, talk of which, critics contend, amounts to little more than "sham compliance" on the part of the state. Writing in the *Daily Nation*, Betty Waithherero, a Kenyan commentator, argues that,

> A lot of time, money and effort has … been put into what looks like just smoke and mirrors; a political stillborn whose intention was to create the appearance of complementarity while utilizing dubious methods to create [it]."[696]

Such "domestic misuse of transitional justice norms," Subotic concludes, can lead to "policy outcomes far removed from international transitional justice expectations."[697] These outcomes may range from marginalizing domestic political opponents (as in the DRC), to obtaining material benefits (as in Uganda), or "gain[ing] membership in prestigious international clubs"[698] – including, perhaps, the "complementarity" club.

5. Conclusion

To varying degrees, complementarity animates and sustains the creation (or proposed creation) of specialized institutions, personnel, and regulations for the domestic prosecution of ICC crimes. Whether as admissibility rule or normative ordering principle, state and non-state actors alike have summoned the adaptive nature of complementarity as the basis for transforming and reforming domestic judicial systems,

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692 "Community Dialogue on the Future of the Amnesty Act" (March 2012). JLOS convened the "dialogue" in conjunction with UN Women and the UN Office of the High Commissioner with "a view to understanding community views on the current operation and future of the [Amnesty] Act." See also JLOS, 'The Amnesty Law (2000) Issues Paper, Review by the Transitional Justice Working Group (April 2012).
693 Ibid. (emphasis added).
694 JLOS, "Justice at Cross Roads? A Special Report on the Thomas Kwoyelo Trial," 4.
695 Jelena Subotic, *Hijacked Justice*, 6.
696 Betty Waitherero, "Can the International Crimes Division prosecute Kenya's PEV cases?", *The Nation* (8 February 2014).
697 Subotic, 6.
698 Ibid.

as well as their relationship to the ICC. Whereas complementarity was once a principle that Uganda sought to invoke to keep the Court at bay, the ICD now appears as the ICC's institutional partner: Thomas Kwoyelo tried in Uganda, Dominic Ongwen tried in The Hague. Non-state actors in the DRC have invoked complementarity in a similar manner, even though the (limited) domestic proceedings there are not connected in any material way to, nor the direct result of, the ICC's undertakings. Indeed, the opposite has taken place: an initial promise of cooperation between the ICC and the government has given way to greater contestation between The Hague and Kinshasa.

At the same time, the creation of specialized regimes or units for the prosecution of international crimes has arguably contributed to an ongoing bifurcation within these systems, often rigidly dividing international and national justice in a way that disadvantages the "ordinary" criminal justice system in the competition for attention and resources.[699] The language of "international standards" and "best practices"—abundantly invoked by external technical "experts" as Rome Statute obligations—abets this phenomenon. Finally, the Kwoyelo proceeding highlights the vexed relationship between state power and complementarity, demonstrating how "compliance" with the latter can also facilitate abusive states practices. Although Kwoyelo cannot invoke complementarity as legal matter, the narrative of his trial has been built on the principle. Moreover, as a progress narrative, his prosecution marks an apparent shift in Ugandan policy from amnesty to accountability; it offers a picture to an international audience of complementarity "in practice." But Kwoyelo's is not a story that the ICC or its supporters should want to tell, built as it is on exceptionalism at the expense of due process. As these evolving histories suggest, the logic of complementarity shifts depending on the political priorities and goals of those who seek to invoke it.

[699] One such example is the Kenyan ICD proposal, which would vest jurisdiction for crimes like piracy and other "transnational crimes" within the division, even though the ordinary criminal justice system has long prosecuted these crimes with some success.

CHAPTER SIX
Implementation and Domestic Politics

While the adoption of the Rome Statute formally initiated the ratification process that brought the ICC into existence, it also inaugurated a far-ranging effort to embed the Statute in the legal framework of states. As one legal scholar has ambitiously characterized it, the Statute was a "quasi-legislative event that produced a criminal code for the world."[700] Conceived and led largely by the same network of global civil society actors that had campaigned for the ICC's establishment, these campaigns for national implementation have again been intimately linked to the complementarity-as-catalyst framework. The CICC notes that, "For the principle of complementarity to become truly effective, following ratification, States must also implement all of the crimes under the Rome Statute into domestic legislation."[701] Similarly, Amnesty International claims that a state that fails to enact national legislation risks "being considered unable and unwilling genuinely to investigate and prosecute crimes within the Court's jurisdiction."[702]

As with the creation of domestic "complementarity" courts, implementation reflects a broader interest in routing governance objectives through international criminal law.[703] To that end, this chapter continues the close examination of Kenya, Uganda, and the DRC by exploring the Rome Statute's implementation in each of these three jurisdictions. Its contention is two-fold. First, implementation has become an increasingly sophisticated and technocratic exercise in applying the Statute as a "global script"[704] to a diverse array of national contexts. Rome Statute "model laws" have emerged and a variety of international NGOs, advisors, and consultants—a growing "transnational expert" community of practice[705]—offer counsel to states on how best to harmonize their domestic legal and constitutional orders with the purported requirements of the Statute. This emphasis on harmonization has, in turn, contributed to an increasingly strict interpretation of what complementarity purportedly requires.

Second, while the ICC's intervention in these countries accelerated advocacy campaigns for the passage of national implementation legislation, it was not the direct catalyst for implementation in either Kenya or Uganda (the DRC has not yet passed such legislation.) Rather, other events, geared predominantly towards international audiences, precipitated the Statute's implementation. In Uganda, the country's role as host of the 2010 Review Conference of the Rome Statute hastened a legislative process that had long stagnated, while, in Kenya, the desire to publicly demonstrate a departure from the election violence of 2007-08 led parliamentarians to "fast-track" implementation following the Waki Commission's recommendation.

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[700] Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Martinus Nijhoff, 2002), 263.
[701] Coalition for the International Criminal Court (CICC), at http://www.iccnow.org/?mod=ratimp.
[702] Amnesty International, "The International Criminal Court: Checklist for Effective Implementation" (2000).
[703] For instance, the CICC states that, "implementation of the Rome Statute provides an opportunity to reinvigorate reforms of the criminal and procedure codes, which, in the long term, will strengthen rule of law, peace, and security globally." See CICC, at http://www.iccnow.org/?mod=romeimplementation.
[704] My use of the term "global script" borrows from Carruthers and Halliday's use of the term as a "formalized expression or codification of global norms." See Bruce G. Carruthers and Terence C. Halliday, "Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes," *Law & Social Inquiry*, 31(3) (2006), 535-536.
[705] Drumbl, *Atrocity, Punishment, and International Law*,135.

The union of these two factors—uniformity of application and the power of external constituencies—was largely responsible for driving the implementation process in both countries, but it glossed over deeper political fissures about the desirability of international criminal law as a framework for domestic accountability. In Uganda, subsequent efforts to abandon the country's long-standing amnesty program have been met with strong opposition, signaling significant discomfort with the domestic legislation's retributive framework. Similarly, in Kenya, the initiation of ICC investigations in 2009 fractured the apparent unanimity of political elites over the desirability of the domestic legislation that had been ratified only one year prior, even as it united former political rivals Kenyatta and Ruto.[706] By contrast, in the DRC, domestic politics have continually thwarted the efforts of a dedicated minority to press for comprehensive implementing legislation. While the release of the UN's 2010 "mapping report" lent a similar urgency (and opportunity) for domestic political actors to be seen as "doing something" for a primarily international audience, implementation legislation has been unsuccessful to date as Congolese parliamentarians continue to regard these efforts with suspicion.

Furthermore, whereas passage of Rome Statute legislation in Kenya and Uganda was initially swift, later developments in both countries share with the DRC a growing suspicion about the aims and purpose of international criminal law, seeing it less as a catalyst for reform than a tool of exclusion. Indeed, the focus on identical implementation of the Rome Statute at national level raises troubling questions about the African continent's equal and consensual participation in the creation of this body of law. Rather than focusing on implementation merely as something the ICC did (or did not) catalyze, then, this chapter also illustrates the costs that "a liberal orthodoxy about what international criminal law should be" might pose to other normative ideals, such as legal pluralism or deliberative, democratic debate.[707]

This chapter proceeds in five parts. Drawing on the arguments that have animated why implementation of the Rome Statute should be understood as a duty of ICC member states, the first section focuses on how international NGOs and the capacity building sector—communities of practice with a shared interest in embedding the ICC's normative framework—have drawn on these arguments in their promotion of implementation guidelines and "model laws." I suggest that these tools, while not without value, have contributed to a view of implementation as an increasingly disciplinary exercise, one that privileges conformity with the Rome Statute. Part two turns to the particular experiences of Uganda and Kenya to show how it was not the ICC's intervention itself, but again the mediated influence of external actors and events that pushed the formal implementation process forward. However, as the third section illustrates, key political questions that were overlooked in this process soon re-emerged. The fourth section dwells on the experience of the DRC, noting some initial similarities with Kenya and Uganda in the relationship between implementation and political action, but also fundamental differences. Based on these histories, the chapter concludes by focusing on three dimensions of implementation: as purity, as politics, and as "performance," i.e., a form of political theatre.

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[706] On shifts in the Kenyan political order, see Sara Kendall, "'UhuRuto' and Other Leviathans: the International Criminal Court and the Kenyan Political Order," *African Journal of Legal Studies* 7 (2014), 399-427.

[707] Mégret, "Too Much of a Good thing? Implementation and the uses of Complementarity," 386.

1. Implementation, Standardization, and Compliance

The incorporation of treaty protections is one form that the legal protection of human rights may take at the domestic level. Implementation thus reinforces not only the primacy of states in international law but also a general rule: states, in general, have far-going freedom as to the manner in which they give effect to their international obligations.[708] Notwithstanding this principle, chapter two examined how complementarity became, over time, a site of influence for norm entrepreneurs to argue that member states are obliged to implement the Rome Statute's provisions in their domestic legal orders. This duty is rooted in a purposive reading of the Statute, particularly its preambular language, which recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[709] Yet, as noted, the text of the Statute requires only that a country's domestic law facilitate cooperation with the ICC and that it criminalize offenses against the "administration of justice"; there is no obligation as such to implement its substantive (or procedural) provisions.[710]

The difference between "ordinary" and international crimes has also been advanced as a basis for domestic implementation; however, while this distinction was critical to the criminal tribunals for Rwanda and the former Yugoslavia,[711] the Rome Statute makes no such distinction. States are permitted to prosecute international crimes as ordinary crimes, provided that their doing so is not deliberately designed to shield perpetrators from criminal responsibility. Indeed, as illustrated by the Statute's drafting history, states explicitly rejected a proposal that would have made a case admissible before the ICC where the national proceeding failed to consider the international character or grave nature of a crime.[712] Recalling the "same conduct" test that has emerged in ICC jurisprudence (explored at greater length in chapter three), the Statute refers instead to the conduct of an accused, "to make clear that a national prosecution of

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[708] As Ward Ferdinandusse argues, however, the extent of this freedom can be, "easily overestimate[d]," particularly in the context of international criminal law. Ward Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (Academisch Proefschrift, 2005), 148. Scholars have argued that the special character of international humanitarian law distinguishes it from other crimes, thus requiring greater fidelity to the manner of its implementation at the national level. Similar arguments point to the uniquely expressivist function of international criminal law as requiring its identical enunciation in national law.

[709] Para. 6, Rome Statute. As two NGOs noted, for instance, in an *amicus curiae* submission to the Court in the case against the LRA, "The use of ordinary offenses in lieu of international crimes itself fails to capture the gravity and aggravated nature of the international crimes." *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Amicus Curiae submitted by The Uganda Victims' Foundation and the Redress Trust, ICC Pre-Trial Chamber II (15 November 2008).

[710] Article 88. Further, as a matter of treaty interpretation, the preambular recital is not part of the Statute's operative text; rather, it "recalls" a suggested pre-existing duty, not one arising from the treaty itself. While states may be obliged to investigate or prosecute crimes based on other rules of international law, the Statute itself does not so oblige. See Robinson, "The Mysterious Mysteriousness of Complementarity," 94-95.

[711] Further, both of the ICTY and ICTR statutes explicitly allow for the retrial of persons who had already been tried by a national court if "the act for which he or she was tried was characterized by an ordinary crime." See ICTR, *The Prosecutor v. Michel Bagaragaza*, Decision on Rule 11 *bis* Appeal, ICTR-05-86-AR11bis, Appeals Chamber, 30 August 2006.

[712] Article 20(3), Rome Statute. As Jo Stigen notes, the ordinary crime criterion, initially endorsed by the [ILC], "was proposed but rejected [in the negotiations] as it met too much resistance." Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, 335.

a crime—international or ordinary—did not prohibit ICC retrial for charges based on different conduct."[713]

Such threat-based approaches to complementarity have been central to the ICC-as-catalyst framing. More broadly, however, implementation discourse also reflects anxieties about fragmentation in international law.[714] As Carsten Stahn and Larissa van den Herik note, "One of the inherent features of international criminal law is a desire for uniformity," which "flows from the need for "certainty, stability and predictability" [that] is required in criminal proceedings."[715] A related concept is that the Statute establishes a common criminal floor—it reflects the international community's desire "to maintain some semblance of 'uniformity' in the way the world combats" international crimes.[716] Cattin, for instance, sees the Statute as posing a "minimum standard for national criminal justice systems exercising their primary responsibility: States can do more, but shall do no less, than what the Rome Statute prescribes, so as to ensure that all crimes against humanity, war crimes and acts of genocide be duly incorporated in the relevant legal order and not left unpunished."[717] If complementarity means that accountability will (and should) increasingly migrate from the ICC to national courts, then the idea of minimum, or "international," standards is attractive, particularly when the "landscape of domestic justice is diverse and partly schizophrenic."[718] To that end, "the play between … unity and diversity, is one of the discursive patterns used by the [legal] discipline to deploy criticism and propose reform projects."[719]

Faithful domestication of the Rome Statute is one such project. Indeed, while implementation is a political process—an act of state—human rights NGOs have been perhaps the most influential contributors to popular understandings of what domestication requires.[720] As a report of the Southern Africa Litigation Centre notes, "implementing legislation has been a key focus area of civil society," and "CSOs have been instrumental in the drafting and adoption process [of implementing legislation]."[721] There now exists an array of implementation materials prepared by such organizations. As early as 2000, Amnesty International created a "Checklist for Effective Implementation," while Human Rights Watch and the International Centre for Criminal Law Reform published similar manuals shortly thereafter.[722] As part of its "Global

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[713] Heller, "A Sentence-Based Theory of Complementarity," 224.
[714] See Conclusions of the Work of the Study Group on the Fragmentation of International Law, "Difficulties arising from the Diversification and Expansion of International Law," UN Doc. A/61/10 (2006).
[715] Carsten Stahn and Larissa van dan Herik, "'Fragmentation,' Diversification and '3D' Legal Pluralism: International Criminal Law and the Jack-in-the-Box?," in *The Diversification and Fragmentation of International Criminal Law*, 58 (citing Appeals Chamber, *Prosecutor v. Aleksovski*, Judgment, 24 March 2003, IT-95-14/1-A, para. 101).
[716] Ada Sheng, "Analyzing the International Criminal Court Complementarity Principle Through a Federal Court Lens," *ILSA Journal of International and Comparative Law* 13 (2006), 426.
[717] Cattin, "Approximation or Harmonisation as a Result of Implementation of the Rome Statute," 373.
[718] Stahn and van dan Herik, "'Fragmentation,' Diversification and '3D Legal Pluralism," 39.
[719]Anne Charlotte Martineau, "The Rhetoric of Fragmentation: Fear and Faith in International Law," *Leiden Journal of International Law* 22(1) (2009), 2-3.
[720] The CICC is one international NGO that has made implementation a centrepiece of its work; however, others like Amnesty International, Avocats Sans Frontiers, the International Federation for Human Rights (FIDH), No Peace Without Justice, PGA, and Human Rights Watch have all been similarly engaged.
[721] Southern Africa Litigation Centre, "Positive Reinforcement: Advocating for International Criminal Justice in Africa," 45.
[722] AI Updated Checklist; Human Rights Watch, "Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute" (September 2001) ("HRW Handbook"); ICCLR,

Advocacy Campaign for the International Criminal Court," the CICC maintains a detailed chart of those states that have either enacted, or are in the process of enacting, "Rome Statute Crimes Legislation" and/or "Cooperation Legislation."[723] The Coalition also includes a resource page with links to "model" national implementation laws, as well as "template statutes" endorsed by various regional organizations like the Commonwealth Secretariat.[724]

The Commonwealth's Model Law—of particular relevance to Kenya and Uganda—is a 58-page document with prepared language that closely tracks the text of the Rome Statute. While noting that, "there is no 'one-size-fits-all' solution to the complex process of domestic implementation," the Law presents itself as "model legislation (i.e. a textual basis to be modified and adapted to a given national system)."[725] Interested states are invited to insert the name of their country at relevant points throughout the document, and to include select optional additional provisions, ranging from the appropriate penalties for crimes ('imprisonment for a term not exceeding 30 years or a term of life imprisonment when justified by the extreme gravity of the crime') to extending the Law's coverage to violations of the Geneva Conventions.[726]

Various "best practice" tools for implementation supplement such material. One such tool is the National Implementing Legislation Database (NILD). NILD seeks to provide users with "access to a fully-searchable, relational database of national implementing legislation."[727] Part of the ICC's Legal Tools project,[728] NILD further allows states that have adopted legislation to "monitor the impact of their legislation on other States and undertake necessary amendments if the content of the Rome Statute changes, or if improvements are deemed necessary."[729] One publication highlights not only NILD but other Legal Tools projects as well—Case Matrix, a Means of Proof Digest—as examples of access to legal information. It notes that such access "should be provided in line with this new paradigm shift towards positive complementarity that focuses on strengthening domestic capacity and empowering national actors."[730]

"International Criminal Court: Checklist of Implementation Considerations and Examples Relating to the Rome Statute and the Rules of Procedure & Evidence" (April 2002).

[723] See CICC webpage.

[724] The Secretariat describes itself as "provid[ing] guidance on policy making, technical assistance and advisory services to Commonwealth member countries." For further information, see http://thecommonwealth.org/organisation/commonwealth-secretariat.

[725] Commonwealth Secretariat, "Cover Note: International Criminal Court (ICC) Statute and Implementation of the Geneva Conventions," SOLM(11)10, May 2011, para. 3(a).

[726] Ibid., Annex B, Model Law to Implement the Rome Statute of the International Criminal Court. See, e.g., Part II ("International Crimes and Offences Against the Administration of Justice").

[727] National Implementing Legislation Database of the International Criminal Court Statute ("NILD Database"), http://www.nottingham.ac.uk/hrlc/documents/projectsummaries/pdfs/projectnild.pdf. NILD is managed by the legal academic Olympia Bekou, who has contributed an extensive literature on complementarity and implementation. See, e.g., Olympia Bekou and Sangeeta Shah, "Realising the Potential of the International Criminal Court: The African Experience," *Human Rights Law Review* 6(3) (2006), 499-544; Olympia Bekou, "Crimes at Crossroads: Incorporating International Crimes at the National Level," *Journal of International Criminal Justice* 10(3) (2012), 677-691.

[728] See "ICC Legal Tools," http://www.legal-tools.org/en/go-to-database/.

[729] NILD Database.

[730] Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer* (Torkel Opsahl Academic EPublisher, 2011), vi; see also Morten Bergsmo, Olympia Bekou, and Annika Jones, "Complementarity After Kampala: Capacity Building and the ICC's Legal Tools," *Goettingen Journal of International Law* 2(2) (2010).

These tools accompany the literature of NGOs, which, consist with the framing of complementarity as a catalyst for "compliance," endorses a similarly maximalist approach to implementation. According to Amnesty's implementation checklist, "principles of criminal responsibility in national legislation should be at least as strict as … the Rome Statute."[731] This includes, for instance, that "all crimes of accessory criminal responsibility such as aiding, abetting, and direct and public incitement as contained in Article 25 [of the Statute] should be punishable under national law."[732] Conformity with the Statute has also been presented as encompassing far-reaching procedural requirements: Human Rights Watch notes that whether states "guarantee the highest international standards for fair trials at the national level" will "be important in the determination of the admissibility of a case by the ICC."[733] Such standards would include not only programs of victim and witness protection but even procedural regimes unique to the Rome Statute, such as a trust fund for victims or provisions for victim participation. A related issue is punishment: effective implementation, it is strongly suggested, would be inconsistent with the death penalty.[734]

Thus, even where commentators and NGOs acknowledge that the Rome Statute contains no positive obligations to implement its substantive (or procedural) law provisions, complementarity is framed in their literature in a manner that nevertheless compels it. As a technique of governance, then, the approach is increasingly disciplinary and coercive: failure to abide by the purported requirements of the Rome Statute opens states up to the risk that the ICC will intervene. This view has been furthered by much academic commentary on implementation (noted above and in previous chapters), which overwhelmingly focuses on fidelity to the Rome Statute's text.[735] Thus, just as the coercive pull of complementarity could catalyze national proceedings, it might also "induce national courts … to conform to a variety of modalities that mimic those found in international criminal law regarding sanction (i.e., no death penalty) and procedure (i.e., a fair trial)."[736] The proliferation of "model laws" abets this process. Indeed, as will be seen, the Kenyan and Ugandan ICC laws are themselves largely identical, insofar as they are both drawn from the Commonwealth Secretariat's model legislation.

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731 AI Updated Checklist, 17.

732 Ibid.

733 HRW Handbook, 19.

734 In Amnesty's words, "it would be inappropriate for national courts to impose a more severe penalty for a crime under international law than the one chosen by the international community itself." AI Updated Checklist.

735 As an example, see the articles gathered in the "Symposium on National Implementation of the ICC Statute," which appeared in two parts in the *Journal of International Criminal Justice,* 2(1), March 2004 and 5(2), May 2007. In the second installment, editor Luisa Vierucci notes that, "states tend to stick to the definition of the crimes as contained in the ICC Statute" and that this "seems … to be a response to the states' inherent concern to avoid the risk of possibly adverse decisions on complementarity by the ICC." Luisa Vierucci, "National Implementation of the ICC Statute (Part II): Foreword," *Journal of International Criminal Justice* 5(2) (2007), 419-20. For a critique of Rome State implementation from a gender perspective, see Bonita Meyersfeld, "Implementing the Rome Statute in Africa: Potential and problems of the prosecution of gender crimes in Africa in accordance with the Rome Statute," in Kai Ambos and Ottilia A. Maunganidze (eds.), *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Göttingen Studies in Criminal Law and Justice, 2012).

736 Drumbl, *Atrocity, Punishment, and International Law*, 139. My discussion of implementation here can be likened to Drumbl's use of the term "legal transplants," which, he argues have a "homogenizing effect on the kind of sanction visited upon atrocity perpetrators," 70.

2. Implementation in Practice: Uganda and Kenya

2.1 Uganda: The ICC's Host State

Like many treaties that Uganda has signed but not domesticated, Nouwen argues that the government ratified the Rome Statute in June 2002 because it was "internationally fashionable and improved the [government's] image in the eyes of European donors."[737] The adoption of implementing legislation at the time appeared "bleak," however, as it was not seen as a priority for either the executive or the legislature. Nevertheless, as a result of the attention increasingly paid to the government's conflict with the LRA, and following President Museveni's referral of that situation to the ICC in 2003, international human rights organizations and their national-level partners prioritized implementation of the Statute there.

After receiving authorization to prepare a draft implementation bill, Uganda's Ministry of Justice and Constitutional Affairs assembled a first draft in 2004. It used Canada and New Zealand's ICC legislation as an example, and the Commonwealth Secretariat reportedly provided "technical support" and "drafting assistance."[738] Groups like PGA also "conducted seminars and workshops on the Rome Statute for MPs, and facilitated relevant contacts for them with others, including the European Union, the ICC, and local civil society."[739] Notably, the rationale for the legislation was intended less as a potential basis for challenging the admissibility of any future ICC cases, but rather to "provide a legal framework for the ICC intervention"[740] and to "smooth the progress of Court proceedings."[741]

Yet political developments on the ground soon stalled any desire to press for the ICC Bill's passage. After the ICC's warrants for the LRA's leaders were unsealed in mid-2005, the legislation was seen, much like the Court itself, as a hindrance to the advancement of peace negotiations. As explained in a letter by the Uganda Coalition for the International Criminal Court (UCICC) for its "Domestication Campaign 2008," the Bill had "been proposed and has lapsed in Parliament before because too many legislators feared that adopting these laws means that the ICC would take jurisdiction away from Uganda and potentially interrupt the peace process."[742] Preparations for multi-party elections in 2006, along with "backlogs in Parliament,"[743] further delayed consideration of the Bill and it ultimately lapsed with the prorogation of Parliament.

A substantially similar version of the Bill was reintroduced in late 2006.[744] The executive, however, "prioritised commercial laws for debate" and commentators have noted that Parliament was instructed to "go slow" with the legislation because its passage

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737 Nouwen, *Complementarity in the Line of Fire*, 194.
738 International Criminal Court Bill, XCVII(26) *Uganda Gazette*, 28 May 2004; e-mail communication from Ministry of Justice, Uganda (on-file).
739 *Putting Complementarity Into Practice*, Open Society Foundations (2010), 61-62. See also remarks of Mr. Wacha in The Eighth Parliament of Uganda, Third Reading, The International Criminal Court Bill, 2006, 10 March 2010, 10950 ("ICC Bill Third Reading").
740 Barney Afako, "Country Study V: Uganda," in *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected Africa Countries*, 93.
741 Ibid., 196.
742 UCICC, Domestic Campaign 2008, 10 July 2008 (letter on-file).
743 Afako, "Country Study V: Uganda," 94.
744 International Criminal Court Bill, XCVIX(67), *Uganda Gazette*, 17 November 2006.

was still "thought to send the wrong message in relation to the ongoing Juba talks."[745] As the then Deputy Attorney General Freddie Ruhindi testified during parliamentary debate over what would become the 2010 Act:

> [T]he long time taken on deliberating on this matter was not by accident. Interestingly, we are not even recalling that the first one was a 2004 Bill, which lapsed with the Seventh Parliament. Then we came out with the Seventh Parliament. Then we came out with the 2006 Bill and at one point, you may recall that we were in very serious negotiations with the Kony group and everyone of us was actually quite reluctant to disturb that process by coming on the Floor of the House and at the end of the day derailing the process. But as we speak, that has gone bad and there is nothing to stop us from going ahead with the enactment of this law in full swing.[746]

Thus, whereas there were a variety of competing and superior interests during the previous six years that implementation legislation was pending, this calculus had shifted by 2010. Peace negotiations were no longer a confounding variable, while the imminent arrival of delegates from around the world to Kampala for the first-ever "Review Conference of the Rome Statute" provided the necessary push for adoption.[747]

The significance of Uganda's hosting the conference is evident from public documents. During the Bill's second reading, Ruhindi noted that, "on the sidelines of the substantive debate on this Bill, Uganda is privileged … [to] be hosting the first ever review conference."[748] In its annual report, the Justice Law and Order Sector (JLOS)— a government mechanism operating a "sector-wide approach" to donor-driven judicial reform—stated that, "one of the conditions that was set by the ICC to allow [Uganda] to host the conference was domestication of the Rome Statute."[749] Mirjam Blaak, Uganda's ambassador to The Hague, confirms this view. In her words, "It was important to have the bill signed before the review conference took place. They wouldn't have cancelled the review conference if it hadn't been, but it was an understanding that we would."[750]

In the end, the Act as passed in 2010 was nearly identical to the version that was put forward almost six years before.[751] Substantively, the ICC Act proscribes war crimes, genocide, and crimes against humanity in a manner identical to the Rome Statute; the

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[745] Nouwen, *Complementarity in the Line of Fire*, 197. Ugandan jurist Afako also describes the "prospects of Uganda implementing a suitable national scheme in the next two years … as "low" (on a scale of 'unlikely – low – fair – good – highly likely')." See Afako "Country Study V: Uganda."

[746] The Eighth Parliament of Uganda, Second Reading, The International Criminal Court Bill, 2004, 10 March 2010, 10941 (Mr. F. Ruhindi) ("ICC Bill Second Reading"). Notably, although the title of the second reading is "The International Criminal Court Bill, 2004', the MPs clarified that 'the committee chairman [was] reading a report entitled, "The International Criminal Court Bill 2006."' Ibid., 10932 (remarks of Mr. Kawuma).

[747] Nouwen, *Complementarity in the Line of Fire*, 198; see also Christopher Mbazira, "Prosecuting international crimes committed by the Lord's Resistance Army in Uganda," in Chacha Murungu and Japhet Biegon (eds.), *Prosecuting International Crimes in Africa* (Pretoria University Law Press, 2011). Mbazira argues, "It appears that the hasty passing of the overdue Bill was catalyzed by Uganda's hosting of the ICC Review Conference from 31 May to 1 June 2010," 215.

[748] ICC Bill Second Reading, 10931.

[749] "JLOS Annual Performance Report 2009/2010" (September 2010), 65.

[750] Bill Oketch," Uganda Set for First War Crime Trial," *Institute for War & Peace Reporting*, 14 July 2010; personal interview with Ambassador Blaak, The Hague, 25 May 2011.

[751] See, e.g., ICC Bill Third Reading, 10950 (remarks of Mr. Wacha.) Mr. Wacha notes that, "the two Bills: the 2004 Bill and this particular Bill were not any different, they were the same."

latter's definitions were incorporated by reference into the Act, as were the modes of responsibility and the Statute's "general principles of criminal law."[752] The Act also grants the Ugandan High Court first-instance jurisdiction to hear cases of war crimes, crimes against humanity, and genocide.[753] Those amendments that were made focused on minor procedural issues.[754] This mirror imaging belied the concerns of some parliamentarians, however, who in an otherwise non-contentious debate, raised questions about the scope of the Rome Statute's protection and whether Uganda was entitled to amend it. Geofrey Ekanya, an MP from Tororo County, asked:

> I want to find out from the Attorney-General and the committee chairperson, what harm would it cause to expand the definition of the Bill as regards the crimes against humanity, to include plunder. As we speak now, the international community has been facilitating some countries to plunder natural resources in Africa and I think this should be part of the crimes against humanity. I am talking about DRC, for example; I am talking about the conflicts we had in other parts of Africa. The guns come from the West to facilitate conflicts; to plunder Africa and then they take the minerals; but the Bill does not talk about those who facilitate plundering because this is what leads to conflict and finally crimes against humanity. So, would it be wrong for us to expand the definition of crimes against humanity to include the agents who facilitate plunder?[755]

Ekanya also expressed concern that "certain provisions within the Rome Statute"—particularly concerning presidential immunity—were "not in consonance" with Ugandan law, and urged that these questions be "taken care of so that we and innocent people are not used as guinea pigs."[756] Other MPs raised similar concerns: John Kawanga agreed that, "at another stage we shall have to deal with commercial crime, corruption and things of the kind," while Alice Alaso asked what passage of the law would "mean with our amnesty law," whether it would "put the final nail on the peace process," and 'the place of traditional justice vis-à-vis the ICC Bill."[757]

The interventions of these MPs raised questions about the place of the ICC Act within Uganda's broader transitional justice architecture, as well as the state's ability to tailor the Statute to suit its particular national context. In reply to Ekanya's concerns, MP Stephen Tashobya, who chaired the Committee on Legal and Parliamentary Affairs, replied (incorrectly) that "you may not actually go beyond what [the Rome Statute] says and, therefore, you have to confine yourself" to its text.[758] Furthermore, as Ms. Alaso's

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[752] International Criminal Court Act, 2010, *Uganda Gazette* No. 39, Vol. 103, 25 June 2010, sections 7-9; 19. Those amendments that were made focused on minor procedural issues. For instance, the Act states that consent for prosecution under the ICA would be required from the Department of Public Prosecutions, rather than the Attorney General. Further, jurisdiction was to vest with the Ugandan High Court, not the Magistrate Court. See Report of the Sessional Committee on Legal and Parliamentary Affairs on the International Criminal Court Bill, 2006 ("Sessional Committee Report"), March 2010, 4-5.

[753] The legislation makes no reference to the specialized division that has become the ICD, even though that division was established by administrative decree in 2008, two years before the ICC Act became law (see further chapter five).

[754] For instance, the Act states that consent for prosecution under the ICA would from the Department of Public Prosecutions, rather than the Attorney General. Further, jurisdiction vests with the Ugandan High Court, not Magistrates' Courts.

[755] ICC Bill, Second Reading, 10935.

[756] Ibid., 10936.

[757] Ibid., 10938-30 (remarks of Messrs. Kawanga and Kyanjo); see also 10934 (remarks of Ms. Alaso).

[758] Ibid., 10936. MP Tashobya added, "But as to whether we can amend the Rome Statute, I do not know. You are intending to expand and that will be an amendment of the Rome Statute."

comments indicate, the Bill as passed offered no provisions on alternative criminal justice proceedings, nor did it address the role of Uganda's Amnesty Committee, which had been issuing amnesties to former combatants, including those from the LRA, for the past 10 years.[759] Indeed, whereas the 2004 version of the ICC Bill included a proposed amendment by MP Jacob Oulanyah that would have recognized "alternative criminal justice proceedings" in addition to "formal" criminal proceedings,[760] no such proposals were later considered or debated. Similarly, whereas previous versions of the bill had provided for application of the death penalty, the 2010 Act provides that the maximum applicable penalty is life imprisonment.[761] Although the Ugandan Penal Code (UPC) recognizes the death penalty as a permissible form of punishment, according to the parliamentary committee that reviewed the 2010 Bill, such "inconsistency" between it and the Rome Statute required amending the maximum penalty available for "extremely grave crimes."[762] Thus, by 2010, an increasingly Hague-centric framework for punishment had taken hold.[763]

Hastened by a perceived need to pass the legislation prior to the start of the ICC Review Conference, a similar mindset informed the influential network of Ugandan justice sector donors. Stephen Oola notes, for example, that an initial agreement by JLOS to present to Parliament in 2009 the ICC Bill together with a proposed National Reconciliation Bill—in order to generate a "comprehensive national discussion on Uganda's justice needs"—was scuttled when donor governments made it clear that they wanted the ICC Bill fast tracked.[764] As a result, Oola argues that, "the ICC Act was rushed through Parliament with little consultation and without much-needed acknowledgment of the domestic legal reality, given the existence of the Amnesty Act."[765]

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[759] See Amnesty Commission, "The Amnesty Act: An Act of Forgiveness," 15-24 ("The Amnesty Commission").

[760] Jacob Oulanyah, "Proposed new Part to ICC Bill; Part X – Alternate Proceedings," 12 December 2004 (proposed amendments on-file). Oulanyah's proposal suggested a possible truth commission model, not unlike that adopted in South Africa. The "alternative proceedings" would, for instance, "provide a system of individual accountability," including "public and open hearings," "participation of victims and affected persons," "full disclosure of all relevant facts," a "written determination of the case," and "sanctions."

[761] International NGO's that had pushed the implementation bill saw the exclusion of capital punishment as the result of their "input and advocacy." E-mail communication, March 15, 2010.

[762] Report of the Sessional Committee, 4-5.

[763] Uganda's ICC Act did not incorporate provisions for victim participation similar to those of the Rome Statute, even though many NGOs had lobbied to include participatory rights in Ugandan proceedings. A special session of the Legal and Parliamentary Affairs Committee of the Ugandan Parliament was held in July 2009, co-sponsored by the PGA and attended by ICC Judge Daniel Nsereko, which included proposals to amend the proposed legislation with specific provisions on victims' participation, protection and reparations. These were themselves extracted from a similar ICC domestication law passed in Uruguay in 2006, referred to by the PGA as an "exemplary incorporation of the rights of victims of Rome Statute crimes into a national system." See Note from PGA to the Legal and Parliamentary Affairs Committee, Parliament of Uganda, and Other Concerned Legislators and Members of PGA in the Parliament of Uganda (on-file).

[764] The Bill proposed, in part, the establishment of a National Truth and Reconciliation Commission to "facilitate the process of reconciliation within the country and to investigate the circumstances under which the gross violations and abuses of human rights were committed, including their motives, perpetrators and victims and to disclose the truth with respect to the violations in order to prevent a repeat of the violation or abuses in future." National Reconciliation Bill, draft of 10 June 2011 (copy on-file).

[765] See Oola, "In the Shadow of Kwoyelo's Trial: The ICC and Complementarity in Uganda."

2.2 Kenya: "Becoming a Global Village"

As in Uganda, international pressure was a key dynamic that drove the passage of Kenya's domestic implementing legislation. Following the election of President Kibaki in 2002, the government ratified (as an executive act) the Rome Statute in 2005. Little is known about the administration's intentions in choosing to do so other than that, in the wake of an ostensibly reformist political moment, ratification of the Statute was seen as a positive step by the new administration. One prominent Kenyan activist described the ratification as "one of those things you do to look good,"[766] while Yvonne Dutton's analysis suggests that Kenya's classification as a democracy in the post-Kibaki era played a role in the government's decision to join the Court.[767] International NGOs also seized on the moment. The CICC, for instance, chose Kenya as a target country on which to focus its efforts, noting that ratification would send an "important signal to other African states who have yet to ratify about Africa's growing commitment to international justice and the rule of law."[768]

At the time, Kenya did not have any laws in place that would have enabled it to prosecute international crimes as such. Neither the Kenyan Penal Code (KPC) nor the Armed Forces Act, which governs the Kenyan military, contained any such provisions, nor had a Kenyan court ever dealt with crimes against humanity, war crimes and genocide.[769] Following ratification, then, the Kenyan National Commission on Human Rights began drafting a bill that sought to implement provisions of the Statute domestically. At the time, however, the country was also undergoing its constitutional review process, with a referendum set for November 2005. As a result, the draft International Crimes Bill was temporarily shelved. It went through an initial reading in Parliament in June 2006 but, before it could proceed further, the 2007 elections had arrived.

In the wake of the electoral violence, a process that might have otherwise proceeded as a quiet, internal manner was quickly internationalized. Following its hearings, a key recommendation of the Waki Commission was that implementation of the Rome Statute be "fast-tracked for enactment by Parliament to facilitate investigation and prosecution of crimes against humanity."[770] Likewise, as Antonina Okuta notes, the Commission's recommendation that a special local tribunal be created to try the alleged perpetrators brought "into sharp focus the country's national legislation as well as its capacity to handle the investigation and prosecution of international crimes."[771]

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[766] Personal interview conducted in Nairobi, Kenya, 30 November 2012.
[767] See Yvonne Dutton, *Rules, Politics, and the International Criminal Court: Committing to the Court* (Routledge Press, 2013).
[768] CICC, "Global Coalition Calls on Kenya to Ratify International Criminal Court" (11 January 2005).
[769] Antonina Okuta, "National Legislation for Prosecution of International Crimes in Kenya," *Journal of International Criminal Justice* 7 (2009), 1063. The one exception was Kenya's Geneva Conventions Act, which, like Uganda, incorporated into Kenyan law the "grave breaches" provisions of the Geneva Conventions. Of course, this Act would not have been applicable for Kenya's post-2007 election violence, as that did not occur in the context of an international conflict.
[770] CIPEV Report, 476. See also Karuti Kanyinga, "Hobbling along to Pay-offs: The Kenya Grand Coalition Government" (April 2009) (on-file). Kanyinga argues that "fast tracking" was part of a broader political dispensation post-2008, in which longstanding debates about constitutional reform that has been "paralyzed … for over 10 years" were "fast tracked during the crisis," 9.
[771] Okuta, "National Legislation for Prosecution of International Crimes in Kenya," 1065.

As in Uganda, the Commonwealth Secretariat played an influential role in the drafting process. At the bill's second reading in May 2008, Kenya's then Attorney General Amos Wako stated that the government had been "well guided" by the United Nations and the Commonwealth Secretariat, which had "developed model legislation to guide the countries."[772] He continued:

> Mr. Speaker, Sir, we talk about the world being a global village. It is, indeed, becoming a global village, whether it is from the perspective of communications; that is telephones, mobile phones, television and so on, but for institutions such as the national State and so on. Also, from the point of view of issues relating to law and order, there can be no state as such which does not have a criminal justice system. Therefore, to the extent that the international community is developing an international criminal justice system, we are indeed and truly becoming a global village.[773]

Reflecting the perception that states are legally bound to implement the Statute, Wako added in his remarks that, "[B]y the mere fact we have ratified this Rome Treaty, we are, as a State, under an obligation to domesticate the Treaty, so that it has a force of law in Kenya."[774]

Unlike the narrowly defeated STK Bill, the parliamentary debate on the International Crimes Act (ICA) records no opposition to its passage. The Attorney General's proposal was supported by Martha Karua (architect of the failed Bill and then Minister for Justice, National Cohesion and Constitutional Affairs), as well as MP Danson Mungatana (an STK opponent), who "[took] the opportunity to thank the Attorney-General for, once again, rising to the occasion and bringing our country's laws in line with the international community, especially in criminal jurisprudence."[775] MP Farah Maalim, a leading figure in the Orange Democratic Movement and himself a member of PGA, made the most extensive remarks on the Bill, supporting its passage but expressing skepticism about the limitations of international criminal law. In particular, Maalim endorsed the "need to redefine … the definition of the UN of what genocide is," calling for it to encompass "cultural" and "economic" genocide.[776] In his words:

> It is easier for the West to arm, facilitate and finance the warlords, while they take away the timber from the Congo Forest. All these raw materials end up in the West. The money [that] is stolen from the continent often ends up in Switzerland, American and European banks. ... Economic genocide should have been included in the Statute more than anything else. The permanent impoverishment of the black man, the slavery and the colonization that we suffered is still what keeps us where we are. There has been no compensation and responsibility for what happened. The context of the Statute tells us how little the black continent participated in the formulation of this Statute.[777]

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[772] Kenya National Assembly Official Record (Hansard), The International Crimes Bill, Second Reading, 7 May 2008, 907 ("ICA Second Reading").
[773] Ibid., 906.
[774] Ibid., 907.
[775] Ibid., 913.
[776] Ibid., 917.
[777] Ibid., 918. In response to MP Maalim, the Attorney General replied: "Sir, a lot was spoken about economic genocide. This Bill is not concerned with what one may call 'economic genocide.' Important as it is, it is only concerned with criminal genocide," 927

Maalim further lamented the absence of Kiswahili "as one of the languages of the ICC." He opined: "I have seen that they have included Russian, Spanish, Arabic, English and Chinese. There are more speakers of Kiswahili than Russian. Our own Governments, and the continental body, would have been done a lot of pride if we also had Kiswahili as one of the languages in the ICC."[778]

Despite MP Maalim's remarks, the ICA, as a model for the Ugandan legislation that followed, imports directly almost all provisions of the Rome Statute. It refers entirely to the Statute's definition of international crimes (none of which were previously provided for in the KPC), [779] while provisions on command responsibility, statutes of limitation, and superior orders are likewise directly imported.[780] Similarly, the Act provides that the maximum penalty is life imprisonment, even though the ordinary penal code maintains the death penalty for crimes such as murder, armed robbery, and treason.[781]

The ICA was tabled and passed with remarkable speed, coming into operation on January 1, 2009. As in Uganda, it is one of the few international treaties to be domesticated into Kenya's national law. Standing in support, MP Ekwee Ethuro took note of the ICA's rapid passage:

> I am aware of many of the international protocols and statutes that have been consented to by the Government, that have not seen the Floor of this House. That is not the proper way to do it. I want to believe the business of knee-jack reaction--- Maybe the greatest motivation of the International Crimes Bill to even see the walls of this House, is a consideration of what we have gone through in terms of the Waki Report. … All the protocols and any other international protocols that the Government of Kenya has committed itself to should be domesticated.[782]

3. Surfacing Political Discomforts: Post-Implementation Domestic Politics

3.1 Uganda: The End of Amnesty?

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[778] Ibid., 917.

[779] The International Crimes Act, 2008 ("ICA 2008"), Art. 6(4). One significant difference between Kenya's ICA and the Rome Statute is its provisions on immunity. Rather than incorporate Article 27 of the Rome Statute, which makes official capacity irrelevant to immunity, the ICA's Section 27 only provides that the official capacity of a person shall not be used as a reason to refuse a request for the surrender of that person to the ICC. Thus, while there is no immunity for purposes of transfer or surrender to the Court, the President's constitutional grant of immunity would prevail for the purpose of domestic prosecutions in Kenya under the ICA. A similar immunity exception was also debated in the Ugandan context; however, the provision there was ultimately defeated, again owing largely to the vigorous efforts of civil society. See M. Ndifuna, J. Apio, and A. Smith, "The Role of States Parties in Building the ICC's Local Impact: Findings from Delegates' Visits to Uganda," (2011), which notes that the ICC Bill "faced delays throughout 2009-10, reportedly in part due to efforts … to provide immunity for Heads of State," 11 (on-file).

[780] ICA 2008, Art. 7(1)(f), (g), (k).

[781] Ibid., Art. 7(5)(b0).

[782] ICA Third Reading, 4084. MP Githae (now the Kenyan ambassador to the U.S.) likewise took the occasion to state, "'[N]ow that the Attorney-General is in the mood of domesticating international agreements, we have so many of them that we have not domesticated in this country, which Kenya has ratified. I would like to ask him to bring them to this House so that we can domesticate them." Ibid

In Uganda, Parliament's rushed support for the ICC Act's passage—seen at the time as a necessary and symbolic precondition for hosting the 2010 Review Conference—soon gave way to a deeper set of political concerns over the future of the Amnesty Act and, by extension, to the dominance of the complementarity framework. This was not surprising. Uganda had passed the Amnesty Act in 2000, within a year of its first signing the Rome Statute, but "without considering any possible inconsistency in obligations."[783] Furthermore, while some MPs had raised questions about amnesty's future in light of the ICC Act, at the time Attorney General Ruhindi had assured them that, "International criminal justice does not throw away our own initiatives to try some of these renegades." He noted, correctly, that, "you can actually have amnesty internally or domestically under the complementarity principle."[784] Nevertheless, the possibility of conflict was apparent. What might happen, for instance, if an amnesty applicant became a target for domestic prosecution under Ugandan law?

This precise question confronted Parliament only one month after the ICC Act's passage, when the executive sought a "carve out" declaration for the eligibility of four individuals to receive amnesty: Thomas Kwoyelo and three of the ICC's named suspects. The Minister of State for Internal Affairs purportedly sought the exemption because these individuals "have been engaged and continue to engage in acts that are contrary to international standards and are rebellious and injurious to the citizens of this country and the neighbouring states."[785] At this point, as noted in chapter five, Ugandan authorities had seized Kwoyelo and he had already applied for amnesty under the existing law. This led one MP who opposed the government's motion to note that it was in a "catch-22" situation:

> The minister is telling us that the fourth person [Kwoyelo] is already in the hands of the security agencies; they do not know what to do with him. Actually, they just want us to pass this request so that they can have this person prosecuted, because they can't grant him amnesty; they can't release him, and they can't take him to court while the peace process is going on. Why should we operate like that?[786]

Another MP from northern Uganda raised similar objections, expressing confusion as to the criterion used in selecting Kwoyelo for prosecution.[787] She added:

> Now, I want to know the effects of the declaration beyond the indictment. Suppose tomorrow, Kony comes out and says, 'I want to sign for amnesty and I will stop all this suffering for the people of Sudan, DRC and for the people of Central African Republic.' What will be the political decision of Uganda, DRC and Sudan for the sake of their people, what will be the effect of this? Is this decision written in stone, or can it be undone?[788]

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[783] Nouwen, *Complementarity in the Line of Fire*, 206.
[784] ICC Bill Second Reading, 10942
[785] Request for Parliament to Approve the Declaration of Named Individuals as Persons Not Eligible for Amnesty, 13 April 2010 (on-file); remarks of Mr. M. Kasaija, 785.
[786] Ibid., 787 (remarks of E. Lukwago). Notably, Hon. Lukwago (now mayor of Kampala) had also served as a member of the Committee of Legal and Parliamentary Affairs that considered the ICC Bill before it went to the floor of Parliament. See Sessional Committee Report.
[787] Ibid., 788 (remarks of B. Amongi).
[788] Ibid.

In the end, the Ministry withdrew its motion; however, the failed attempt soon inaugurated a more concerted effort to cease the issuing of amnesties entirely. Indeed, although amnesty remained strongly supported by Ugandans in the north and amongst their political representatives, its continuance increasingly conflicted with Uganda's carefully crafted image as a "complementarity state." JLOS, for instance, which was meant to act as a "neutral" justice coordinator, undertook a more aggressive effort to discontinue the Act, arguing that it was incompatible with Uganda's obligations under international law.[789] Organizations like Amnesty International took a similarly hard line. Following the Constitutional Court's decision halting the Kwoyelo trial, it issued a statement calling the decision a "setback" for accountability and urged the Ugandan government to "revoke any amnesty applicable to crimes under international law."[790]

A more urgent crisis thus presented itself in mid-2012, when, the Ministry of the Interior did not renew Part II of the Amnesty Act, which was the provision that empowered the Commission to grant amnesties.[791] The provision's lapsing—largely understood as a response to the Ugandan Constitutional Court's halting of Kwoyelo's trial in September 2011, on the grounds that he was entitled to amnesty—was met with intense opposition. Oola notes that it "angered many victims and leaders from the conflict affected sub-regions in northern Uganda," so much that local leaders and domestic civil society groups petitioned the Speaker of Parliament, condemning the "illegal and unconstitutional manner" in which the amnesty provision had been removed.[792] Ultimately, the matter was referred to the Parliamentary Committee on Defense and Internal Affairs, which proceeded to undertake extensive consultations with key stakeholders.

In its final, 45-page report, published in August 2013, the Committee concluded that the lapsing of Part II of the Act was "premature and out step with the sentiments of affected communities', and recommended that it be "restore[d] in its entirety."[793] Far more than the debate over the ICC Act, the Committee's report surfaces the complexity of Uganda's post-conflict landscape. It reviews, for instance, the arguments in favor of amnesty—the fact that "the vast majority of rebels were forcibly abducted, many at a very tender age"; the concern that there is "now no legal protection for returnees from prosecution"—and assesses the executive branch's contention that the granting of amnesty "was inconsistent with the Rome Statute of the International Criminal Court (1998) (domesticated in Uganda in 2010)."[794] It notes that JLOS and the UCICC played a leading role in advancing this argument, along with "diverse external pressure from some of Uganda's development partners as well as agencies of the United Nations and other international commentators who have policy objections to the amnesty."[795] In the

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[789] See, e.g., The Amnesty Law (2000) Issues Paper, Review by the Transitional Justice Working Group, JLOS (April 2012).
[790] Amnesty International Public Statement, "Court's decision a setback for accountability for crimes committed in northern Uganda conflict," AFR 59/015/2011, 23 September 2011.
[791] Statutory Instruments 2012 No. 34, The Amnesty Act (Declaration of Lapse of the Operation of Part II) Instrument, 2012 (23 May 2012, issued by MP Hilary Onek, Minister of Internal Affairs) (on-file).
[792] Oola notes that, in addition to the suspicious manner of the lapsing, it was procedurally improper: Under the Amnesty Act, the decision to renew or lapse any part of the law is at the discretion of the Minister of the Interior. Here, the Chief Justice and Attorney General both were alleged to have improperly intervened in the process. For a more detail account of this episode, see Oola, "In the Shadow of Kwoyelo's Trial: The ICC and Complementarity in Uganda."
[793] Report of the Committee on Defence and Internal Affairs on the Petition on the Lapsing of Part II of The Amnesty Act ("Committee Report – Amnesty Lapse"), August 2013, para. 13.1.
[794] Ibid., para. 9.8.
[795] Ibid., paras. 9.4, 9.6.

Committee's view, these external actors "appear to have exerted a disproportional influence on the Executive's approach to the amnesty issue, by promoting their own policy preferences."[796]

The Committee's conclusions also dispel a number of the misconceptions about complementarity's purported obligations. It notes, for instance, that there "is in fact no provision of [the Rome Statute] which outlaws amnesties, neither does the Statute impose any express obligations upon states to prosecute relevant crimes."[797] It further notes the common view encountered by Committee members that the Statute "imposes upon states parties a general obligation to establish international crimes courts and to introduce criminal legislation in order to prosecute ICC crimes nationally."[798] In perhaps its strongest passage, the report concludes:

> There is … a broader political issue at stake here, which relates not only to Uganda, but generally to the African continent: it concerns the extent to which African values and priorities inform the content of international law. There is a greater need for African states to be more assertive in ensuring that their values are reflected in the development of international law.[799]

Following the Committee's conclusions, the Ugandan government reinstated the Amnesty Act in its entirety. It remains in effect until May 2015.

3.2 Kenya: A Return to the Political

The politically contested nature of amnesty in Uganda, and the relative detachment of that debate from the ICC Act's passage, resonates in the Kenyan context as well. There, the swift approval of the ICA was soon followed by political stalemate on the attendant institutional question of whether or not to establish, as the Waki Commission had also stipulated, a Special Tribunal for Kenya that would be empowered to retroactively judge alleged perpetrators of the election violence. As previously noted, the defeat of the STK was largely the product of an "unholy alliance" between politicians who feared that genuine, independent domestic proceedings would never be possible through Kenyan courts, and those who saw such a tribunal, at the time, as a greater threat than the ICC itself. The phrase "Don't be vague, go to The Hague" emerged as part of the country's political lexicon, ostensibly indicating a preference for the ICC's involvement, even if it signaled that the Court was the more limited threat.

Unlike the ICA, which saw minimal debate as to the incorporation of its substantial obligations into Kenya's legal framework, the STK Bill was deeply contested. Parliamentarians rejected the overt directives of the executive to vote in favor of the STK, raising questions about its comportment with the Kenyan Constitution as well as the risk of creating a parallel structure to the country's broader legal system. Repeated attempts by the Kenyan Parliament to withdraw from the Rome Statute and to repeal the ICA also reflect the deeply contested nature of the ICC's intervention.[800] At the time of the Court's summons, domestic legislation was, in fact, tabled seeking to repeal the ICA.

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[796] Ibid., para. 9.38.
[797] Ibid., para. 9.18.
[798] Ibid., para. 9.21.
[799] Ibid., para. 9.39.
[800] See, e.g., Nicholas Kulish, "Legislators in Kenya vote to quit global court," *International Herald Tribune*, 5 (6 September 2013).

Although the government took no action on the bill, only one parliamentarian (former Justice Minister Karua) opposed the motion.[801] Furthermore, in contrast to the "global village" invoked by Attorney General Wako only three years before, at a special session of the Senate in December 2013 (and following a similar debate by the National Assembly in September), senators spoke of cooperation with the ICC as "singing the tune of the whites"; of "playing politics with the boundaries of this country and the flag and the national anthem of our nation"; and of an "unsupervised prosecutor who can … arrest people who he thinks do not suck up to international neo-colonial ideology."[802]

This discourse has increasingly cast civil society as shadowy hands conspiring against the Kenyan state and people—"evil society" in the words of Kenyatta's 2013 presidential campaign.[803] Furthermore, according to the Senate Majority Leader:

> What has happened … is that a few people especially from the Non-Government Organisations (NGOs) world decided to convert the misery and the tragedy that befell our country into a money-minting business where a few citizens have converted themselves into running rings and organisations in the name of victims support. These are people who have been responsible and have been used by foreigners to cook up the stories and bring up the kind of friction that is now being witnessed before the [ICC]. As I said, we should be all ashamed as Kenyans.[804]

The Senate ultimately passed a motion expressing its intention to bring forward a bill that would compel the government to withdraw from the ICC. Like the ICA's passage, however, this motion may be largely symbolic: to date, no bill has been tabled.

4. Democratic Republic of Congo: Resistance and Contestation

The DRC was the 60th state to ratify the Rome Statute, thus formally bringing the ICC into existence. It is unclear whether this symbolic threshold played a role in President Kabila's decision to ratify the Statute in 2002; however, the symbolism has itself been summoned by many advocates in their long-standing effort to have the Congolese Parliament pass implementing legislation. For example, Olivier Kambala notes that, "it was the [DRC's] 60th ratification that triggered the Statute's entry into force—and made the human rights community applaud the birth of something

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[801] See Peter Opiyo, "Isaac Ruto: Kenya Should Pull Out of ICC," *Standard Digital*, 15 December 2010; Thomas Obel Hansen, "Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns," *California Western International Law Journal*, 42(1) (2011).
[802] Parliament of Kenya, Convening of Special Sitting of The Senate to Debate Motion on Withdrawal of Kenya from the Rome Statute, Official Record (Hansard) ("Senate Debate"), 10 September 2013; comments at 46 (Senator Keter) and 14,16 (Senator (Prof.) Kindiki). Unlike previous legislative debates on the ICC Act and the establishment of the STK, the various Rome Statute withdrawal motions have been debated in both the Senate and the National Assembly, following the introduction of a bicameral legislature in March 2013.
[803] John Githongo, "Whither Civil Society?," *The Star*, 6 April 2013.
[804] Senate Debate, 22. See also Parliamentary Debates, National Assembly Official Report (Hansard), 15 October 2014, in which one MP suggests that the Open Society Initiative in East Africa is a "terrorist organisation," and that NGOs such as the Africa Centre for Open Governance, Kenyans for Peace Truth and Justice, and the Kenya Human Rights Commission "bears the greatest responsibility for the post-election violence." In his words, "The forest might be different at different times but the monkeys are always the same" (remarks of Hon. Moses Kuria).

impossible to envision fifty year earlier."[805] The publication in June 2010 of the United Nations' long awaited mapping exercise of crimes committed between 1993 and 2003 also brought renewed international pressure for accountability, including for national implementation of the Statute. The performative dimension of implementation thus loomed large in the DRC as well.

Unlike Kenya and Uganda, however, international crimes have been crimes under Congolese law since well before the ICC's establishment. Genocide, war crimes, and crimes against humanity were first codified in the 1972 Code of Military Justice (*code de justice militaire*) and the Parliament enacted new criminal (*code penal militaire*) and judicial codes (*code judiciaire militaire*) for the military in 2002.[806] The preamble to the revised Military Criminal Code (MCC) further acknowledges that the DRC ratified the Statute, even if the definitions of crimes under Congolese law depart from it in certain respects.[807] Not unlike the "mirroring" effect observed in Uganda and Kenya's domestic ICC legislation, most of the limited commentary on the DRC has drawn attention to these differences. Scholars have noted, for instance, that the conscription of minor children into the armed forces is not criminalized under the MCC; that the Code "seemingly merges the current normative understandings of crimes against humanity and war crimes"; and that "the domestic law of crimes against humanity in the DRC is not as clearly defined as the current norms of international law."[808] At the same time, the MCC also offers more expansive definitions than the Rome Statute. Political groups are a protected class under the DRC's definition of genocide, while the "destruction of natural heritage" and "universal culture" may constitute crimes against humanity.[809]

Draft implementation legislation for the DRC—intended to transpose the Rome Statute's definitions into the *code pénal ordinaire*—existed well before 2010 as well. Cooperation legislation was drafted as early as 2002 and later revised in 2003 "after consultation with a variety of entities, including civil society."[810] A later version of a government-led *projet de loi* was also published in 2005, following "a number of expert meetings supported by Human Rights First, Human Rights Watch, the NGO Coalition for the International Criminal Court, and the African Association for the Defense of Human Rights, a Congolese non-governmental organization."[811] Despite these numerous campaigns, this legislation was never put on the parliamentary agenda. Godfrey Musila

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[805] Olivier Kambala wa Kambala, "International Criminal Court in Africa: *'alea jacta est,*" Oxford Transitional Justice Research Working Paper Series (12 July 2010). Several interlocutors expressed similar sentiments to the effect that the "ICC exists thanks to the DRC; it brought the Court into existence."

[806] Thus, under Congolese law, Rome Statute crimes committed during any period prior to 2003 would fall under the 1972 Code, while crimes committed post-2003 would fall under the 2002 codes or, as some domestic courts have determined, the Rome Statute. The 2002 criminal code is Loi No. 024/2002 du 18 Novembre 2002 Portant Code Pénal Militaire ("2002 Code Pénal Militaire"); it is included in a compendium of the DRC's criminal law, published as "Code Pénal Congolais: Décret du 30 janvier 1940 tel que modifie jusqu'au 31 décembre 2009 et ses dispositions complémentaires" (2010) (on-file). The judicial code is Loi No. 023/2002 du 18 Novembre 2002 Portant Code Judicaire Militaire, at http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.023.2002.18.11.2002.pdf.

[807] See Règlement du 10 septembre 2010 relatif aux éléments de crime, para. 1 (in "Code Pénal Congolais").

[808] See, e.g., Antonietta Trapani, ""Bringing National Courts in Line with International Norms: A Comparative Look at the Court of Bosnia and Herzegovina and the Military Court of the Democratic Republic of Congo," *Israel Law Review* 46(2) (July 2013), 239-240; Labuda, "Applying and 'Misapplying' the Rome Statute"; UN Mapping Report, paras. 820-825.

[809] See 2002 Code Pénal Militaire, Arts. 164, 169(9), 169(10).

[810] Musila, "Between rhetoric and action," 16. Earlier versions of this legislation (from 2001 and 2002) are appendixed in Musila's monograph; see Appendices 3 and 4.

[811] Ibid.

suggests that this may be attributed to the law "not [being] considered a priority in view of other issues that … occupied the government and legislators' time," as well as "perceptions among some people that the ICC's work ... is a project of the executive, directed at destroying its political enemies."[812] (The arrest and transfer of Kabila's main political rival, Jean-Pierre Bemba Gombo, to The Hague in 2008 did little to allay such perceptions.) Furthermore, the 2004 signing of a comprehensive Agreement on Judicial Cooperation between the government and the Office of the Prosecutor—similar to cooperation agreements signed with the OTP in Kenya and Uganda—may have obviated the perceived need for more comprehensive legislation.[813]

Discussion of domestic implementation thus remained stalled in the DRC until the release of the UN's mapping report in 2010.[814] (Again reflecting a duty-based understanding of complementarity, the report noted that, "by ratifying the Rome Statute, the DRC subscribed to the *obligation to adapt* its domestic legislation to the law enshrined in the Statute."[815]) Several months after the report's release, however, proposed implementation legislation (*proposition de loi de mise en oeuvre*) finally emerged on the National Assembly's agenda. Two MPs, the Honorable Mutumbe Mbuya and Professor Nyabirungu mwene Songa, a well-known Congolese intellectual and human rights activist,[816] had first introduced this legislation in March 2008, but no previous action had been taken on it.[817]

Patryk Labuda, who closely followed the legislative process for the *propositon*, notes that the bill had four main objectives: (1) to incorporate the Rome Statute's classification of international crimes into domestic criminal law (the bill "copied most of" the Statute's definition of crimes); (2) to transfer jurisdiction over international crimes to civilian courts, not military tribunals; (3) to provide for a greater number of fair trial guarantees, "especially relating to defendant rights, victim participation and witness protection"; and (4) to establish a "coherent framework regulating collaboration between the ICC's field units and domestic Congolese judicial and governmental authorities."[818] In addition to these practical objectives, compliance and complementarity were again rhetorically marshaled in support of the legislation's passage. A briefing note prepared by the ICTJ states that "[y]ears have lapsed" since the DRC ratified the Rome Statute, "but the DRC government has yet to meet its legal obligation to incorporate the statute into

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[812] Ibid., 16, 17.
[813] Judicial Cooperation Agreement between the Democratic Republic of Congo and the Office of the Prosecutor of the International Criminal Court (reproduced as Appendix 2 in Musila, "Between rhetoric and action," 81-90).
[814] While this chapter focuses on the 2010-11 parliamentary period, there have been other efforts to pass such legislation. Most recently, in June 2015 (with presidential elections again looming), the National Assembly voted for the adoption of a "Law to Implement the Rome Statute" in the domestic legal order, which, at the time of writing, awaits Senate approval. See Patryk Labuda, "Whither the Fight Against Impunity in the Democratic Republic of Congo?" (24 June 2015), at http://justicehub.org/article/whither-fight-against-impunity-democratic-republic-congo.
[815] UN Mapping Report, para. 1022 (emphasis added).
[816] Nyabirungu has been an important figure in Congo's legal and political landscape and has been the focal point for a number of international organizations engaged in domestic complementarity efforts. He and mwene Songa both are also members of Parliamentarians for Global Action. Interview with ICTJ staff, Kinshasa, 21 June 2011; interview with PGA consultant, Kinshasa, 27 June 2011.
[817] See ICTJ, "The Democratic Republic of Congo Must Adopt the Rome Statute Implementation Law" (April 2010) ("Two Congolese members of parliament introduced a draft bill before the National Assembly, Congo's lower house, in March 2008.").
[818] Labuda, "Applying and 'Misapplying' the Rome Statute."

national law."[819] Further, adopting such legislation "is essential to ensure complementarity between domestic Congolese courts and the ICC" and to "strengthen the country's legal system."[820]

Despite having languished for two and a half years, "heated" and "stormy" debates on the draft bill were held within the Assembly in November 2010 whereupon, under Congolese parliamentary procedure, it was declared admissible (*recevable*) and transferred to the National Assembly's PAJ Committee for further consideration.[821] In spite of its advancement, the debates on the law – as with the competing Special Chambers/Court legislation – underscored the opposition expressed by many MPs, reflecting a critical discourse akin to the post-implementation discomforts later seen in Kenya and Uganda. The involvement of outside actors in advocating for the bill's passage was both seen and described as a form of neo-colonialism and a threat to national sovereignty.[822] Again, a particular point of contention was punishment: the DRC legislation, at least in its earlier iteration, prohibited the application of the death penalty. By contrast, under the MCC, Congolese military courts have discretion to impose the death penalty for crimes against humanity, genocide, as well as certain war crimes.[823] Most Congolese MPs found this provision unacceptable and it became a central point of contention during the Assembly's debate.[824]

Such opposition has largely been presented as a distraction to the substantive issues raised by the bill. As elsewhere, however, many proponents of the ICC's normative framework did see implementation of the Statute as an opportunity to push for abolition of the death penalty. Indeed, a bill to that effect was introduced at the same time as the Rome Statute implementation bill, which, though unsuccessful, was supported by a prominent Congolese NGO on the grounds that it was "a valuable opportunity for the DRC to conform with international instruments it had ratified, notably the Rome Statute of the ICC."[825] Another NGO circulated an advocacy paper during the time of the debate urging passage of the law, in part, because:

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[819] ICTJ, "The Democratic Republic of Congo Must Adopt the Rome Statute Implementation Law." The ICTJ also states that it, ASF, and the Konrad Adenauer Foundation convened in 2008 "and issued a memorandum of suggested amendments to the draft bill to maximize conformity with the Rome Statute." Ibid.

[820] Ibid.

[821] The debates were characterized as such in the following press releases: CICC Press Release, "Global Justice Coalition Welcomes Advances in the Criminal Law Reform in the Democratic Republic of Congo," 9 November 2010; CN-CPI Press Release, "The DRC Coalition for the ICC welcomes the admission of the law proposal on the implementation of the Rome Statute," 5 November 2010.

[822] See Kambale, "Mix and Match."

[823] See 2002 Code Pénal Militaire, Arts, 65, 164, 167, 169, 171, 172.

[824] See, e.g., PGA Press Release, "La loi de mise en oeuvre du statut de Rome déclare recevable par l'Assemblée Nationale de la République Démocratique du Congo," 4 November 2010. The release notes that the "intense" debate lasted more than 2½ hours with a total of 15 interventions, which "attracted criticism" for not retaining the death penalty as a form of punishment (author's translation).

[825] See Ligue Pour la Paix et les Droits de l'Homme, Commique de Presse No. 006/CN/LIPADHO/2010, "La Majorité des Députes s'opposent a l'abolition de peine capital," 18 November 2010 (author's translation). On the fate of this bill and its imbrication with debates over Rome Statute legislation, see also Lievin Ngondji Ongombe, "RDC: la peine de mort, l'adoption de la loi de mise en oeuvre du statut du Rome," in Kai Ambos and Ottilia A. Maunganidze (eds.), *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Göttingen Studies in Criminal Law and Justice, 2012).

> The definitions of international crimes are different in the Rome Statute and the Congolese military judicial code. Moreover, the sentences are not the same in both systems (death penalty and no sentence for war crimes in the DRC.)[826]

Similarly, a 2009 concept paper by the PGA for an "international parliamentary conference on justice and peace" includes the following:

> It is time for the DRC to undertake this historic step to implement the Rome Statute of the ICC and equip itself with a strong arsenal of laws against impunity, and this legislation could also represent a definitive step towards abolishing the death penalty, even if the Rome Statute itself leaves to each State Party the sovereign decision to legislate on penalties for international crimes that are adjudicated before domestic Courts.[827]

Punishment was thus an integral part of the implementation debate in the DRC. As with insisting on "international standards," advocates and norm entrepreneurs saw in implementation an opportunity to route broader political objectives through the principle of complementarity.

Even with the draft implementation law advancing to the PAJ, it remained a relatively low political priority. It was not until June 2011—eight months after having been declared *recevable*—that a special sub-committee of the PAJ finally convened, to review and revise the bill.[828] By this point, however, the executive was vigorously advancing its separate *projet de loi*. As noted, despite the pressure being placed on them by the executive, Congolese MPs declined to vote on that draft law's admissibility. Unlike Kenya and Uganda, where legislative actors assented to hastily presented legislation, Congolese MPs objected to the railroading of the specialized chambers bill. This led to a further political divide between the legislative and executive branch: Parliament refused to endorse the government's *projet de loi*, and government largely ignored the Rome Statute implementing bill.[829] Indeed, although the government presented a revised version of the Special Court bill to the Senate in August 2011 under an exceptional procedure, the implementation bill of MPs Mbuya and Mwene Songa was not included as part of that legislative package. In the end, no formal vote on it was ever taken.

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[826] Le Club des Amis du Droit du Congo, "The Repression of International Crimes by Congolese Jurisdictions" (December 2010) (on-file). See also UN Mapping Report, para. 63 (noting, in reference to a proposed hybrid mechanism that, "Such a mechanism should also … not include the death penalty among its sentences, in compliance with international principles").

[827] Parliamentarians for Global Action, "International Parliamentary Conference on Justice and Peace in the Democratic Republic of Congo, the Great Lakes Region and Central Africa," 10-12 December 2009, at http://www.pgaction.org/pdf/pre/Kin%20TOR%20EN.pdf, p. 3. As noted in the terms of reference, this event was co-organized with, *inter alia*, the ICTJ, ASF, the Konrad Adenauer Foundation, and the DRC's National Coalition for the International Criminal Court.

[828] République Démocratique du Congo, Assemblée Nationale, Commission Politique, Administrative et Judiciaire, "Proposition de loi modifiant et complétant le Code Pénal, le Code de Procédure Pénale, le Code Judiciaire Militaire et le Code Pénal Militaire en vue de la mise en œuvre du Statut de Rome de la Cour Pénale Internationale" (June 2011) (on-file). At the bottom of this document, March 2008—the original date on which the legislation was introduced by Mutumbe Mbuya and mwene Songa—appears to be crossed out and replaced with June 2011.

[829] See Human Rights Watch, "DR Congo: Commentary." HRW underscores the "importance of harmonizing the draft legislation creating specialized chambers and the draft ICC implementing legislation," and states, "We rely on the Congolese government to urge Parliament to also pass the ICC implementing legislation, which contains important features such as incorporating definitions of Rome Statute crimes into Congolese law, and arrangements for effective cooperation with the court."

5. Implementation Reconsidered

The histories recounted herein suggest three tentative fault lines around implementation of the Rome Statute and its relationship to complementarity.

5.1 Implementation as Purity

Rather than a catalyst for Rome Statute domestication, complementarity is better understood as the axis and rationale around which advocacy for implementation has turned. Domestic NGO coalitions were stimulated and supported by larger, international organizations who saw implementation not only as a way to facilitate cooperation with the ICC or enable domestic prosecutions, but also as a step in broader criminal justice reform. Abolition of the death penalty and the inclusion of domestic victim participation regimes are perhaps the clearest illustration of such reform efforts. The normative stake of many of these actors, however, as well as legal academics, is to preserve the Rome Statute in its technically correct or "pure" form, transplanting its complex substantive and unique procedural provisions into national legal frameworks. The proliferation of "model laws" and legal tools—most of which copy the Statute in content and form—can be understood as a means towards this end.

Yet "distortions" in implementation are an issue of legal pluralism; they are an inevitable product of importing new legal principles into an established legal system.[830] In her work on the "translation" of international law into local justice, the anthropologist Sally Engle Merry contends that the efficacy of human rights depends on their "need to be translated into local terms and situated within local contexts of power and meaning"; they need "to be remade in the vernacular."[831] Merry helpfully defines translation as "the process of adjusting the rhetoric and structures of … programs or interventions to local circumstances,"[832] but she notes that the process can also yield replication: rather than a merger of global frames with local forms (hybridization), they are appropriated wholesale. In a similar vein, Drumbl notes that, "Pressures emanating from dominant international norms [can] narrow the diversity of national and local accountability modalities."[833]

Analogized to the implementation efforts detailed herein, there is little evidence of vernacularization at work in Kenya or Uganda. In both countries, the Statute's core substantive and procedural provisions were copied, based almost entirely on "model" ICC legislation that had been prepared for export. Rather than an opportunity to tailor domestic legislation to reflect more localized concerns and desires—to encompass, for instance, suggestions that it incorporate the crime of pillage or corporate liability, or to accommodate other transitional justice measures—implementation was instead an exercise in mimicry. Rather than being "remade in the vernacular," domestic versions of the Rome Statute, much like the domestic complementarity courts described in chapter five, largely mimic international juridical and institutional forms. By contrast, whereas the DRC's revised MCC reflects greater hybridity, the little attention these laws have

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[830] On the relationship between "legal transplantation" and ICL, see Cassandra Steer, "Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law," in Elies van Sliedregt and Sergey Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014).
[831] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006), 1.
[832] Ibid., 135.
[833] Drumbl, *Atrocity, Punishment, and International Law*, 121.

received focus on their departures from international—understood as "minimum"—standards.

This lack of attention is not accidental. As noted previously, much of the academic literature has deliberately presented complementarity as requiring uniformity with the Rome Statute, while the ICC itself has adopted the language of the "mirror" between it and national jurisdictions. NGO implementation materials and other capacity-building programs have been similarly designed. Even though international law certainly permits amendments in the form of broader protection at the national level, few (if any) of these materials encourage them.

6.2 Implementation as Politics

While often presented as a seemingly technical exercise, implementation is fundamentally a political process. In Uganda, the passage of implementing legislation was delayed because it was not a sufficient political priority (indeed, it was at odds with other political priorities) and then passed swiftly because it became important enough to external constituencies and carried little political cost. A similar dynamic animated the Kenyan experience following the release of the Waki Commission's report. In both countries, then, the politics that enabled implementation were one of wanting to be seen as compliant states: implementation was evidence of putting complementarity "into practice" and a means of signaling to external constituencies the governments' purported commitment to accountability.

At the time the acts were passed, these priorities briefly outweighed other domestic concerns. In Uganda, what passage of the ICC Act might mean for the continued practice of granting amnesties was glossed over, but quickly returned to (and remains at) the political fore. Similarly, Kenya's charged domestic politics are largely absent from the 2008 parliamentary debate on the ICA's passage, yet the unexpected swiftness of the ICC's intervention there has since radically altered the political landscape; indeed, most "regard the leadership of the Jubilee Alliance as a political marriage forged to protect" Kenyatta and Ruto from the Court.[834] This, in turn, has led to repeated efforts to nullify the domestic legislation, withdraw from the ICC, and derail its proceedings.

The intensity of these debates, and their relative absence from earlier discourse, suggests a decoupling from the politics of the Rome Statute's enactment and the text of the legislation itself. A focus on the "ceremonial conformity"[835] of Uganda's ICC Act and Kenya's ICA with the Rome Statute—their near symmetry with the latter's substantive and procedural provisions—can be understood as a desire to gain or maintain international legitimacy, but it also reflects the power and influence of private, non-state actors—influential NGOs, legal academics, ICC staff— to mediate the relationship between the international and national spheres.[836] It also underscores their influence in the social construction of a new norm of complementarity, one that is increasingly freed from its legal constraints as an admissibility principle in the service of broader governance goals. These goals may be normatively desirable; however, they also risk

[834] Chatham House, "The ICC Intervention in Kenya," AFP/ILP 2013/01, February 2013.
[835] Marion Fourcade and Joachim J. Savelsberg, "Global Processes, National Institutions, Local Bricolage: Shaping Law in an Era of Globalization," *Law & Social Inquiry* 31(3) (2006), 516.
[836] For a trenchant critique of a similar power dynamic in the context of post-Soviet countries, see Mertus, "From Legal Transplants to Transformative Justice," 1377-1384.

supplanting democratic deliberation with what Drumbl has called "a treaty-centered international administrative bureaucracy," contributing to a "whittling down of democratic input in important aspects of national lawmaking."[837] The presentation of implementation as an international duty rather than a choice (or even a priority) amongst domestic political actors has arguably contributed to such "whittling down."

Unlike Kenya and Uganda, complementarity's coercive power was largely absent in the DRC, in favor of what was intended to be from the outset a more "positive" arrangement. However, here, too, political considerations were the primary drivers of domestic action: with presidential elections on the horizon, the need to be seen as "doing something" led Kabila's administration to push strongly for a Special Chambers/Court bill of the sort that the UN's report had recommended, while the parliamentary *proposition de loi* (as well as the UN's recommendation for another truth commission) withered. Yet the DRC, which could otherwise be seen as a "failure" for not yet having ICC legislation in place, has also approached implementation more deliberatively, raising pertinent questions about the impact of legal transplants (and their political economy) on domestic institutions. Furthermore, even as the trappings of complementarity might appear to be absent in the DRC—there is no dedicated international crimes division, there is no Rome Statute legislation as such—it has nevertheless prosecuted the most conflict-related cases to date.

6.3 Implementation as "Performance"

Contrary to popular accounts, the ICC itself was not a catalyst for implementation of the Rome Statute. The passage of Uganda's ICC Act did not come until eight years after the Court had formally intervened there but, crucially, the ICC's arrival brought with it an array of transnational non-state actors who summoned complementarity (and the "shadow" of the Court) to pursue broader reform projects. Moreover, it is now clear that it was Uganda's role as host state for the ICC Review Conference, part of an orchestrated performance for international donors, which pushed forward legislation that had otherwise languished. In this sense, the conference itself was the catalyst for the ICC Act. Its passage also dovetailed with a new chapter in the relationship between Uganda and the principle of complementarity. Whereas complementarity—understood as jurisdictional rivalry with the ICC—was the dominant logic for the creation of a specialized court in 2008, by 2010 the principle had a new meaning: Uganda's law and institutions would complement The Hague, not compete with it.

The desire to be seen as a compliant, cooperative state in the eyes of international actors likewise motivated Kenyan politicians, at least in the early phase of the post-election violence. At that stage, in 2008, the imminence of ICC intervention still appeared quite remote—indeed, it was the remoteness that led many MPs to reject the Special Tribunal bill—but passage of the ICA was seen as a politically strategic move. As a standalone recommendation of the Waki Commission it was an opportunity to signal a break with the past, even as the Act's own retrospective applicability to those events appeared doubtful. The ICA may have been, in the words of the director of a leading

[837] Drumbl, *Atrocity, Punishment, and International Law*, 135. For a similar critique in the context of constitutional drafting, see Sara Kendall, "'Constitutional Technicity': Displacing Politics through Expert Knowledge," *Law, Culture and the Humanities* 11(3) (2015).

Kenyan NGO, the country's "never again" moment but, unlike the STK, the political price it threatened to extract was low.

Similarly, although the DRC remains without a Special Chambers or implementing legislation, the most concerted efforts to pass both came in the wake not of the ICC's initiation of its investigations, but the release of the UN Mapping Report seven years later. While the Court's work was symbolically summoned to press the need for accountability that the report's recommendations raised anew, the opposition of many Congolese parliamentarians to much of this proposed legislation reflected a deeper resistance in the DRC to international intervention. Congolese parliamentarians raised many of the same concerns about implementation—the risk of exceptionalism, the threat to constitutionalism, an encroachment on sovereignty—which Kenyan and Ugandan politicians would raise later as well.

These histories suggest that implementation is better understood not as an effect of the ICC's intervention but a form of political theatre.[838] In both Kenya and Uganda, passage of domestic ICC legislation was hailed for its swift passage with large majorities, demonstrating the entrenchment of global norms domestically and vindicating the ICC's catalytic potential. In fact, however, implementation of the Statute was accelerated in order to "perform" complementarity for predominantly international audiences, and to signal, in the Kenyan context, a return to the "global village." Much like the international criminal trial itself, then, implementation served a symbolic function, even as the post-implementation domestic politics of both countries remain deeply contested.

6. Conclusion

Implementation narratives often present the process as part of a progress march towards global consensus—as something above the state, rather than a part of it. Model laws and toolkits facilitate this process; however, as this chapter has suggested, such questions of technique overwhelmingly privilege uniformity with the Rome Statute, often stifling deeper political debates within the state itself. The outsized role of external actors and constituencies in these processes (most of who regard deviation from the Statute with suspicion) thus raises questions about who the agents of implementation are, as well as the content and form of the domestic legislation that is enacted. Efforts to progressively narrow discussions about alternative forms of justice from the Ugandan ICC Act, or the mistaken belief that a domestic Rome Statute could not incorporate economic crimes in Kenya, suggests a view of implementation driven less by domestic political interests than replicating the Statute as a "global script."

Furthermore, despite the passage of Rome Statute legislation in both Kenya and Uganda, implementation appears to have had little influence on national investigations and prosecutions. Of the handful of cases related to the ICC referrals that have been prosecuted domestically, they have been for ordinary crimes. Similarly, in the DRC, judges have drawn interpretive guidance from the Rome Statute in the adjudication of international crimes but the codification of these crimes domestically long predated the

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838 On the symbolic function of the criminal trial, see Martti Koskenniemi, "Between Impunity and Show Trials," in J.A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law, Volume 6* (The Netherlands: Kluwer Law International, 2002), 1-35. On ritual and "performance" in the context of state transition, John Borneman, *Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe* (Princeton: Princeton University Press, 1997), 20-25.

Statute, and ICC legislation itself has not been the source of law for prosecutions before Congolese military courts.

CHAPTER SEVEN
Conclusions

The idea that all international problems will dissolve with the establishment of an international court with compulsory jurisdiction is an invitation to political indolence. It allows one to make no alterations in domestic political action and thought, to change no attitudes, to try no new approaches and yet appear to be working for peace.

Judith Shklar (1964)[839]

[I]n the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you, as lawyers and tribunes of justice to do your utmost in our struggle to ensure that no ruler, no state, no junta, and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights and that those who violate those rights will be punished.

Kofi Annan (1997)[840]

1. Reassessing Complementarity as a Catalyst

The ICC remains a pivotal institution in the growing juridification of international politics. At the same time it faces many challenges, ranging from the damaging breakdown of the Kenyan cases to increasing criticism that it is a neo-colonial project targeting African states.[841] This increasingly fragile political space in which the Court finds itself is, to some extent, captured in the dueling views of Annan and Shklar above. The certitude of Annan's remarks is rooted in the vision of a progressive, cosmopolitan legal order, of which the ICC is both agent and apex; by contrast, Shklar warns against seeking such certitude in the law or its institutions.[842] These competing conceptions inform a number of the themes that this dissertation has sought to trace in its examination of the ICC's "catalytic effect" in Uganda, Kenya, and the DRC.

First, because the ICC was understood from early on as needing to be more than the sum of its parts – a vehicle for retributive justice, but also an engine for accountability at the domestic level – complementarity has multiple meanings. Such a project is at once progressive and disciplinary: it is driven by Annan's vision that all

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[839] Shklar, *Legalism*, 134.

[840] Kofi Annan, "Advocating for an International Criminal Court," *Fordham International Law Journal* 21(2) (1997), 366.

[841] See, e.g., the March 2012 issue of the *New African*, with the title "ICC, Why Africa Will Always Lose." More critical scholarship has also increasingly questioned the triumphalism surrounding international criminal law, as well as its own exclusions. See, e.g., Christine Schwöbel, *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014); Tor Krever, "Dispensing Global Justice," *New Left Review* 85 (January-February 2014).

[842] For a thoughtful reflection on Shklar and the ICC, see Samuel Moyn, "Judith Shklar versus the International Criminal Court," *Humanity* (Winter 2013), 473-500. These polarities also recall Martti Koskenniemi's insights into the dynamics of the international legal field: the ICC and its body of law oscillates between deference to the power of states, and openness to more cosmopolitan visions. See Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006).

might "sleep under the cover of justice," but insists that, in order to do so, states follow certain rules. Complementarity, in turn, has become more than a question of admissibility but the juridical logic through which these rules have been articulated. As chapter two illustrated, it has been effectively reshaped from shield—a principle protective of sovereignty—to sword. In Mégret's words, "Complementarity has become part of the way in which international criminal lawyers project a sense of the 'international criminal law *acquis*,' a sort of global package of norms that have to be developed by states that become part of the ICC club."[843] Two principal conceptions of complementarity animate this global package. One is as a tool for cooperation (a "gentle incentivizer"), the other as an instrument of coercion. Both interpretations, however, position the Court as a catalytic body: the threat of ICC intervention prompts states to undertake their own accountability efforts, while the promise of assistance and cooperation encourages them to do so.

A central feature of this new norm is the commonly held understanding that complementarity imposes explicit duties on states, thus linking the ICC-as-catalyst frame to the dominant discourse of compliance in international law. Indeed, although legally inaccurate, this duty-based conception of complementarity—with its attendant domestic obligations of implementation, investigation, and prosecution—has come to dominate the popular understanding of the principle. The reflection and advancement of this understanding in a vast array of literature demonstrates how, in Robinson's words, "collective belief can influence our understanding not only of history but also of text."[844]

In so doing, the domestic forms and possibilities for post-conflict justice have increasingly been cast within a compliance-oriented model as w, with attention predominantly paid to criminal prosecution and punishment rather than the plural approaches more commonly associated with transitional justice. Thus, while complementarity might once have been thought to spur pluralism—to enable greater "ownership" of national or local level judicial processes—ICC primacy has instead taken root. The Court's admissibility jurisprudence has contributed to this phenomenon. As chapter three demonstrated, it has largely followed a strict approach in its admissibility decisions, suggesting that a state's domestic proceedings must effectively mirror Court proceedings in order to successfully retain (or assert) control over them. (The application of this test has been even stricter when brought by an accused under Article 19(2)(a).) At the same time, the Court's jurisprudence on "positive" complementarity remains thin and underdeveloped.

Second, although complementarity was initially seen as a mechanism to catalyze state actors in the pursuit of criminal accountability, its effects on non-state actors appear to have been far more profound. While the evolution in complementarity's meaning was perhaps inevitable given the ICC's institutional limitations, its speed and spread owes largely to the critical role that private actors and organizations have played in the process. As part of a highly networked, transnational community of practice, these norm entrepreneurs have not only played the most active role in shaping and transforming the normative content of complementarity, but they have also increasingly reoriented their own advocacy agendas towards the ICC. In this sense, as Emily Haslam has elsewhere argued, civil society organizations are both object and subject of the Court's "catalytic

[843] Mégret, "Implementation and the Uses of Complementarity," 362.
[844] Robinson, "The Controversy over Territorial State Referrals and Reflections on ICL Discourse," 380.

effect": they seek to expand complementarity's normative influence, while having themselves been transformed by it.[845]

Third, it is clear that, in all aspects of the ICC's work, law and politics are deeply entwined. While legalism remains a seductive (and perhaps necessary) fiction in the pursuit of a rules-based global order, the effects of ICC interventions in Uganda, Kenya, and the DRC underscore how, returning to Leebaw, "international standards [do] not transcend the influence of local politics or the impact of global asymmetries." Rather, these asymmetries, as well as the patronage networks they produce and sustain, are intimately entwined with the catalytic project. This reality is particularly acute for the Office of the Prosecutor. Situated at the nexus of The Hague and situation countries, the OTP's decision of whether and when to open preliminary examinations and investigations is arguably the defining question of whether the ICC's engagement can trigger domestic criminal proceedings. The Office's use of preliminary examinations holds some promise for catalyzing domestic accountability processes but the conduct of these examinations is highly dependent on political context and timing, as the Court's early intervention in Kenya suggests. Investigations, which are similarly contingent on political context and cooperation, are also an important site where certain goals of "positive" complementarity—knowledge transfer, technical assistance to national jurisdictions, strengthening domestic prosecutorial capacity—could be meaningfully enacted but, to date, such an approach has been limited in practice.

Fourth, the developments traced here at national level make clear that the "catalytic effect" of complementarity should be understood as part of a complex political process, rather than a singular desired outcome. Judged by the latter, the outcomes that the ICC was meant to catalyze—domestic investigation and prosecution of international crimes—have only rarely and sporadically materialized. But while complementarity has not necessarily produced greater criminal accountability, the absence of criminal proceedings has not meant that these states are inactive.[846] Indeed, the Court has been deeply alive in the political discourse and decision-making of all three countries: from Uganda, where it loomed large in the government's peace negotiations with the LRA, to Kenya, where it helped forge a political alliance united in opposition to The Hague. Moreover, as chapter five illustrated, it has influenced the strategies and priorities of numerous NGOs and donor states. In the DRC, these actors have invoked complementarity—not as an admissibility principle, but the idea that the ICC symbolically complements domestic accountability efforts—to support important (if limited) prosecutions at the national level.

Finally, compliance with ICC standards and procedures belies the outsized influence of external constituencies as to what activities states undertake in the name of complementarity. Even in the absence of domestic proceedings, much attention has been focused on the creation (or proposed creation) of ICDs in both Uganda and Kenya. While Uganda's ICD initially emerged out of a coercive relationship with the ICC's investigations ("classical" complementarity), this has shifted in recent years to complementarity in a literal sense; it is less an alternative forum for domestic prosecution than the ICC's domestic twin. The proposed Kenyan ICD has been characterized in a

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[845] Emily Haslam, "Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society," *International Journal of Transitional Justice* 5(2) (2011).

[846] On dyadic tensions in the structuring of arguments, see Darryl Robinson, "Inescapable Dyads: Why the International Criminal Court Cannot Win," *Leiden Journal of International Law* 28(2) (2015).

similar fashion, as have the mobile courts in the DRC. These juridical bodies have frequently been portrayed as helping to strengthen domestic justice systems in the wake of conflict; however, as I have argued, there is a tension between the exceptionalism associated with their origin and functioning—particularly the donor agendas and economies upon which they draw—and the desire to fortify "ordinary" domestic systems. Indeed, in demonstrating an excessive homology with The Hague, they can produce significant micro-tensions in the competition for attention and resources.

The perceived duty to implement the Rome Statute in its identical form at the domestic level is another telling illustration of the relationship between the power of external constituencies and compliance. As chapter six argued, it was less the threat or actuality of ICC intervention that catalyzed the passage of national implementation legislation (in Uganda, the ICC had already been engaged for many years; in Kenya; the threat of its intervention was then perceived to be remote); rather, identical implementation of the Statute was accelerated in order to "perform" complementarity for predominantly international audiences. In particular, the imminence of Uganda serving as host state for the Rome Statute Review Conference drove the passage of its 2010 legislation, while in Kenya the recommendation of the Waki Commission was the catalyst for Kenya's ICA. The appearance of "performance" for the international community was significant in the DRC as well, insofar as the release of the 2010 UN Mapping Report served, at the time, to catalyze renewed proposals for the establishment of a Special Chambers/Court and for passage of implementing legislation. A related concern is thus whether implementation of the Statute, when seen as something merely to be copied or transplanted, may in fact stymie the pursuit of other legal reform efforts that might be more meaningful to affected communities.

2. Ways Forward

In light of these complex histories, what paths might the ICC and criminal justice advocates chart in the years ahead? The trajectory traced here suggests that, while the Court is an important actor in the criminal justice landscape, the weight of too many expectations has been placed on its shoulders. Furthermore, while advocates and norm entrepreneurs have continually summoned the symbolic power of the ICC and the polysemy of complementarity to serve a variety of reformist agendas, this strategy has not been without cost to other normative values like legal pluralism, local "ownership," and democratic deliberation. Below I offer five broad areas for reflection.

2.1 Beyond Compliance

Although compliance with the Rome Statute's purported obligations has animated much of the interest in complementarity, ICC interventions have precipitated developments that are not limited to domestic criminal proceedings alone. In this sense, thinking of the ICC as a "catalyst for compliance" is too narrow a lens to capture the complex legal and political alchemy that Court interventions produce, or the diverse ways in which actors have oriented their own objectives around the principle of complementarity. As Robert Howse and Ruti Teitel argue, the lens of rule compliance can lead "to inadequate scrutiny and understanding of the diverse complex purposes and projects that multiple actors impose and transpose on international legality."[847]

[847] Robert Howse and Ruti Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters," *Global Policy* 1(2) (May 2010), 127.

In order to better appreciate the ICC's catalytic power, then, legalism—compliance with a particular set of rules—cannot be the dominant framework. Indeed, the question that should be asked is not merely whether states comply with international norms or duties, but how and why they do so. Such an orientation can better capture not only what norms infiltrate a state in the process of an international judicial intervention, but if, how, and why those norms are implemented in practice. As Subotic notes, "Although international organizations may initiate international justice projects for all the noble reasons, their effects may be quite different when they are strategically adopted by local political actors in the context of domestic political contention and mobilization."[848] For these reasons, an understanding of domestic political context is essential.

The importance of political context also casts in doubt the coercive potential of complementarity. Although this approach might yield results in certain contexts, it would appear that the reputational cost of domestic inaction by states in the face of ICC activity may be lower than was first presumed, and that the Court, ultimately, does not possess "the type of primacy or finality akin to the ideal of sovereign coercive actors."[849] The wisdom of a predominantly disciplinary approach to complementarity, wherein domestic jurisdictions are encouraged to "mirror" the standards and practices of the ICC, is thus worth reflecting upon.[850] In particular, the OTP and the ASP should consider anew a more robust investment in the cooperative dimensions of the principle, focusing on how the Court itself can help strengthen domestic capacity and commitment.[851] While legitimate questions persist about the propriety of an international court carrying such an assistance mandate, the circumscribed interactions between The Hague and national jurisdictions to date, and the OTP's own limited capacities, suggest that this approach merits further examination.

2.2 Towards a Place-Based Court

Just as a shift away from the language of compliance might open up a space to better understand the range of effects of the ICC's "shadow" at national level, greater resources must also be invested in its presence. Numerous expectations by state and non-state actors alike have been attached to the Court, without an attendant

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[848] As Lucy Hovil argues, "Supported by the assumption that any intervention working to 'end impunity' is somehow above reproach, there is an unwillingness to critically evaluate these well meaning, but sometimes unwanted and even harmful, interventions." Lucy Hovil, "Challenging International Justice: The Initial Years of the International Criminal Court's Intervention in Uganda," *Stability* 2(1) (2013), 1.

[849] Antonio Franceschet, "The International Criminal Court's Provisional Authority to Coerce," *Ethics & International Affairs* 26(1) (Spring 2012), 100. See also David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014); Nouwen, *Complementarity in the Line of Fire*, 26 (concluding that, "even in countries where sovereignty and reputation costs are considered high, complementarity has not catalyzed domestic proceedings because there are other costs that are even higher").

[850] See, e.g., Heller, "A Sentence-Based Theory of Complementarity," 132 (describing the "hard mirror" and soft mirror" theses as "both … based on the assumption—almost never questioned—that the goals of the ICC will be best served if states are either required [the "hard mirror"] or pressured [the "soft mirror"] to prosecute international crimes as ordinary crimes").

[851] For a helpful, early assessment of the ICC's ability to serve as a "supporting institution for national courts," see Jenia Iontcheva Turner, "Nationalizing International Criminal Law," *Stanford Journal of International Law* 41(1) (2004), 30-37. For a more recent iteration, see Serge Brammertz, "International criminal court: now for Kony and Bashir," *The Guardian*, 13 June 2012; Brammertz contends that the fact that "national capacity building is not happening in parallel to the [ICC's] work" is "a missed opportunity and should be reconsidered."

commitment of material resources and political support. From two unfunded UN Security Council referrals (Sudan and Libya) to continued non-cooperation in the arrest and transfer of suspects, the rhetorical commitments to Annan's "promise of universal justice" appear to be increasingly overshadowed by the political costs those commitments would entail.[852] Such political assessments are, of course, stitched into the Court's constitutional fabric, but the ICC's troubled history suggests that its current trajectory is unsustainable in the long term.

Furthermore, within the Court itself the promise of "positive" complementarity has functioned far more in theory than practice. The OTP's Hague-centric approach to the conduct of preliminary examinations and investigations is but one clear illustration of an institutional reluctance to engage more deeply in the complicated terrain of "the field." A senior, Nairobi-based Court official, whose previous assignments have spanned both the ICC and ICTY, expressed this reluctance well:

> For the first time in many years, I see the benefit of a field office. I see that the Court is here, not in The Hague. We have to deal with the impact here. The victims are here, not in The Hague. But we spend such time having to defend what we do … [for those] who don't realize the context in which we operate.[853]

Such a field-based orientation—ranging from more place-based (or proximally-based) examinations and investigations, to more fulsome outreach programs, to greater use of *in situ* proceedings—would look quite different than the Court that currently exists.[854] But if the ICC is to be a catalyst for change, then it too must change.

2.3 Defining Deference

Much of the ICC's complementarity jurisprudence supports an excessive homology with the OTP's charging practices, suggesting that failure to pursue the "same conduct" as the Court's Prosecutor would per se render a case admissible. This strict approach to complementarity tacitly furthers the "mirror image" between The Hague and domestic jurisdictions; arguably, it can also deter states that may be willing to pursue criminal investigations and prosecutions but see little hope of successfully doing so. Put another way, through the Court's current admissibility regime, states are perpetually seeking to "catch up" with the ICC. In this vein, scholars like Drumbl have called for "qualified deference" in the allocation of institutional authority, one that "strikes a middle ground between subsidiarity and complementarity."[855]

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[852] See Philipp Ambach and Klaus U. Rackwitz, "A Model of International Judicial Administration? The Evolution of Managerial Practices at the International Criminal Court," *Law and Contemporary Problems* 76(3&4) (2013), 148-153. Ambach and Rackwitz clearly state, "As desirable as the referral of yet another situation by the UN Security Council would be for the legitimacy, perception, and universal reach of the Court, if such a referral does not include a cost solution it will be potentially do more harm than good for the Court," 160.

[853] Interview with ICC outreach official, conducted jointly with Sara Kendall, Nairobi, 27 November 2012. A similar disconnect is palpable in a 2009 piece on the early stages of the Lubanga proceedings. See Adam Hochschild, "The Trial of Thomas Lubanga," *The Atlantic*, 1 December 2009.

[854] On the value of *in situ* proceedings, see Clark, "Peace, Justice and the International Criminal Court," 532-535. Notably, the Court has sought on numerous occasions to host portions of trials or confirmation proceeding in country (in DRC and Kenya both, and most recently Uganda) but has not done so to date. See, e.g., Judge Sir Adrian Fulford, "The Reflections of a Trial Judge," *Criminal Law Forum* 22 (2011), 215-223; David Kaye, "What to Do With Qaddafi," *New York Times*, 31 August 2011.

[855] Drumbl, *Atrocity, Punishment, and International Law*, 188.

As an orienting principle, subsidiarity recalls other deference doctrines such as the margin of appreciation, which originated in human rights adjudication but could be fruitfully applied in the context of ICC admissibility determinations as well. As developed by the European Court of Human Rights, the doctrine is premised on the understanding that, while the European Convention binds all member states, they have substantial leeway as to the means by which those obligations are implemented. In this sense, the "machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights."[856] Subsidiarity then, like "classical" complementarity, is a protective principle: it is rooted in the sovereignty of states.

Such an approach to admissibility could better navigate the tensions between the legal test for complementarity, which is rooted in the degree of similarity between an ICC case and national jurisdictions, and its policy-based elements, wherein domestic proceedings are to be encouraged amidst a much larger "universe of criminality."[857] In Drumbl's words, deference "creates a rebuttable presumption in favor of local or national institutions that, unlike complementarity, does not search for procedural compatibility between their process and liberal criminal law and, unlike primacy, does not explicitly impose liberal criminal procedure."[858] Thus, rather than "bear[ing] the burden of proof" to show evidence of "concrete and progressive investigative steps," a rebuttable presumption would afford a lower threshold for indicia of investigative activity at the domestic level. Whether that activity was indeed genuine would be a subsequent matter for the Court to determine as a matter of unwillingness.

An approach that draws from subsidiarity would also avoid an outright jettisoning of the established "same conduct" test, while tempering the incentives towards mimicry. The Appeals Chamber's endorsement of a "substantially the same" approach to conduct appears to be a step in this direction but, as noted, it remains a relatively restrictive standard that has been inconsistently applied. A more clearly articulated and consistent application of a deference principle could thus permit the Court to maintain its current case-by-case approach to admissibility determinations without "radically depart[ing] from the framing of admissibility structures."[859] A margin of appreciation would, however, be incompatible with the excessively exacting "same incident" approach to domestic proceedings, which, unlike the "same conduct" test, finds no textual basis in the Statute. While the ICC Prosecutor has periodically referenced an incidents-based test to support the admissibility of certain cases, the Court has notably yet to opine on the issue.

There has also been significant attention paid to the question of whether the ICC might play a more formal monitoring role over domestic proceedings, suggesting a form of "qualified" or "conditional" admissibility not unlike the "reverse complementarity" approach that came to later define the ICTY and ICTR's relationships with national jurisdictions. There would appear to be little support in the Statute for such a procedure; however, as Stahn has noted, "If a Chamber is entitled to make a final finding on admissibility, based on the criteria of Article 17, it must have the power to rule on the

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[856] *Handyside v. United Kingdom*, European Court of Human Rights (1976), para. 48. For a thoughtful exploration of subsidiarity's relevance to international law and governance, see Paolo G. Carroza, "Subsidiarity as a Structural Principle of International Human Rights Law," *American Journal of International Law* 97 (2003), 38-79.
[857] Rod Rastan, "Situation and Case: Defining the Parameters," 442.
[858] Drumbl, *Atrocity, Punishment, and International Law*, 188.
[859] Stahn, 258.

steps leading to that result."[860] Deference would thus constitute, in effect, "an interim decision on inadmissibility."[861]

Yet it is far from clear that a conditional admissibility approach, particularly one that is judicially engineered, would not ultimately reinforce the primacy that qualified deference should guard against. More dramatically, it may also imperil the Court's fragile political standing with member states. To that end, a more fruitful area of practice would be to make greater use of the Rome Statute's cooperation and dialogue regimes. Articles 89 and 94, for instance, provide for consultation between a state and the Court in cases where an ICC request conflicts with domestic investigation of prosecution—that is to say, in relation to a different case—yet these provisions have received scant attention to date. According to Darryl Robinson, "The ICC has never rejected, nor has it ever received, a request for postponement from a state wishing to pursue a suspect for a different case."[862]

Article 18(2) offers a similar opportunity in the context of the same case: the OTP could suspend or conditionally defer its investigation(s) (subject to re-initiation if domestic proceedings prove inadequate), while perhaps also undertaking a monitoring and/or advisory role in the process.[863] In short, although Article 17 applications have been the crucible through which states have sought to accommodate their interaction with the ICC, they are a blunt instrument: the space they create for dialogue between states and organs of the Court is exceedingly limited. Greater attention to the Statute's cooperation and consultation regimes is thus needed.

Finally, although the Court's admissibility decisions in the Libyan cases were increasingly clear that an exacting standard of due process is not required for states undertaking domestic proceedings, this has mattered little in the broader meaning of the term, where conformity with "international standards" continues to permeate discussions about implementation at the domestic level. To that end, deference must also mean the necessary acceptance that the goal of accountability—whether sought alongside ICC proceedings, in the shadow of them, or without them at all—is necessarily contingent on the numerous political, material, and technical challenges that confront states. As Elena Baylis writes of military courts in the DRC:

> [T]he goal in the Congo cannot be justice absolute, ideal and untarnished, but rather must be partial justice—justice for at least some victims, through imperfect processes, with the meager but nonetheless ambitious aim of ending the certainty of impunity, rather than ending impunity itself.[864]

This reality need not mean that the language of legal obligation should be relinquished, nor must it limit more abundant aspirations for justice. It should, however, temper them.

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[860] Stahn, 257.
[861] Ibid.
[862] Robinson, "Three Theories of Complementarity," 182. On "sequencing" in the context of Articles 89(4) and 94, see Carsten Stahn, "Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility,'" *Journal of International Criminal Justice* 10(2) (2012).
[863] Article 97, by way of analogy, may offer a similar opportunity for consultation in the context of a same case (although it relates to the Court's cooperation regime rather than admissibility).
[864] Elena Baylis, "Reassessing the Role of International Criminal Law," 9.

2.4 Geographies of Justice

At the same that the ICC demands greater investment, another important approach would be to seek out other, potentially more creative avenues for encouraging accountability at the international, regional, sub-regional, national, and sub-national level.[865] Judicial "romanticism" for international criminal tribunals has too often invited and encouraged a mono-institutional approach to accountability.[866] Indeed, as the experiences recounted herein suggest, the ICC has been regarded more often than not as the sole institutional locus of power or influence, even as it exists within a transnational network of institutions participating in and/or supporting national proceedings (MONUSCO for instance, the UN mission that continues to operate in the DRC). This has resulted in a narrow approach towards the Court's relationship with domestic jurisdictions that puts it too often above, rather than nested within, a broader network of judicial actors. Moreover, as noted, such ICC-centrism harbors a risk: it places a heavy performance burden on the Court, one that the institution has largely failed to meet.

Disproportionate focus on the Court also overlooks other hybrid arrangements that, by their design, have a deeper relationship to national jurisdictions and may thus have a more lasting effect on strengthening domestic capacity. An instructive example is the work of the Guatemala International Commission against Impunity (CICIG), a novel institution that was created in late 2006, in the wake of Guatemala's long-running conflict, as a treaty-level agreement between the United Nations and the government. By mandate, CIGIG operates as an independent body to support the Public Prosecutor's Office and the National Police, as well as other relevant state institutions, in the investigation and prosecution of crimes committed by organized criminal enterprises, and engages alongside state institutions in the dismantling of these groups' strong ties to Guatemala's political and security sectors.

In its near ten-year existence, CICIG has played a key role in strengthening state investigative and prosecutorial institutions (resulting in a number of high-level convictions against former senior state and military officials for corruption), improving prosecutorial capacity, and establishing "high risk" courts for the prosecution of organized crime and other complex cases.[867] Indeed, it was one such court (and the extraordinary efforts of Guatemala's former Attorney General, Claudia Paz y Paz) that led to the remarkable 2013 trial and conviction for genocide and crimes against humanity of Efraín Ríos Montt, Guatemala's former President.[868] The Ríos Montt trial and, more recently, criminal proceedings against former President Perez Molina, are the most public in a series of important domestic investigations, but it was an outcome that owed to years of close, concerted work between CICIG and its national counterparts.

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[865] See, e.g., Alexandra Huneeus, "International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Bodies," *American Journal of International Law* 107 (January, 2013), 1-44.
[866] See McMahon and Forsythe, "The ICTY's Impact on Serbia: Judicial Romanticism Meets Network Politics."
[867] For more on the impact of CICIG's work, see Open Society Justice Initiative, "Unfinished Business: Guatemala's International Commission against Impunity"; Morris Panner and Adriana Beltrán, "Battling Organized Crime in Guatemala," *Americas Quarterly* (Fall 2010).
[868] See, e.g., Naomi Roht-Arriaza, "The Trial of Ríos Montt," *Aportes DPLf* 18(6) (December 2013). For additional history of the Montt trial relevant to this point, see Elizabeth Oglesby and Amy Ross, "Guatemala's Genocide Determination and the Spatial Politics of Justice," *Space and Polity* 13(1) (April 2009), 21-39.

As a form of cooperation and assistance not unlike that imagined for "positive" complementarity, CICIG speaks to the importance of international(ized), yet nationally/locally situated, mechanisms that can work with judicial and political actors to seek accountability in ways that might resonate more meaningfully with domestic communities.[869] Indeed, despite CICIG's significant later contributions to international criminal justice, its work (and legitimacy) owes largely to its achievements in joining accountability with other crucial efforts in post-conflict Guatemala, such as investigating and prosecuting cases of corruption and other economic crimes. Similar creative initiatives have taken root elsewhere in national courts, including the use of domestic litigation to enforce ICC arrest warrants (as in Kenya), or the novel use of universal jurisdiction principles, rooted in the domestic ICC legislation of states, to press for national investigations of Rome Statute violators (as in South Africa).[870] These promising initiatives suggest that the empowerment of independent domestic judicial actors and the strengthening of ordinary domestic courts likely deserve more attention than they have received to date. Such approaches take inspiration from the principle of complementarity but do so in ways that creatively expand the geographies of justice beyond The Hague.

2.5 Promoting Pluralism

An attendant phenomenon of ICC-centrism is mimicry. As interpreted by many norm entrepreneurs and advocates, the language of complementarity has increasingly been cast in the idiom of "best practices" and "international standards," while the ICC's jurisprudence suggests to national prosecutors that states should hew towards its procedures. This mirroring phenomenon is institutional as well as normative, ranging from what domestic courtrooms should look like to the content of national implementation legislation.[871] While such an interpretation of the Rome Statute is progressive in its reading of state obligations under complementarity it is potentially regressive as well, insofar as those obligations can have the effect of calcifying the form and substance of justice at the national/local level. Indeed, just as the creation of special criminal divisions (as in Uganda) or the passage of national implementing legislation (as in Kenya) were "fast tracked" for international audiences, so-called alternative justice measures—from enfeebled to truth commissions to indolent "transitional justice policies"—have been slow walked.

Here, too, the concept of margin of appreciation, as an orientation that seeks to "develop a geographically and culturally plural notion of implementation," could be

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[869] See, e.g., David A. Kaye, "Justice Beyond The Hague: Supporting the Prosecution of International Crimes in Domestic Courts," Council on Foreign Relations (Council Special Report No. 61, June 2011). Kaye further notes that, the "compartmentalization of 'accountability' and 'rule of law' programming means that support for one does not benefit the other." The two should be "integrated as a central aspect of building rule of law in the wake of conflict," 15. The Open Society Justice Initiative has supported a similar approach. See, e.g., *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers* (Open Society Foundations, 2011).

[870] See, e.g., *Southern African Litigation Centre and Zimbabwe Exiles Forum v. National Director of Public Prosecutions*, High Court of South Africa (North Gauteng), Case No. 77150/09, Judgment (8 May 2012). State efforts to improve mutual legal assistance for the national prosecution of international crimes are also a promising step forward in this respect. See, e.g., Ward Ferdinandusse, "Improving Inter-State Cooperation for the National Prosecution of International Crimes: Towards a New Treaty?" *ASIL Insight*, 21 July 2014.

[871] For another articulation of this view, see Sarah M.H. Nouwen and Wouter G. Werner, "Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity," *Journal of International Criminal Justice* 13(1) (2015).

usefully applied.[872] As Mégret notes, complementarity may be better understood as a "device to accommodate diversity … not only because this diversity exists, but because it has normative value in itself."[873] Approaching complementarity in this way—as more than ceremonial fidelity to the Rome Statute—could free a space in which to think critically about its productive potential as part of a politically fraught and dynamic process. Echoing Drumbl, a "richly multivalent approach" to justice is needed.[874]

Such an approach would, for example, encourage expanding the scope of national legislation to include corporate liability and economic crimes,[875] as well as supporting the establishment of judicial arrangements that may fall outside of the ICC's framework.[876] It would also encompass a deeper, more nuanced grappling with the relationship between criminal accountability and other transitional justice approaches, as the experience of South Africa's Truth and Reconciliation Commission once exemplified.[877] The proposed peace agreement between the Colombian government and the FARC, which foresees a similar exchange of testimony in return for eligibility for a system of "alternative justice," suggests a return to the South Africa's admixture of accountability and truth. The ICC's preliminary examination in Colombia is notable in this regard, but it is unclear the extent to which the terms of the proposed arrangement were influenced by the OTP's involvement or rather emerged in spite of it.[878]

Finally, a "multivalent approach" would also require a loosening of the grip that the monarchical language of "international standards" and "best practices" currently commands over much of the accountability discourse. Doing so could open more spaces for experimentation and innovation, as well as contestation. Indeed, it is precisely the hybridity of systems and processes—their contingency as well as their possibility—that, in Baylis' words, "provide opportunities for multiple voices to be heard in multiple contexts, [and] in order to genuinely accommodate those multiple interests and communities."[879]

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872 Frédéric Mégret, "Nature of Obligations," in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds.), *International Human Rights Law* (Oxford: Oxford University Press, 2010), 132.

873 Mégret, "Implementation and the Uses of Complementarity," 390. For a compelling exploration of this theme, see Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012).

874 Drumbl, *Atrocity, Punishment, and International Law*, 181. Drumbl likewise advances a philosophy of "cosmopolitan pluralism," 186.

875 It is worth noting that the recently adopted protocol on amendments to the statute of the African Court of Justice includes jurisdiction over ICC crimes, as well as, *inter alia*, the crimes of corruption, money laundering, and illicit exploitation of natural resources.See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Arts. 28A, 28E, 28I, 28I *Bis*, 28L *Bis* (on-file). More controversially, the Protocol also includes the proposed crime of "unconstitutional change of government."

876 Notably in this regard, the AU's Peace and Security Council, following its review of the AU Commission of Inquiry on South Sudan, has recently decided to create "an independent hybrid judicial court," the Hybrid Court of South Sudan (HCSS), in accordance with Chapter V (3) of the Agreement reached by the South Sudanese parties, as "an *African-led and Africa-owned* legal mechanism" (emphasis added).

877 For a compelling argument favoring this approach in the Ugandan context, see Erin Baines, "Spirits and Social Reconstruction after Mass Violence: Rethinking Transitional Justice," *African Affairs* 109(436) (2010), 409-430; on amnesties, see Louise Mallinder and Kieran McEvoy, "Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies," *Contemporary Social Science* 6(1) (2011), 1-7-128.

878 See Louisa Reynolds, "Colombia looks towards peace rather than punishment in FARC deal," *International Justice Tribune* No. 186, 30 September 2015.

879 Elena Baylis, Reassessing the Role of International Criminal Law," 72. See also Mégret, who suggests that the idea of "ownership" might better accommodate such multiplicity, in that it "lends itself well to the

2.6 From Management to Modesty

Although the ICC may be accused of having too quickly put itself at the center of contentious accountability debates, many private actors and organizations have helped put it there.[880] The desire to catalyze domestic judicial reform or threaten governments into action may have been the reason for doing so, but it is not always clear that the political consequences of these strategies have been sufficiently thought through. The ICC Prosecutor, for instance, may be perceived as an ally by civil society but, ultimately, the choices she makes have consequences for national-level advocates that may do more harm than good. The near ubiquitous refrain amongst Court officials and international NGOs of the need to "manage the expectations" of victims and affected communities suggests a similar phenomenon. At the same time, it is many of these same expectations that drive the belief in the ICC's "catalytic effect."

Rather than "management" of expectations, then, these uncertainties speak to the need for greater modesty about what the ICC is able to achieve. To that end, it also calls for more careful consideration and sober reflection about the wisdom of soliciting the Court's intervention in a country, before the scale of civil society's ambitions is publicly tested by its doctrinal and/or institutional limits. Finally, as the case studies here suggest, the ICC is but one factor among many that influence and shape the choices of domestic political actors. Consistent with a more process-based approach, then, Court interventions can be more productively seen as one *tactic* that might, over time, alter a domestic political environment in favor of greater accountability. As Karen Alter suggests, "The existence of an international legal remedy empowers those actors who have international law on their side, increasing their out of court political leverage."[881]

3. Epilogue: *Une belle époque?*

I close this dissertation with a more recent encounter. In late March 2015, I was in Brussels for a high-level conference convened by the Belgian government. Entitled "Implementation of the European Convention on Human Rights, our shared responsibility,"' the conference marked the culmination of Belgium's six month chairing of the Council of Europe, an alphabetically rotating honor that this small country would not hold for another twenty years. Amidst increasing fears of the United Kingdom withdrawing from the European Convention on Human Rights, and other, similar rumblings in countries throughout the Council, the conference was intended to reaffirm the "deep and abiding commitment" of member states to the European Convention and to the "full, effective and prompt execution" of the judgments of the European Court of Human Rights.[882] Negotiations on a text had been underway for the previous five

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possibility of dual or multiple ownership." Frédéric Mégret, "In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice," *Cornell International Law Journal* 38 (2005), 741.

[880] For a similar view, see Clark, "Peace, Justice and the International Criminal Court"; in the context of universal jurisdiction, see Naomi Roht-Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back," *Leiden Journal of International Law* 17 (2004), 375-389; in the context of a negotiated peace, see Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28(3) (Winter 2003/04), 5-44.

[881] Alter, *The New Terrain of International Law*, 19. For a similar assessment in the context of the ICC's engagement in situations of armed conflict, see Philipp Kastner, "Armed Conflicts and Referrals to the International Criminal Court: From Measuring Impact to Emerging Legal Obligations," *Journal of International Criminal Justice* 12(3) (2014), 471-490.

[882] Brussels Declaration (27 March 2015), http://justice.belgium.be/fr/binaries/Declaration_EN_tcm421-265137.pdf.

months and it was at the conference that the final "Brussels Declaration" was to be adopted.

I attended the conference not as a researcher but as an advocate for an international NGO that I joined in early 2013. Now a norm entrepreneur myself, being there was a bit how I imagined the summer of 1998 might have felt in Rome. As the conference began, there was still uncertainty as to whether agreement on a final text had been reached; hushed conversations over coffee and croissants made clear that implementation was a verb that states were more comfortable with in theory than practice. And the parallels to the ICC were striking: another revered but overburdened court; another bold experiment in the taming of sovereignty through law; another appeal to states, reminding them that it was their primary responsibility to protect and defend human rights at the national level. Rather than complementarity, the diplomats here spoke of subsidiarity, but the logic was the same: like The Hague, Strasbourg, too, was a place of last resort.

When the Declaration was adopted at the end of the second day—after all 47 states had expressed their support, and their reservations—everyone stood and applauded, flush with political commitments renewed. As the delegates slowly drifted out for the final reception, I spoke casually with an old friend from Amnesty International's office in Brussels, whom I had once worked for (as an intern, on Belgium's domestic implementation of the Rome Statute) in 2001, but whom I had not seen since. Our meeting felt at once accidental and purposeful —as Adler says, "communities of practice have no fixed membership; people 'move in and out' of them"[883]—but it was a pleasure to reconnect. Eventually joined by other Belgian colleagues, I listened as the group's conversation turned to the future of not only the European Court but other human rights institutions as well. They were clearly worried. There was a feeling that the human rights movement's best moments were perhaps behind it: Belgium's once pioneering universal jurisdiction law, now neutered; the signing of the Rome Statute in 1998, the ICC in what now felt like disarray; the promise of the International Court of Justice's *Yerodia* decision, now at risk of obscurity. *Ça c'était une belle époque*, said one member of the group, to wistful nods.[884]

My colleagues' sense of a progress narrative interrupted, as well as the circumstances that brought us together, touch upon a number of themes that this dissertation has sought to surface. As their recollections attest, the role of international criminal law in global governance has grown ever larger but, as I have suggested herein, it has also increasingly narrowed into the face of one institution at the transnational top: the ICC. The Court's performance woes have unfortunately complicated this phenomenon while dovetailing with a resurgent discourse of sovereignty, leaving many advocates to wonder, as those gathered in Brussels did, whether the hard won achievements of the international human rights movement may be eroding.[885]

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[883] Emanuel Adler, "Communities of practice in International Relations," 15.

[884] "Belle epoque," in French, refers to "a period of high artistic or cultural development." My colleagues are not alone in this assessment. See, e.g., Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca: Cornell University Press, 2013); for responses to Hopgood, see Kenneth Roth, "The End of Human Rights?", *The New York Review of Books*, 23 October 2014 and Doutje Lettings & Lars van Troost, "Debating *The Endtimes of Human Rights:* Activism and Institutions in a Neo-Westphalian World" (The Strategic Studies Project, Amnesty International Netherlands, 2014).

[885] The title of a 2015 symposium in the *Journal of International Criminal Justice* 11(3) (July 2013) captures the sentiment well: "Down the Drain or Down to Earth? International Criminal Justice under Pressure." See

More than a decade later the soaring rhetoric that accompanied the ICC's establishment feels dimmed. But while the Court remains a key actor in the international legal and political landscape, it is hardly the only one. The mere fact that it exists cannot be, as Shklar warns, an invitation to indolence. Furthermore, the close examination offered here of Uganda, Kenya, and the DRC illustrates that the ICC's practices on the ground, as well as its institutional limitations, provide reason for sober reflection. Such inquiries from the proverbial "field" may temper our faith in how catalytic a force the Court or the principles summoned in its name can actually be, but that is a necessary reckoning. Our ambitions should be measured by more realistic expectations, while seeking new possibilities on the horizon.

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also the February 2015 debate issued by the ICTJ, "Is the International Community Abandoning the Fight Against Impunity?" at https://www.ictj.org/debate/impunity/opening-remarks.

SAMENVATTING

Sinds de oprichting van het Internationaal Strafhof is een van de voornaamste bekommernissen van en voor het Hof het vermogen om het streven naar verantwoordelijkheid op het nationale niveau te "katalyseren". Het complementariteitsbeginsel is de dominante juridische logica door middel waarvan deze katalytische relatie zich gemanifesteerd heeft, maar dit op zich is een transformatie. Eerst opgevat als een ontvankelijkheidsvereiste—een manier om prioriteit van rechtsmacht vast te stellen tussen het ISH en nationale rechters—is complementariteit sindsdien uitgegroeid tot een transnationaal proces en een adaptieve strategie voor het realiseren van een reeks doelstellingen, met inbegrip van het stimuleren van nationale vervolgingen en, meer algemeen, de hervorming van binnenlandse rechtssystemen. Academici, op hun beurt, onderzoeken sinds kort of deze ambities in de praktijk gerealiseerd zijn. Als onderdeel van een breder momentum in "global governance", stellen deze academici niet enkel de vraag of internationale juridische instellingen het gedrag van staten kunnen beïnvloeden, maar ook hoe en waarom ze dat doen.

Dit proefschrift draagt bij aan deze doctrine door te onderzoeken of en hoe de interventies van het ISH in Oeganda, Kenia, en de Democratische Republiek Congo inderdaad gediend hebben om binnenlandse onderzoeken en vervolgingen te katalyseren. Het onderzoek stelt drie belangrijke vragen: Ten eerste, hoe is het begrip van complementariteit geëvolueerd sinds de oprichting van het ISH en welke rol hebben niet-statelijke actoren, in het bijzonder, gespeeld in deze evolutie? Ten tweede, hoe hebben de rechters van het ISH de complementariteitsvereiste begrepen en geïnterpreteerd in de rechtszaal, en hoe heeft het Parket van de Aanklager van het Hof getracht het te implementeren als deel van zijn beleid? Tot slot, in welke mate en hoe hebben de interventies van het ISH in Oeganda, Kenia en de DRC de institutionele en normatieve kaders voor het uitvoeren van strafrechtelijke vervolgingen op nationaal niveau beïnvloed?

De meeste literatuur over het vermogen van het ISH om binnenlandse onderzoeken en vervolgingen te katalyseren heeft complementariteit geïnterpreteerd als een kwestie van het naleven van regels, met inbegrip van een wettelijke verplichting voor lidstaten om het Statuut van Rome om te zetten in hun nationale strafrecht; om ervoor te zorgen dat hun rechtbanken in staat zijn om de internationale misdrijven te vervolgen; en, zoals de taal van de preambule van het Statuut bevestigt, om een onderzoek in te stellen naar de verantwoordelijken en hen te vervolgen. Deze op regels gebaseerde benadering heeft op haar beurt twee belangrijke strategieën voor complementariteit voortgebracht: complementariteit fungeert als een dwingende stimulans voor nationale jurisdicties (de dreiging van een interventie door het ISH zal staten aanzetten tot handelen), terwijl het ook een meer coöperatieve, leidinggevende functie vervult. In deze opvatting, ondersteunt of, letterlijk, "complementeert" het ISH nationale jurisdicties.

Beoordeeld onder deze voorwaarden lijkt het alsof het ISH weinig bereikt heeft in deze drie landen. In Kenia heeft tot dusver geen hoge ambtenaar of politieke leider verantwoording moeten afleggen voor misdrijven begaan tijdens de uitbraak van geweld in de nasleep van de verkiezingen van 2007-08. Bovendien hebben parlementaire inspanningen om op nationaal niveau een speciaal tribunaal op te richten herhaaldelijk gefaald. Er hebben meer, maar nog steeds beperkt, binnenlandse vervolgingen plaatsgevonden in de DRC via mobiele militaire rechtbanken. Dit is echter voornamelijk te danken aan de inspanningen van mensenrechtenverdedigers die complementariteit

inroepen als een beginsel van lastenverdeling en samenwerking (eerder dan ontvankelijkheid) om hun werk te ondersteunen. Het ISH als instelling is zelf nauwelijks aanwezig geweest. Tot slot is er in Oeganda tot op heden slechts één poging geweest tot vervolging van een voormalig lid van het Lord's Resistance Army door de Divisie Internationale Misdrijven, een procedure waarin schendingen van het recht op een eerlijk proces schering en inslag waren.

De afwezigheid van nationale vervolgingen betekent echter niet dat deze staten inactief zijn geweest als gevolg van het werk van het ISH. Integendeel, het Hof was sterk aanwezig in het politieke debat en de besluitvorming in de drie landen: van Oeganda, waar het regelmatig opdoemde in de vredesonderhandelingen tussen de regering en het LRA, tot Kenia, waar het Hof een politieke alliantie hielp smeden, verenigd in weerstand tegen Den Haag. Een aanpak die zich voornamelijk focust op de uitkomst, namelijk binnenlandse vervolging, benadrukt inderdaad de mate waarin legalisme het katalytisch-/complementariteitskader vormgeeft. Dit kader en legalisme hebben gemeen dat ze de nadruk leggen op de naleving van regels, waarbij politieke problemen grotendeels ondergeschikt zijn aan het juridische. Dit proefschrift benadrukt daarentegen het primordiaal belang van de politieke context om het effect van ISH interventies te begrijpen en om te begrijpen hoe binnenlandse actoren, zowel statelijke als niet-statelijke, hierover onderhandeld hebben op nationaal niveau. Het beargumenteert dat deze interventies en de doelen die ze willen bereiken de politiek niet overstegen hebben; ze worden gevormd door de politiek.

Methodologisch steunt dit proefschrift voornamelijk op tekst- en discoursanalyse, evenals op veldonderzoek uitgevoerd in Kenia, Oeganda, de Democratische Republiek Congo en Den Haag tussen augustus 2010 en december 2012. De studiereizen stelden mij in staat interviews af te nemen met een breed scala aan actoren betrokken bij ISH-gerelateerde werkzaamheden en lieten mij toe documenten—gerechtelijke beslissingen, parlementaire debatten, wetsontwerpen—te verzamelen die doorgaans niet beschikbaar waren buiten deze landen. Hoewel geworteld in juridische analyse, beoogt dit proefschrift bij te dragen aan een groeiend vakgebied van de interpretatieve sociale wetenschappen dat interdisciplinaire, kwalitatieve methodes gebruikt om een breder, meer context-specifiek beeld te schetsen van de waarde en de impact van globale juridische instellingen. Structureel is dit proefschrift opgedeeld in de volgende zes hoofdstukken.

1. Een Idee Opsporen, een Norm Bouwen: Complementariteit als een Katalysator

Dit hoofdstuk onderzoekt hoe complementariteit geëvolueerd is van een juridische vereiste voor ontvankelijkheid—een organiserend beginsel voor de regulering van samenloop van rechtsmacht—en verworden is tot meer, nu het ook een instrument van beleid is. Dit beleid, vaak aangeduid als "positieve complementariteit", promoot het ISH en het "Statuut van Rome Systeem" als proactieve vertegenwoordigers voor binnenlandse verantwoordelijkheid. Om inzicht te krijgen in de betekenis en het doel van deze evolutie, betoogt het hoofdstuk dat de opkomst van deze meer ambitieuze verwoording van de relatie die het ISH heeft met nationale jurisdicties het werk reflecteert van normatieve ondernemers die in toenemende mate getracht hebben een meer proactieve visie te articuleren voor het Hof en een breder scala aan beleidsdoelstellingen. Ze hebben op overtuigende wijze de opvatting van complementariteit als een katalysator bevorderd, door het voor te stellen als een reeks

verplichtingen voor staten om internationale misdrijven op nationaal niveau in wetgeving op te nemen, te onderzoeken en te vervolgen.

Bij het nagaan van de ontstaansgeschiedenis van het ISH betoogt het hoofdstuk dat deze evolutie van complementariteit in contrast staat met het vroegere, eerste begrip van complementariteit als een beginsel van beperking. In tegenstelling tot de ad hoc tribunalen voor Rwanda (ICTR) en voormalig Joegoslavië (ICTY), hebben de opstellers van het Statuut ervoor gekozen om het ISH geen voorrang te verlenen op nationale jurisdicties. Deze kwestie was erg betwist tijdens de onderhandelingen over het Hof en reflecteerde een delicaat proces dat supranationale jurisdictie in evenwicht trachtte te brengen met een bestendige bezorgdheid om staatssoevereiniteit. Bovendien werd, in lijn met dit proces, een bewuste keuze gemaakt om staten aanzienlijke bewegingsruimte te geven in het vervolgen van internationale misdrijven, met inbegrip van, bijvoorbeeld, het vermogen om de misdrijven in het Statuut van Rome te vervolgen als "gewone" misdrijven.

Ondanks deze zorgvuldige onderhandelingen is complementariteit geëvolueerd van een technische ontvankelijkheidseis, voornamelijk opgesteld door staten, naar een meer katalytische visie, voornamelijk gedreven door niet-statelijke actoren. Deze visie werd al snel onderschreven door het Parket van de Aanklager als beleid, en had als intellectueel precedent de ervaringen van het ICTR en ICTY, waarvan de voltooiingsstrategieën een belangrijke rol gespeeld hebben in de academische literatuur over het concept van positieve complementariteit, die, op hun beurt, de vroege beleidsontwikkelingen binnen het Parket van de Aanklager van het ISH beïnvloed hebben. In dit proces is complementariteit geïnterpreteerd op een manier die een weerspiegeling van het normatieve en institutionele kader van het ISH bevoorrecht (ook al is dit niet juridisch vereist). Nationale verantwoordelijkheid wordt dus steeds meer begrepen en gemeten in vergeldings- en resultaatgerichte termen.

Tot slot stelt dit hoofdstuk de vraag hoe dit verruimde begrip van complementariteit—gezien de mate waarin het de vermeende verplichtingen van staten veranderde, en de mate waarin staten die perceptie hebben bekrachtigd—met dergelijke schijnbare snelheid geëvolueerd is. Hier wordt gesuggereerd dat de gecombineerde rol van normatieve ondernemers en transnationale netwerken van cruciaal belang geweest is in het bevorderen van deze ambitieuzere opvatting van complementariteit. Zoals bemiddeld door een dicht, onderling verbonden web van niet-statelijke actoren—NGO's, ISH-ambtenaren, mensenrechtenactivisten, en academici—heeft complementariteit niet alleen meerdere betekenissen aangenomen (zowel een ontvankelijkheidseis, als een katalysator), maar ook twee dimensies (zowel coöperatief, als dwingend). Ik suggereer ook dat een groeiende literatuur over transnationale "praktijkgemeenschappen", een concept ontwikkeld door de politicoloog Emanuel Adler, een handige lens biedt om de verspreiding van deze nieuwe norm te begrijpen.

2. Spiegelbeelden: Complementariteit in de Rechtszaal

Dit hoofdstuk maakt de overgang van discours naar doctrine en richt zich op complementariteit in de rechtszaal: het geeft een gedetailleerd overzicht van Artikel 17 rechtspraak. Hierbij betoogt dit hoofdstuk dat het ISH jurisprudentie heeft voortgebracht die staten in praktijk verplicht om de veeleisende procedures van het ISH te weerspiegelen (of na te bootsen) als voorwaarde om een zaak niet-ontvankelijk te verklaren. Hoewel deze aanpak strookt met de dwingende dimensie van

complementariteit, voor zover het staten beoogt te dwingen tot naleving van het Statuut van Rome, plaatst het ook een zware last op de staten, een die ze mogelijks niet willen (of niet kunnen) dragen.

In deze reeks van testen ligt de nadruk op de vraag of een procedure gestart door het ISH en een staat die de ontvankelijkheid succesvol zou willen betwisten elkaar voldoende "weerspiegelen". Uit de rechtspraak van het Hof blijkt dat een staat, om succesvol ontvankelijkheid aan te vechten, meer bepaald binnenlandse procedures moet voeren met betrekking tot dezelfde "zaak" als in het ISH, zodanig dat zij betrekking hebben op dezelfde persoon, hetzelfde gedrag, en mogelijk zelfs dezelfde feitelijke incidenten. Bovendien hebben rechters van het ISH, wanneer zij geconfronteerd worden met concurrerende claims over binnenlandse procedures (met name vorderingen ingesteld door een individuele verdachte op grond van Artikel 19(2)(a)), een relatief oppervlakkige evaluatie verricht en tegelijkertijd een hoge bewijsdrempel ingesteld voor eisers om aan te voldoen. Het Hof heeft ook de mogelijkheid om een bezwaar aan te tekenen tegen de ontvankelijkheid effectief verkleind door de omvang van de toetsing door Kamers van vooronderzoek te beperken bij het beslissen of er een arrestatiebevel uitgevaardigd moet worden.

De gerechtelijke behandeling van Artikel 93(10), dat de juridische basis biedt voor het beleid van "positieve" complementariteit, is daarentegen schaars geweest, voor zover het Hof ervoor gekozen heeft om de behandeling van verzoeken om samenwerking met het ISH, een pijler van "positieve" complementariteit, te scheiden van bezwaren tegen ontvankelijkheid. Complementariteit blijkt dus minder een ruimte voor constructieve betrokkenheid en dialoog dan een reeks verenigende criteria waaraan landen moeten voldoen. Hoewel de meer recente rechtspraak van het Hof in het kader van de ontvankelijkheidbezwaren geuit door Libië dit spiegelende regime enigszins op losse schroeven gezet heeft, is het goed mogelijk dat een dergelijke strikte interpretatie van complementariteit binnenlandse vervolgingen belemmert, eerder dan katalyseert. Sommige commentatoren hebben op zulke kritiek gereageerd met een poging tot het opsplitsen van de gerechtelijke behandeling van complementariteit en de politieke dimensies van complementariteit. Ik stel echter dat deze opdeling op zichzelf symptomatisch is voor legalisme: het berust op een kunstmatige scheiding tussen het Hof als een juridische en politieke actor.

3. Complementariteit en het Parket van de Aanklager

Dit hoofdstuk verlegt de aandacht van het juridisch kader van complementariteit naar de beleidsdimensies zoals ontwikkeld door een andere cruciale actor binnen het Hof: het Parket van de Aanklager. Gesitueerd binnen het institutionele centrum van het ISH in Den Haag en de verschillende nationale contexten waarin het actief is, geeft het Parket—door het uitoefenen van de beoordelingsvrijheid van de Aanklager en de toegang tot de lokale actoren die op het terrein werken—niet alleen vorm aan het algehele werk van het Hof, het kan ook een belangrijke invloed hebben op de contouren van de inspanningen tot binnenlandse vervolging. Het hoofdstuk onderzoekt dus op welke manieren het Parket getracht heeft het gedrag van staten te beïnvloeden in het voordeel van binnenlandse vervolging in twee kerngebieden van zijn werk: voorbereidende onderzoeken en onderzoeken.

Terugkomend op de dubbele eigenschap van complementariteit als zowel dwingend als coöperatief, onderzoek ik eerst hoe het Parket van de Aanklager in

toenemende mate steunt op voorbereidende onderzoeken als een voorbeeld van de dwingende kracht van complementariteit en een belangrijk instrument in haar inspanningen om nationale jurisdicties tot actie te bewegen. Als enig land van de drie onderzochte landen dat onderworpen werd aan een uitgebreid voorbereidend onderzoek, biedt Kenia een voorbeeld van hoe het Parket getracht heeft deze periode als potentieel pressiemiddel te gebruiken om aan te dringen op de oprichting van een binnenlands straftribunaal in 2009. Deze inspanning was uiteindelijk onsuccesvol, wat zowel het context-specifieke karakter van het voorbereidend onderzoek benadrukt als de complexe politieke dynamiek waarin ISH interventies verlopen. In het bijzonder lijkt het erop dat het Parket van de Aanklager onvoldoende afgestemd was op de politieke ontwikkelingen in Kenia, onder meer omdat het er niet in geslaagd was een sterkere, lokale aanwezigheid in het land te ontwikkelen, tijdens de kritieke periode waarin de mogelijkheid van een binnenlands tribunaal ernstig in overweging genomen werd. Wat van meer belang is, er lag een paradox ten grondslag aan de kern van het Keniaanse experiment: terwijl het Parket van de Aanklager de dreiging van een interventie trachtte te gebruiken als drukmiddel voor de creatie van een binnenlands tribunaal, zagen veel Keniaanse slachtoffers en activisten, wiens steun essentieel was voor de inspanningen van het Hof, ISH rechtszaken als een noodzakelijke voorwaarde voor een dergelijk proces.

De tweede helft van het hoofdstuk behandelt de onderzoekspraktijken van het Parket, wat ten dele belangrijk is omdat het ISH's slechte track record inzake bevestigingen van tenlastegelegde feiten en veroordelingen het vermogen van het Hof om te dienen als een geloofwaardige dreiging in gevaar kan brengen. Verder beargumenteer ik dat het onderzoek een wezenlijke fase is waarin een meer positieve, coöperatieve aanpak van complementariteit aangenomen zou kunnen worden. Tot op heden heeft het Parket van de Aanklager echter grotendeels het tegenovergestelde gedaan, door ervoor te kiezen om zijn onderzoekers niet te vestigen in de situatie-landen en geen meer duurzame lokale aanwezigheid te ontwikkelen. Terwijl het Parket voornamelijk gesteund heeft op haar relaties met lokale informanten die bekend staan als "tussenpersonen" om deze leemte op te vullen, heeft het al te vaak een eenzijdige aanpak gebruikt voor bewijsverzameling en is het er niet in geslaagd om hun zorgen en prioriteiten in het onderzoeksproces te integreren. In dit verband wordt bijzondere aandacht besteed aan Oeganda en de DRC, waar zelfs bij "uitnodigende" verwijzingen, de lokale aanwezigheid van het Parket in het land minimaal is geweest. Ook al was dit een bewuste aanpak, deze aanpak heeft te kampen gehad met grote beperkingen, variërend van een beperkte bereidheid van lidstaten om het ISH te voorzien van de nodige middelen, tot een institutionele terughoudendheid om de grotere risico's te nemen die een langdurige aanwezigheid op het terrein met zich zou kunnen meebrengen. Deze beperkingen, betoog ik, vormen een belangrijke uitdaging voor het vermogen van het Hof om binnenlandse vervolgingen te katalyseren.

4. Concurrerend, Aanvullend, Kopiërend: Nationale Rechtbanken en Complementariteit

Van actoren gevestigd in Den Haag naar actoren op nationaal niveau, dit hoofdstuk onderzoekt hoe complementariteit de oprichting (of het voorstel tot oprichting) van gespecialiseerde instellingen, personeel, en de regulering voor de binnenlandse vervolging van ISH misdrijven bezielt en draagt. In Oeganda is de Divisie Internationale Misdrijven, opgericht als een speciale afdeling binnen de Hoge Raad om de misdrijven in het Statuut van Rome te berechten, de belangrijkste binnenlandse instelling waarvan de creatie werd gekatalyseerd door de dreiging van een ISH interventie.

In Kenia waren mislukte pogingen om een Speciaal Tribunaal te creëren voor het geweld in de nasleep van de verkiezingen een hoogtepunt in de poging een binnenlands verantwoordingsproces op poten te zetten in plaats van ISH-procedures. Meer recente discussies blijken echter zich echter ook te richten op de creatie van een Divisie Internationale Misdrijven in Kenia's Hoge Raad. In beide gevallen zijn deze divisies gecreëerd of voorgesteld om te voldoen aan vermeende verplichtingen onder het complementariteitsregime van het ISH en om steun te bieden voor hypothetische ontvankelijkheidsbezwaren.

In de DRC daarentegen hebben binnenlandse militaire rechtbanken, in toepassing van het Congolese krijgsrecht, een veel groter (maar nog steeds beperkt) aantal vervolgingen ondernomen. Het is opmerkelijk dat deze rechtbanken niet opgericht werden in reactie op de betrokkenheid van het ISH in het land: zij hebben al jarenlang rechtsmacht over internationale misdrijven gehad, ook al zijn de procedures zelf relatief recent. De meer recente evolutie van binnenlandse vervolgingen door middel van zogenaamde "mobiele" rechtbanken in het oostelijke regio van de DRC vertegenwoordigt een nieuwe inroeping van het complementariteitsprincipe; het merendeel van deze pogingen is echter ondernomen door internationale donoren en NGO actoren, die opzettelijk getracht hebben de rechtbanken te karakteriseren als een uitbreiding van en "complementair" aan het werk van het ISH, ook al is het Hof zelf nauwelijks aanwezig geweest in hun activiteiten.

Het hoofdstuk belicht dus de veranderende manieren waarop en de concurrerende doeleinden waarvoor complementariteit ingeroepen is als basis voor de oprichting van deze nationale rechtbanken. Het centrale uitgangspunt is opnieuw dat de rol van het ISH als katalysator gebaseerd is op verschillende opvattingen van het complementariteitsprincipe. In bepaalde gevallen is de dreiging van de bevoegdheid van het Hof gebruikt om het opzetten van binnenlandse juridische instituties te bewerkstelligen, zoals Oeganda's Divisie Internationale Misdrijven of de voorgestelde speciale tribunalen in Kenia en de DRC; in die zin is het katalytische potentieel van het ISH grotendeels van dwingende aard geweest. Daarentegen presenteren de recente omschrijvingen van deze instituties hen ook letterlijk als institutionele uitbreidingen van het ISH: eerder dan het Hof te vervangen, zijn ze bedoeld om het werk van het ISH aan te vullen en zelfs te "vervullen". De logica van complementariteit verandert dus afhankelijk van de politieke prioriteiten en doelstellingen van degenen die het inroepen.

De tweede helft van het hoofdstuk onderzoekt de zorgen die ontstaan zijn door deze instellingen, in het bijzonder de blijvende spanningen tussen de uitzonderlijkheid die inherent is aan de oprichting van speciale rechtbanken en hun relatie tot normale strafrechtelijke rechtssystemen. Terwijl de oprichting van nationale rechtbanken gespecialiseerd in de berechting van internationale misdrijven doorgaans gepresenteerd wordt als een normatief goed, is hun weergave als onderdeel van complementariteit "in realiteit" grotendeels gericht geweest op een internationaal publiek van donoren, normatieve ondernemers, en andere staten. De donoreconomieën die deze rechtbanken omringen, en de institutionele spanningen die gecreëerd worden door hun relatie met het gewone rechtssysteem, worden vaak over het hoofd gezien. Een gerelateerde zorg is een schijnbare aandrang op slecht gedefinieerde "internationale standaarden" als het middel waarmee naleving van complementariteit moet worden beoordeeld. Tot slot gaat het hoofdstuk, door middel van een case study van het Kwoyelo proces, na hoe het binnenlandse beroep op complementariteit ook ruimte kan bieden aan staatsmacht, wat

onder bepaalde omstandigheden tot resultaten leidt die zelf in strijd zijn met mensenrechtennormen.

5. Implementatie en Binnenlandse Politiek

Dit hoofdstuk zet het onderzoek naar de effecten van het ISH op nationaal niveau verder door de normatieve impact te verkennen van de interventie van het Hof op het binnenlands wettelijk kader in de drie landen. Terugkerend naar de spiegelingskritiek van de vorige hoofdstukken, beargumenteert dit hoofdstuk eerst dat implementatie een gesofisticeerde en technocratische oefening geworden is in het toepassen van het Statuut van Rome als een "globaal script". Dit heeft op zijn beurt bijgedragen tot een steeds meer disciplinaire benadering van implementatie, een benadering die overeenstemming met het Statuut bevoordeelt. Ten tweede, de implementatie van het Statuur werd niet zozeer bespoedigd door de dreiging van ISH interventie, maar wel door andere gebeurtenissen die overwegend gericht waren op een internationaal publiek. In Oeganda heeft de rol van het land als gastheer van de Toetsingsconferentie in 2010 een wetgevend proces versneld dat lang gestagneerd was. In Kenia leidde het verlangen om publiekelijk afstand te nemen van het electoraal geweld in 2007-08 parlementariërs ertoe de implementatie op een "fast-track" te zetten, op aanbeveling van een internationale onderzoekscommissie; in die tijd leek de mogelijkheid van een ISH interventie echter veraf.

De combinatie van deze twee factoren—uniformiteit in toepassing en de kracht van externe belangengroepen—was grotendeels verantwoordelijk voor het aansturen van het implementatieproces, zowel in Kenia als Oeganda, maar het verdoezelde diepere politieke tegenstellingen over de wenselijkheid van internationaal strafrecht als kader voor binnenlandse verantwoordelijkheid. In Oeganda werden daaropvolgende inspanningen om het jarenlange amnestieprogramma stop te zetten beantwoord met hevig verzet, wat aangeeft dat er heel wat onbehagen is over het vergeldend kader van de nationale wetgeving. Ook in Kenia betekende de opening van het ISH onderzoek in 2009 een breuk van de schijnbare eensgezindheid van de politieke elites over de wenselijkheid van de nationale wetgeving die slechts een jaar eerder geratificeerd was en verenigde zelfs de voormalige politieke rivalen Uhuru Kenyatta en William Ruto. In de DRC daarentegen dwarsboomde het politieke wantrouwen in internationale juridische interventies tot voor kort het aannemen van alomvattende implementatiewetgeving (ook al waren internationale misdrijven al misdrijven onder Congolees recht lang voor de oprichting van het ISH). Op basis van deze geschiedenis sluit het hoofdstuk af door te focussen op drie dimensies van implementatie: als zuiverheid, als politiek, en als "voorstelling", dat wil zeggen, een vorm van politiek theater.

6. Conclusie

Het laatste hoofdstuk biedt een aantal afsluitende observaties. Ten eerste, complementariteit omvat meerdere betekenissen: het is niet alleen een ontvankelijkheidseis, maar ook de juridische logica waardoor de katalytische werking van het ISH zich uitgedrukt heeft. Ten tweede, hoewel complementariteit aanvankelijk gezien werd als een mechanisme om de keuzes van statelijke actoren te beïnvloeden, lijkt het effect op niet-statelijke actoren veel diepgaander te zijn geweest. In deze zin zijn organisaties uit het maatschappelijk middenveld zowel object als subject van het "katalytisch effect" van het Hof: zij pogen de normatieve invloed van complementariteit uit te breiden, maar worden zelf beïnvloed door complementariteit. Ten derde, terwijl

legalisme centraal staat in het streven naar een op regels gebaseerde wereldorde, benadrukken de gevolgen van de ISH interventies in Oeganda, Kenia, en de DRC hoe globale asymmetrieën, en de patronaatsnetwerken die ze produceren, sterk verweven zijn met het katalytische project. De toenemende focus op "naleving" van de standaarden en procedures van het ISH is ten dele een functie van deze asymmetrieën: het weerlegt de buitenmaatse invloed die externe belanghebbenden kunnen hebben over welke activiteiten staten ondernemen in naam van complementariteit. Tenslotte, en om deze redenen, kan het "katalytisch effect" van het ISH op staatsgedrag beter begrepen worden als onderdeel van een complex politiek proces dan als een simpel gewenst resultaat.

In het licht van deze observaties concludeer ik met een aantal suggesties voor toekomstig onderzoek en voor de praktijk. Ten eerste, om de katalytische kracht van het ISH beter te waarderen, kan naleving niet het dominante kader voor complementariteit zijn; het is een te smalle lens om de complexe juridische en politieke alchemie door te bekijken die interventies van het Hof voortbrengen. Ten tweede, het ISH zou een meer lokale oriëntatie moeten aannemen in zijn werk: dit omvat meer onderzoeken en opsporingen op het terrein (of in dichte nabijheid), meer uitvoerige outreach programma's en een groter gebruik van *in situ* hoorzittingen. Ten derde, een meer respectvolle benadering van ontvankelijkheidsbezwaren door het ISH zou wenselijk zijn: het Hof zou beter kunnen omgaan met de spanningen tussen de juridische test voor complementariteit, die geworteld is in de mate van overeenstemming tussen een ISH-zaak en de nationale jurisdicties, en de elementen gebaseerd op beleid, waarbij binnenlandse procedures aangemoedigd zouden moeten worden te midden van een veel groter universum van criminaliteit. Bovendien, hoewel ontvankelijkheidsverzoekschriften het kanaal vormen waardoor staten getracht hebben te communiceren met het ISH, is de ruimte die deze creëren voor dialoog zeer beperkt. Meer aandacht voor samenwerkings- en overlegregimes zoals voorzien in het Statuut van Rome is dus gerechtvaardigd. Ten vierde, een disproportionele focus op het ISH heeft ertoe geleid dat andere hybride regelingen over het hoofd gezien worden die, door hun opzet, een diepere band met nationale jurisdicties kunnen hebben en een meer blijvend effect op het versterken van de binnenlandse capaciteit. Er zou meer geïnvesteerd moeten worden in deze regelingen, en in een kritische oriëntatie die internationale strafrechtelijke gerechtigheid verwelkomt, minder als een kwestie van het volgen van regels, maar eerder als een project van wereldwijd juridisch pluralisme. Hierdoor zou meer ruimte geboden kunnen worden aan experimenten en innovatie, evenals betwisting.

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CURRICULUM VITAE

Christian Michael De Vos (Weymouth, USA, 1978) was a PhD researcher at Leiden University's Grotius Centre for International Legal Studies from 2010-2012. During this time, he conducted research in the areas of international criminal law and transitional justice as part of the Post-Conflict Justice and 'Local Ownership' project, under the supervision of Professor Carsten Stahn and Professor Larissa van den Herik. In addition to his research, Christian lectured in the Grotius Centre's Summer Schools and served as co-instructor for the course "The Spirit of International Law" (Brandeis University Semester in The Hague, Spring 2012).

Prior to his position at Leiden, Christian worked for such organizations as Amnesty International, the Human Sciences Research Council, the United States Institute of Peace, and the War Crimes Research Office. He also served as a law clerk for two years with the United States Court of Appeals for the Second Circuit's Office of Legal Affairs. Since 2013, Christian has been an advocacy officer with the Open Society Justice Initiative. He engages in advocacy across the Justice Initiative's areas of work, focusing in particular on the implementation of international human rights judgments, the strengthening of regional human rights systems, and national accountability for grave crimes.

Christian received his Juris Doctorate from the American University Washington College of Law (2007, *cum laude*); an MSc in Theory and History of International Relations from the London School of Economics (2004); and a Bachelor of Arts in Government and African-American Studies from Wesleyan University (2000, *magna cum laude*). He is a member of the New York bar and a term member of the Council on Foreign Relations.

Publications (based on research undertaken for this book):

"All roads lead to Rome: implementation and domestic politics in Kenya and Uganda," in C. De Vos, S. Kendall, and C. Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015), pp. 379-407.

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