CHAPTER 5

PARADOXES UNRAVELLED: EXPLANATIONS FOR COMPLEMENTARITY'S WEAK CATALYSING EFFECT ON DOMESTIC PROCEEDINGS

> *States not only have the right to exercise their criminal jurisdiction over those allegedly responsible for the commission of crimes that fall within the jurisdiction of the Court, they are also under an existing duty to do so as explicitly stated in the Statute's preambular paragraph 6. However, it should be borne in mind that a core rationale underlying the concept of complementarity aims at 'strik[ing] a balance between safeguarding the primacy of domestic proceedings* vis-à-vis *the [. . .] Court on the one hand, and the goal of the Rome Statute to "put an end to impunity" on the other hand . . .'.*
>
> ICC Pre-Trial Chamber II[1]

For all the effects it has catalysed, the complementarity principle has to date not led to a substantial increase in Ugandan and Sudanese proceedings in respect of cases within the ICC's purview. This is remarkable in that only genuine domestic proceedings can render the ICC's cases inadmissible on grounds of complementarity. Part of the explanation may simply be time – investigations and prosecutions require preparation, and the ICC began its work, and its catalysing role, only a decade ago. However, some developments in Uganda and Sudan, or the lack thereof, challenge the very assumptions underpinning the widespread expectation of a catalysing effect on domestic proceedings – assumptions with respect to the normative character of complementarity and with respect to the cost–benefit analyses engaged in by states.[2]

[1] *Admissibility Decision Ruto et al. (PTC)*:[44] and *Admissibility Decision Muthaura et al. (PTC)*:[40].

[2] See Chapter 1, 'Assumptions underlying the expectation of a catalysing effect'.

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COMPLEMENTARITY'S NORMATIVE CHARACTER

A number of factors contribute to an explanation of the weakness of complementarity as an expectation on states to investigate and prosecute conflict-related crimes. The underlying factor is that, as has been argued in Chapter 2, there is no legal obligation to conduct domestic proceedings under the Statute. To the extent that complementarity as big idea contains a non-legal political expectation, its catalysing effect has been thwarted by three other factors.

First, there has been considerable confusion, ambiguity and even misrepresentation with respect to the content of complementarity as the principle that grants states the primary right to investigate and prosecute crimes within the Court's jurisdiction. The clearest example of norm misrepresentation is the gradual replacement of the explanation of complementarity as a state's primary right to investigate and prosecute by a seemingly similar but essentially different understanding according to which the international and domestic jurisdiction 'complement' each other, the former being responsible for the big cases and the latter for the smaller ones.

Secondly, even more than with complementarity as admissibility rule granting states a primary right, there is ambiguity with respect to complementarity as big idea entailing the responsibility or duty of states to investigate and prosecute. To some extent this ambiguity reflects the discrepancy between on the one hand the big-idea discourse on complementarity as a reminder to states of their responsibility to investigate and prosecute, and on the other the Rome Statute that creates a court on the very assumption that states do not always fulfil that responsibility. The Court's interpretation of the Statute, and particularly the OTP's policy of inviting self-referrals, has intensified this normative paradox of complementarity. By prioritising the fight against impunity over the responsibility of the state and by providing too ready a back-up, the Court diminishes the expectation on states to investigate and prosecute and thus the potential catalysing effect of complementarity on domestic proceedings. The expectation has been further countered by the emergence of a *pro-ICC ideology*, which, on various grounds, prefers ICC proceedings to domestic ones.

Finally, at the domestic level, the context in Uganda and Sudan has not been hospitable to the infiltration of a norm according to which the state has a responsibility to investigate and prosecute conflict-related crimes. In part, this context is specific to Uganda and Sudan;

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in part it is related to the character of conflict-related crimes and thus also potentially confronts other states dealing with such crimes.

Complementarity as primary right: confusion, ambiguity and misrepresentation

A first reason why complementarity's catalysing effect on domestic proceedings has remained limited is confusion, ambiguity and misrepresentation with respect to its content. As Chayes and Chayes have demonstrated, norm compliance is enhanced by norm clarity and norm-clarifying procedures.[3] Since, as Chapter 2 has argued, complementarity is an admissibility rule that binds the Court – not states – there is little for states to 'comply' with. Nonetheless, clarity about the fact that this admissibility rule accords states the primary right to investigate and prosecute crimes within the Court's jurisdiction could enhance complementarity's catalysing effect by reminding states of that right and encouraging them to take advantage of it. In fact, however, there has been considerable confusion, ambiguity and even misrepresentation of complementarity as a primary right.

One example of confusion is the widespread idea among national as well as international officials in Uganda and Sudan that willingness and ability are assessed on a situation-wide, rather than case-by-case, basis.[4] In Sudan, the assessment by the International Commission of Inquiry on Darfur (ICID) of the legal system as a whole has contributed to this idea.[5] In the Uganda situation, the PTC judges have fostered the same idea by suggesting that they can make a final determination regarding admissibility once the laws to be applied by the Ugandan War Crimes Court have been determined.[6] This confusion potentially limits complementarity's catalysing effect by suggesting that an overhaul of the entire domestic justice system is required, as opposed to genuine proceedings in the particular case.

Another example of norm confusion is the pervasive idea that a determination of admissibility is permanent. When interviewed in 2008, many Ugandan and Sudanese officials and officials from international organisations believed that, once a case had been held admissible, the facts relevant to admissibility were frozen, whether this was at the stage of the ICID report, at the moment of the referral

[3] Chayes and Chayes 1993 and Chayes and Chayes 1995.
[4] See Chapter 2, 'The complementarity assessment is case-specific'.
[5] See Chapter 4, nn. 81 and 90 and accompanying text. [6] See Chapter 3, n. 613.

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or when the Court issued arrest warrants. Subsequent domestic proceedings would not be able to render ICC cases inadmissible. Such a view obviously forestalls any catalysing effect, because after an admissibility assessment domestic proceedings would be futile.[7] The OTP has at times contributed to this view:

> [The efforts of the ICC and regional organisations] complement each other . . . In accordance with the Rome Statute, the ICC is a Court of last resort, complementary to the national judiciary. We have six cases. Should Regional organizations succeed in promoting national accountability mechanisms for the victims of other crimes, and stop new abuses, we would not need to further intervene.[8]

The statement suggests that national accountability mechanisms are relevant only to cases that the ICC has not yet opened.

The clearest example of norm misrepresentation or norm hijacking has been the use of the term 'complementarity' in its literal rather than legal meaning.[9] Whereas complementarity in the legal sense is a rule of priority that determines a competition for jurisdiction, complementarity in the literal sense is used to describe a collaborative effort to end impunity in which the ICC's proceedings and domestic efforts 'complement' each other.[10] The OTP has often referred to complementarity in this literal sense, for instance in the following statement:

> [C]omplementarity . . . may play a part in preventing impunity. If the ICC has successfully prosecuted the leaders of a State or organisation, the situation in the country concerned might then be such as to inspire confidence in the national jurisdiction. The reinvigorated national authorities might now be able to deal with the other cases. In other instances, the international community might be ready to combine

[7] For instance, a Sudanese political observer explained as follows the lull in domestic investigations and prosecutions between the issuance of the arrest warrants for Harun and Kushayb and the request for Bashir's warrant: 'After the Prosecutor requested the summonses to appear the show ended, the show had failed and we had all been indicted' (interview, Khartoum, September 2007).

[8] *Prosecutor's Darfur Statement SC June 2009*:8. In his first reports to the Security Council on Sudan, the Prosecutor, however, correctly explained that the complementarity assessment was a continuous process. See Chapter 4, n. 93.

[9] See also Schabas 2004:85, arguing that the term 'complementarity' is 'a misnomer' for a rule of precedence, in which ultimately one jurisdiction has priority in a specific case. 'Subsidiarity' would have been more telling, but according to Crawford 2003:138–9 this term was not chosen because the EU had already 'taken' it.

[10] Some academic literature has also used the term in this way, see e.g. Bos 1998:253.

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> national and international efforts to ensure that perpetrators of serious international crimes are brought to justice.[11]

In this context, the OTP uses 'complementarity' to describe a 'division of labour' in which the ICC focuses on alleged perpetrators bearing the greatest responsibility, while the state, possibly with international assistance, handles the remaining cases, whether through formal court proceedings or 'alternative means'.[12]

Probably because both are based on an idea of 'positive' and 'cooperative'[13] – in fact what is meant is 'uncompetitive' – relations between the ICC and domestic jurisdictions, it is mostly in the context of the policy of positive complementarity that the term complementarity has been used to describe a division of labour between the ICC and domestic jurisdictions.[14] Indeed, some authors claim that such a division of labour is a 'tactic' of positive complementarity.[15]

However, this argument, and the use of complementarity in its literal sense more generally, is misleading because it ignores the fact that the admissibility rules giving effect to the principle of complementarity apply to *all* cases before the ICC, including those pertaining to persons bearing the greatest responsibility. Thus, if a state genuinely investigates or prosecutes a case involving those bearing the greatest responsibility for conduct within the Court's jurisdiction, complementarity grants that state primacy over the ICC, even if this does not reflect or result in 'positive' relations with the ICC. Any policy of

[11] ICC-OTP 2003d:7. For other examples of the OTP using complementarity in its literal rather than legal meaning, see: ICC-OTP 2006d:8, Moreno-Ocampo 2007b:8, ICC-OTP 2006e:10 and Moreno-Ocampo 2011:22 ('the Court should handle a limited number of cases. My Office ... will select for prosecution those most responsible for the most serious crimes, based on the evidence. The strength of the system lies therefore in the possibility for shared responsibility and complementary action between the Court and the domestic judiciary.').

[12] For the suggestion of alternative means, see ICC-OTP 2003d:3. For similar suggestions for such a division of labour, see e.g. ICC-OTP 2003c:4, Moreno-Ocampo 2004c:1–2 and 4, Moreno-Ocampo 2008a:5, Schabas 2003:3, El Zeidy 2002:967, and also 874 and 876 and Totten and Tyler 2008:1070–1 and 1099–1100. Cf. *contra* Bitti 2007.

[13] Or, in the words of one OTP official cited by Verrijn Stuart 2005, the policy of positive complementarity would make it possible 'to establish a warm and fuzzy partnership within [situation] countries with all parties to a conflict'.

[14] See e.g. Moreno-Ocampo 2011:26, ICC-ASP/8/Res.9 Annex 4 (2010):[15] and [24]–[25] and ICC Registrar Arbia and Bassy 2011:62.

[15] Burke-White 2008b:59–63. Similarly, El Zeidy 2008a:405, El Zeidy 2008b:305 and Stahn 2008:109–10.

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positive complementarity aimed at establishing cooperative relations cannot overrule the law of complementarity which grants states the primary right to investigate and prosecute crimes within the Court's jurisdiction.

And yet, some of the ICC judges appear to share the OTP's preferred reading of complementarity as a division-of-labour rule. One former ICC judge, for instance, writes:

> What then is the ultimate purpose of complementarity? There is no doubt that one important goal is to establish a division of labour between national jurisdictions and the ICC, under which the Court should essentially concentrate on those who have the major responsibility for the crimes involved.[16]

The fact that this interpretation of complementarity is without judicial endorsement has not precluded it from influencing how complementarity is understood: the public's understanding of the principle is based more on the OTP's public statements than on considerations in judicial decisions. The public understanding, in turn, influences complementarity's catalysing effect.

In Sudan, for example, international officials have replicated the misleading use of the term and thereby discouraged Sudanese proceedings. When the Sudanese Minister of Justice was quoted as stating that the Special Criminal Court on the Events in Darfur was 'considered a substitute to the International Criminal Court', an ICC public information advisor responded:

> Before the prosecutor decided to take on the Darfur case, he first analysed the admissibility of the case, which included ICC complementarity with what the Sudanese legal system was doing … Given that the prosecutor would focus his investigations on individuals who bear the greatest criminal responsibility for crimes committed in Darfur, the analysis concluded that an ICC investigation would complement [the work of] the Sudanese judiciary.[17]

The Minister of Justice, quite rightly, retorted with an invocation of article 17 of the Statute. The Special Representative of the UN Secretary-General in Sudan, however, argued that the Sudanese SCCED could 'not be a substitute for the International Criminal Court' and suggested that the two courts operate side by side, referring to the ICTR's operating alongside Rwandan national courts.[18]

[16] Politi 2011:145.
[17] 'Sudan: judiciary challenges ICC over Darfur cases' 2005. [18] *Ibid.*

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Even where international actors did not copy the division-of-labour reading of complementarity, the OTP has summarised their work by stating that they did. Thus, whilst the African Union High-Level Panel on Darfur discussed complementarity in its legal sense, in other words as applicable to all cases including those involving persons bearing the greatest responsibility, the Prosecutor summarised the AUPD's report as proposing 'additional solutions including the creation of a hybrid court to complement the action of the ICC, to address those cases that the ICC will not deal with'.[19]

In Uganda, as Chapter 3 has begun to reveal,[20] the distorted understanding of complementarity as assigning the big cases to the ICC and the smaller ones to domestic mechanisms is even more prevalent. In Uganda, unlike in Sudan, the ICC has an office to conduct its 'outreach', in other words to explain the ICC and the Rome Statute to Ugandans and others present in Uganda. Asked how the office dealt with the public's confusion between the ICD (the Ugandan International Crimes Division) and the ICC, one ICC outreach officer responded:

> We tell them: 'this is complementarity at play. Those who cannot be tried by ICC will be done at the national level: it is a complementary court.'[21]

Against this background it is not surprising that Ugandan reporters write in their articles: 'Recently, Kampala tasked a division of the High Court to try alleged war criminals that the ICC is unlikely to deal with',[22] or:

> Since the ICC does not have the resources to try all suspected war criminals, its mandate is to prosecute only those deemed most

[19] Moreno-Ocampo 2009b:9. See also *Tenth Darfur Report*:[103], *Prosecutor's Darfur Statement SC December 2009*:[18] ('[During a meeting between the AUPD and the OTP] [i]t was . . . clarified that the cases against President Bashir, Ahmad Harun and Ali Kushayb as well as Abu Garda and two other rebel commanders will be decided by the judges of the International Criminal Court. Additionally we had exchanges on the complementary role that other courts can play to investigate *other* perpetrators.') and the Prosecutor's Special Advisor Méndez 2011:46.

[20] See the explanation of complementarity given by a judge on the Ugandan International Crimes Division, cited in Chapter 3, n. 605.

[21] Interview with two officers of the ICC outreach office, Kampala, November 2011.

[22] Ogola 2010.

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> responsible for atrocities, with the remainder being tried by national courts, provided that the local judiciary is capable of doing this.[23]

As one lawyer's explanation of the ICD's workload illustrates, the division-of-labour reading of complementarity has been so successfully promoted that the international jargon of 'the big fish' for the international courts and 'the small fry' for national mechanisms is literally being vernacularised: 'In the ICD . . . we try the tilapia, not the nile perch.'[24]

This distorted explanation of complementarity goes against the stated aim of positive complementarity, namely, of encouraging domestic proceedings. The transformation of complementarity into a division-of-labour rule promotes the notion that the ICC is always responsible for those bearing the greatest responsibility and that the state may handle (only) the remaining cases.[25]

Complementarity as big idea: a responsibility to investigate and prosecute?

Even more than over the content of complementarity as admissibility rule, there is ambiguity over the content of complementarity as big idea entailing the 'responsibility' of states to investigate and prosecute. The term 'responsibility' means all things to all people. The Rome Statute, positing complementarity merely as a norm relevant to when the Court may exercise jurisdiction, provides no guidance. Nonetheless, support from states for, and the ICC's insistence on, such a responsibility could crystallise such a norm. For example, the Security Council's consideration of complementarity as a political criterion[26] and the Prosecutor's espoused policy of positive complementarity[27]

[23] Oketch 2010. [24] Interview, Kampala, November 2011.

[25] There are signs of this notion's spreading in other countries, too. For instance, the Principal Public Prosecutor Office of the Central African Republic requested the Court of Appeal of Bangui hold that 'the offences affecting persons, referred to as "blood crimes" (crimes de sang), should be tried by the ICC and that the economic crimes should be tried by the Cour Criminelle' (see *Judgment Admissibility Challenge Bemba (AC)*:[40b]; in the end, the Central African Republic referred the situation on its territory to the ICC). Similarly, in Côte d'Ivoire, President Ouattara wrote to the ICC Prosecutor arguing that the Ivorian justice system was dealing with minor infractions, but that those bearing the greatest responsibility should be addressed by the Court (see 'Letter President Ouattara to the Office of the Prosecutor' 2011).

[26] See Chapter 4, 'Encouraging more trials, prosecutions and/or investigations?' and 'Conclusion: complementarity's catalysing effect in Sudan'.

[27] See Chapter 1 and Chapter 2, 'The policy of positive complementarity'.

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suggest that international organisations, the member states of these organisations and the OTP foster a non-legal expectation that domestic proceedings be pursued. Clarification of any such expectation by the ICC or political actors could enhance its normativity and thus its catalysing effect.

However, two ICC-related developments have in fact weakened this expectation. First, the *normative paradox of complementarity* is that the creation of the 'Rome System', and particularly the way it has so far been implemented, may, by projecting the Court as an institution to take over from states the responsibility to investigate and prosecute conflict-related crimes, actually undermine the expectation on states to discharge that responsibility. Secondly, this expectation has been further undercut by the emergence of a *pro-ICC ideology* that counteracts complementarity both as a primary right and as a responsibility to investigate and prosecute.

The normative paradox of complementarity

The roots of the normative paradox of complementarity are in the Rome Statute. On the one hand, the preamble recalls every state's duty to exercise its criminal jurisdiction over those responsible for international crimes. It is with reference to this recital that many authors have argued that complementarity reflects states' responsibility or duty to investigate and prosecute the crimes within the Court's jurisdiction.

On the other hand, as argued in Chapter 2, neither this preambular recital nor any other provision in the Statute *creates* an obligation for a state to investigate or prosecute.[28] What the Statute does create is a court that is based on the very assumption that states do not always investigate and prosecute. The Statute even allows states to refer situations on their own territory to the Court. The Japanese representative may have observed during the negotiations of the Statute that the Court 'should not be used as a "garbage can" into which national court systems could dump criminals that they should be punishing at the national level',[29] but no sooner had the Court been created than

[28] Akhavan 2010b therefore proposes an Optional Protocol to the Rome Statute containing an express and enforceable obligation to exercise national jurisdiction.

[29] L/2773 (1996).

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Uganda,[30] the DRC[31] and the CAR,[32] and later also Mali,[33] effectively outsourced their responsibility to investigate and prosecute to the ICC.[34] The Statute has thus created not just a court of last resort, but also a court of convenience.

The Rome System lacks not only a norm obliging states to investigate and prosecute but also any infrastructure for the enforcement of such a norm.[35] Admissibility proceedings do assess whether or not

[30] See Chapter 3.

[31] 'Letter of the President of the Democratic Republic of the Congo, Joseph Kabila, to the Prosecutor of the International Criminal Court' 2004, stating: 'En raison de la situation particulière que connaît mon pays, les autorités compétentes ne sont maulheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d'engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale.'

[32] As reported by the ICC Appeals Chamber in *Judgment Admissibility Challenge Bemba (AC)*:[45], the Central African 'Court of Cassation held that "there can be no doubt that the Central African judicial services are unable genuinely to investigate or prosecute" in the proceedings against Mr Patassé, Mr Bemba and others . . . The Court of Cassation therefore held that "recourse to international cooperation remains in this case the sole means of averting such impunity" and as such, in its view, the Senior Investigating Judge erred *in not availing himself of this option*' (footnotes omitted, emphasis added).

[33] 'Letter from Malick Coulibali, Minister of Justice of the Republic of Mali, to the Prosecutor of the ICC, "Renvoi de la situation au Mali"' 2012:1 ('l'Etat du Mali . . . a l'honneur de déférer devant vous les crimes les plus graves commis depuis le mois de Janvier 2012 sur son territoire dans la mesure où les juridictions maliennes sont dans l'impossibilité de poursuivre ou juger les auteurs').

[34] Not a state party to the Statute, Côte d'Ivoire could not refer the situation on its own territory, but it has used the possibility of RS, art. 12(3) to accept the Court's jurisdiction on an *ad hoc* basis. It explained its decision to do so also with reference to the fact that the Court was better suited to investigate and prosecute the crimes within its jurisdiction. See 'Letter President Ouattara to the Office of the Prosecutor' 2011:2 ('Dans ce contexte, et après consultation avec le parquet général et les autorités judiciaires, il apparaît . . . que la justice ivoirienne n'est, à ce jour, pas la mieux placée pour connaître des crimes les plus graves commis au cours des derniers mois et toute tentative d'en traduire en justice les plus hauts responsables risquerait de se heurter à des difficultés de tous ordres. Par la présente, j'entends confirmer mon souhait que votre Bureau mène en Côte d'Ivoire des enquêtes indépendantes et impartiales sur les crimes les plus graves commis depuis le 28 novembre 2010 sur l'ensemble du territoire ivoirien, et fasse en sorte que les personnes portant la responsabilité pénale la plus lourde pour ces crimes soient identifiées, poursuivies et traduites devant la Cour pénale internationale.').

[35] See also *Admissibility Judgment Katanga* AC:[86]. On the importance of an enforcement framework for norm compliance, see Finnemore and Sikkink 1998, Chayes and Chayes 1993 and Chayes and Chayes 1995.

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genuine domestic proceedings have taken place, but they result only in a finding on admissibility; the Court does not pronounce upon state responsibility. The Statute does not provide for other monitoring mechanisms either, for instance reporting procedures by which states must inform the Assembly of States Parties (ASP) of domestic implementation of any obligations arising from the Statute. The procedure in the Statute that seems to come closest to sanctioning states for not investigating and prosecuting domestically is a finding of inability and unwillingness genuinely to investigate or prosecute, which could be an implicit 'naming and shaming' instrument. However, as Chapter 2 has argued,[36] an assessment of willingness and ability is necessary only in the event of domestic proceedings in the same case as the ICC's. Moreover, as the section on cost–benefit assessments will show, states have not necessarily considered such a finding to be a sanction; indeed, they themselves have at times argued that they are 'unable'.[37]

The Court has implicitly recognised the normative paradox of complementarity. PTC II presented complementarity as a principle '*reconciling* the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes'.[38] In another case, Trial Chamber II went a step further, conceptualising a self-referral and transfer of a suspect to the Court as a fulfilment of the duty to exercise its jurisdiction and implicitly referring to the idea of the ICC as a court of convenience:

> [L]a Chambre rappelle que, comme le prévoit le sixième alinéa du préambule du Statut 'il est du devoir de chaque État de soumettre à sa juridiction criminelle les responsables de crimes internationaux'. Cependant *si un État juge plus opportun* que la Cour mène les enquêtes et les poursuites, il n'en remplit pas moins ses obligations au regard du principe de complémentarité s'il assure le transfert du suspect dans les meilleurs délais et apporte à la Cour sa coopération pleine et entière conformément au chapitre IX du Statut.[39]

On appeal, the defendant argued that this reasoning 'violates paragraph 6 of the Preamble, as well as the fundamental values underlying

[36] 'The substance of complementarity: the criteria for inadmissibility'.
[37] See e.g. n. 32 above.
[38] *LRA Admissibility Decision (PTC)*:[34] (emphasis added).
[39] *Admissibility Decision Katanga (TC)*:[79] (emphasis added). See Chapter 2, n. 215, on the unfortunate use of 'obligations au regard du principe de complementarité'.

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the complementarity principle as inherent in the Preamble, Articles 1 and 17 of the Rome Statute', and continued: 'Indeed, if States are granted an unconditional right not to prosecute, this would seriously jeopardize any encouragement for States to prosecute domestically and thereby endanger the correct application of the principle of complementarity.'[40] Explicitly mentioning a catalysing effect as one of complementarity's purposes and reminding the Prosecutor of his inaugural statement, the defendant argued:

> One of the objectives of the establishment of the ICC was to encourage States to investigate and prosecute international crimes and to reinforce their legal capacity to do so. The drafters of the Rome Statute envisaged the ICC as a Court of last resort to come into action in the most exceptional circumstances only, when a State is genuinely unable or unwilling to take action within its own jurisdiction. A successful ICC has no or very few cases, the majority of cases being investigated and prosecuted domestically.[41]

The Appeals Chamber disagreed and followed the PTC's image of complementarity as a principle balancing a state's duty and the creation of the Court. However, in the Appeals Chamber's view the principle balances the duty to exercise jurisdiction not with the creation of the ICC, but with the fight against impunity:

> The Appeals Chamber is not persuaded by the argument of the Appellant that it would be to negate the obligation of States to prosecute crimes if they were allowed to relinquish domestic jurisdiction in favour of the International Criminal Court. The Appeals Chamber acknowledges that States have a duty to exercise their criminal jurisdiction over international crimes. The Chamber must *nevertheless* stress that the complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings *vis-à-vis* the International Criminal Court on the one hand, and the goal of the Rome Statute to 'put an end to impunity' on the other hand. If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in.[42]

[40] *Defence Appeal Admissibility Katanga*:[64]. [41] *Ibid.*:[67].

[42] *Admissibility Judgment Katanga (AC)*:[85] (footnotes omitted, emphasis added). The concept of a balance was quoted and used by the PTC in *Admissibility Decision Ruto et al. (PTC)*:[44] and *Admissibility Decision Muthaura et al. (PTC)*:[40] but in that case a state's primary right, not duty, was at issue.

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Whilst the complementarity principle could be understood as a principle that enhances the fight against impunity by granting states a primary right (and possibly responsibility or even duty) to investigate and prosecute – after all, the combined capacity of domestic jurisdictions far exceeds that of the ICC – the Appeals Chamber presents it as a principle that subordinates the primacy of domestic jurisdictions to the fight against impunity (as defined by the ICC). By prioritising the fight against impunity over the primary responsibility of the state and by then providing too ready a back-up, the Court diminishes the notion of the responsibility of the state.

The Appeals Chamber not only implicitly recognised the normative paradox of complementarity, it explicitly diminished the responsibility of the state by – admittedly rather speculatively – conceptualising the duty recalled in the preamble as an obligation *aut dedere aut judicare*, rather than an obligation to investigate or prosecute domestically:

> [T]here may be merit in the argument that the sovereign decision of a State to relinquish its jurisdiction in favour of the Court may well be seen as complying with the 'duty to exercise [its] criminal jurisdiction', as envisaged in the sixth paragraph of the Preamble.[43]

Whilst keeping the option open not to act upon a state's self-referral,[44] the Chamber concluded that 'the general prohibition of a relinquishment of jurisdiction in favour of the Court is not a suitable tool for fostering compliance by States with the duty to exercise criminal jurisdiction'.[45] More critical with respect to self-referrals, Pre-Trial Chamber I held that for the Court to have jurisdiction there must be a link between a referral and crimes committed afterwards,

> precisely with a view to avoiding that referrals become instruments 'permitting a State to abdicate its responsibility for exercising jurisdiction over atrocity crimes for eternity', which – as the Defence correctly points out – 'would be wholly antithetical to the concept of complementarity'. The Statute cannot be interpreted as permitting a State to permanently abdicate its responsibilities by referring a wholesale of present and future criminal activities comprising the whole of its territory, without any limitation whether in context or duration. Such an interpretation would be inconsistent with the proper functioning of the principle of complementarity.[46]

[43] *Admissibility Judgment Katanga (AC)*:[85]. [44] *Ibid*.
[45] *Ibid*.:[86]. See Chapter 2, 'Other jurisdictional provisions: the triggers', on the problematic use of 'relinquishment' in this context.
[46] *Decision on Jurisdiction Challenge Mbarushimana*:[16] (footnote omitted).

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Implicitly endorsing the normative paradox of complementarity, the Chamber does not seem to consider *temporal* abdication of this responsibility as inconsistent with the principle of complementarity.

The Office of the Prosecutor has for its part diminished the expectation on states to investigate and prosecute domestically by actively encouraging states to refer situations to the Court. It is one thing for the Rome Statute not to prohibit a self-referral; it is quite another for the OTP to make it an explicit policy to invite states to refer to the Court situations concerning their own territory and nationals, stating that '[t]here may be cases where inaction by States is the appropriate course of action' and arguing that the Court may have 'superior evidence and expertise relating to that situation, making the Court the more effective forum'.[47]

This policy of inviting self-referrals has often been associated with or even considered part of the policy of positive complementarity, possibly because they are both based on an idea of cooperative relations between the ICC and a state.[48] However, the effect of the policy of inviting self-referrals is the opposite of the stated aim of positive complementarity: domestic proceedings are outsourced rather than encouraged. Where the policy of positive complementarity focuses on the ICC's cooperating with a state to help the state conduct proceedings, the policy of encouraging self-referrals aims at states' assigning situations to the ICC.[49] Where the policy of positive complementarity could enhance the expectation on states to investigate

[47] ICC-OTP 2003d:5.

[48] For examples of the OTP's amalgamating policies that share the characteristic of cooperative relations between a state and the ICC as part of one overarching policy, see Moreno-Ocampo 2004a:2, ICC-OTP 2006c:5 and ICC-OTP 2006d:22–3. See also, in the literature, Cryer 2011:1105, Stahn 2008:94 and 112, and Takemura 2007.

[49] The only way to reconcile the two policies is the Prosecutor's idea of a division of labour, challenged in this chapter, above, 'Complementarity as primary right: confusion, ambiguity and misrepresentation'. One can also counter that the two policies are not inconsistent because they apply at different moments. More recent policy documents on positive complementarity suggest that the policy is considered particularly prior to the OTP's decision whether or not to open an investigation, whereas the policy of inviting self-referral becomes relevant once the OTP has decided to open an investigation (see ICC-OTP 2011c:[14]–[15]). However, this reduced relevance of the policy of positive complementarity equally reduces the extent to which the policy contributes to an expectation on states to investigate and prosecute. Moreover, the policy of inviting self-referrals continues to do the opposite of encouraging domestic proceedings.

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and prosecute domestically, the policy of inviting self-referrals suggests states are better international actors if they refer situations to the Court.

Despite lip-service to the policy of positive complementarity, the OTP in its first years prioritised the policy of inviting self-referrals. To an OTP that needed to prove its worth,[50] self-referrals seemed ideal as they were thought to imply a state's willingness to cooperate with the Court[51] – thus covering the Court's Achilles' heel.

Whilst the seeds for the normative paradox of complementarity are in the Rome Statute, the Court's organs have thus further diminished the idea of a domestic responsibility to investigate and prosecute by arguing that in some instances the ICC is the better forum for the prosecution of international crimes, that self-referrals are consistent with the anti-impunity ideal of the Rome Statute and that a state that refers a situation and transfers a suspect has not taken a decision not to prosecute in the meaning of article 17(1)(b).[52] Moreover, by defining narrowly the concept of same case, the Prosecutor and the PTCs have avoided findings of inability or unwillingness and thus, to the extent that there is any,[53] the naming-and-shaming effect of the ICC's involvement.

From the Court's perspective, all these developments are consistent with the aim of ending impunity. Regardless of the virtue of this argument, it does not negate the existence of the normative paradox of complementarity: the creation of the 'Rome System', and particularly the way it has been implemented so far, may, by projecting the Court as an institution to take over from states the responsibility to investigate and prosecute conflict-related crimes, actually undermine the expectation on states to discharge that responsibility. In other words, the Rome Statute and the ICC have fostered a norm according to which crimes may not go unpunished, but weakened the idea that states have the responsibility to this effect. The latter idea has been further weakened by the emergence of a *pro-ICC ideology*.

[50] See also the Prosecutor in the documentary Yates, de Onis and Kinoy 2009, MacMillan 2007:210, Clark 2009:263 and 265 and Greenawalt 2009:160.
[51] ICC-OTP 2003a:5, ICC-OTP 2006d:7 and Moreno-Ocampo 2008c. See also Gallavin 2006:50.
[52] See Chapter 2, 'A decision not to prosecute'.
[53] See this chapter, 'Low costs of inaction'.

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Pro-ICC ideology countering a political expectation on states to conduct proceedings

Complementarity as a principle that grants states the primary right to investigate and prosecute, and *a fortiori* as a norm according to which states are politically expected to do so, has been undermined by *pro-ICC ideology*. This ideology is based on three sometimes interrelated beliefs, namely, that (1) international courts mete out better justice than domestic systems;[54] (2) international crimes, particularly those committed by those bearing the greatest responsibility, must be prosecuted as international crimes and, ideally, in international courts, because such crimes have been committed 'against humanity';[55] and (3) at a minimum, once the ICC is involved it should not be publicly criticised or rendered less relevant because as a fledgling court it must be seen to succeed.[56] By favouring ICC proceedings, pro-ICC ideology has countered the political expectation on states to conduct domestic proceedings for conflict-related crimes and thus complementarity's catalysing effect.

At the international level, this ideology is backed by the international-criminal-justice movement,[57] some Western governments and, unsurprisingly, the ICC itself.[58] Having spent decades lobbying for the creation of the ICC,[59] the international-criminal-justice movement is one of the best exemplars of pro-ICC ideology. Members of the Coalition for the International Criminal Court (CICC), for instance, have joined an alliance whose aim is not just fighting impunity, but supporting the ICC as the institution chosen to fight this battle.[60] As Chapter 3 in particular has illustrated, the CICC and other members of the international-criminal-justice movement

[54] For case law and literature supporting this view, see, *inter alia*, ICTY, *Tadić Defence Motion Decision (AC)*:[62] and Goldstone 1997:238.

[55] See e.g. ICTY, *Tadić Defence Motion Decision (AC)*:[57] and UN Doc. S/PV.3453 (1994):13 (Mr Bakuramutsa). For an example of this view in the literature, see Pellet 2004:438–9.

[56] See the Swiss Ambassador's considerations reported in Hume 2006c, cited below, n. 72. For additional arguments for preferring international to domestic trials, see Arendt 1977:270, Mégret 2005 and Burke-White 2002:93.

[57] See Chapter 1, text above n. 58.

[58] For supporters of this ideology at the domestic level, see this chapter, 'A domestic context inhospitable to a responsibility to conduct proceedings'.

[59] See Glasius 2006, Schiff 2008:Chapter 5 and Treves, di Rattalma, Tanzi, Fodella, Pitea and Ragni 2005:Part II.

[60] See www.coalitionfortheicc.org.

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have had significant influence on complementarity's catalysing effect. The Court's opening of its respective investigations saw a parade of international NGOs marching into Uganda or standing ready to organise events for Sudanese abroad. Whether providing information about the Court, assisting victims in applying for participant status in ICC proceedings or setting in motion transnational processes in which activists in situation countries interact with foreign members of the international-criminal-justice movement, these organisations have done much by way of outreach for the Court.[61]

However, when these organisations promote the Court and its Statute, they do not just provide all the information; they interpret and select information strategically.[62] They do not pay much attention to complementarity, a principle that could end the ICC's involvement in situations with respect to which they have lobbied for the ICC's exercise of jurisdiction. When these organisations do discuss complementarity, they elaborate on the high 'international standards' that domestic proceedings must meet and argue that offences must be charged in accordance with the definitions of the Rome Statute because charges of ordinary crimes do not reflect the seriousness of the crimes,[63] thus going beyond the requirements of the Statute.

[61] Locally, these NGOs are often seen as mouthpieces of the ICC. In part, this is due to the fact that they fail to distinguish themselves from the ICC. Indeed, the ICC Outreach Office has explained its joint outreach trips with the Ugandan Coalition on the ICC on the ground that they 'have the same message' (interview ICC outreach officers, Kampala, November 2011) and the UCICC has used the ICC's template for PowerPoint presentations (participant observation, UCICC session on the ICC at Kampala International University, Kampala, 16 October 2008). But such identification is also encouraged by the fact that the ICC outreach office is less visible than these NGOs, purportedly for reasons of security. In Uganda, the location of the ICC 'outreach' office in Kampala is not disclosed to the public, and the ICC is almost the only international agency driving in Gulu without its logo on its landcruisers.

[62] See Keck and Sikkink 1998:30, arguing that transnational advocacy networks rely, like epistemic communities, on information, but that for transnational advocacy networks it is the interpretation and strategic use of information that is most important.

[63] Interview with a CICC representative, New York, June 2008 ('The complementarity package in the Juba Agreement is irrelevant unless Uganda enacts implementing legislation … The Special Division of the High Court cannot really function because the Rome Statute crimes are not part of Ugandan law … Ordinary crimes are not the same as Rome Statute crimes.'); interview with a representative of a human rights organisation in Kampala, October 2008 ('The law here is inadequate to deal with the crimes. There is no proscription of international

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The movement's propagation of pro-ICC ideology has both practical and normative underpinnings. Practically, many international-criminal-justice experts are considered as such on the basis of their experience with other international tribunals, none of which has thus far had a jurisdictional arrangement based on complementarity. Many experts are thus accustomed to the primacy of an international court. Moreover, the 'organizational platform'[64] from which the international-criminal-justice movement promotes its norms – an international network – is more naturally suited to one overarching institution such as the ICC than a principle, such as complementarity, which allows for diversity among justice systems. The normative underpinning of pro-ICC ideology is that many members of the international-criminal-justice movement consider complementarity an uncomfortable concession to state sovereignty.[65] Their ideal remains primacy.[66] For proponents of this view, the battle for primacy was lost on the road to Rome,[67] but can be reopened in the courtrooms of The Hague.[68]

crimes. Ordinary crimes are not going to reflect the magnitude of the crimes.'). See also Human Rights Watch 2001:16 n. 46, International Commission of Jurists 2007:27, and Ellis 2002:224–5. For a compelling critique of this stance, see Mégret 2011.

[64] Finnemore and Sikkink 1998:899.

[65] For this view in the literature, see e.g. Brown 1998:386. In a discussion, one international lawyer described complementarity as an 'evil invention of the Americans' (Cambridge, October 2009). On NGOs' view of complementarity as a 'regrettable necessity', see also Becker 2004:481. On the remaining preference for primacy, see also Ratner 2003:453.

[66] For this view in the *travaux*, see UN Doc. A/50/22 (1995):6–7. See also Stigen 2008:70, arguing that during the negotiations on the Statute a majority of the NGOs seemed to favour primacy, inspired by a speech by former ICTY Prosecutor Arbour. Her preference for primacy is clearly expressed in Llewellyn and Raponi 1999:96–7 ('the most serious flaw is the primacy of national courts . . . I think this is an extremely bad provision . . . I think the complementarity issue is an absolute recipe for disaster. The simple solution is to put primacy in the ICC.').

[67] See e.g. ICC Judge Fernández de Gurmendi 2011:xix, writing extra-judicially: '[M]any left Rome with the feeling that the complementarity provisions, which failed to recognize primacy to the international jurisdiction, were a necessary but regrettable concession to national sovereignty that could weaken the future institution to some extent'.

[68] See former ICTY President Cassese 2003:355 ('[I]nternational courts are by definition better suited to pronounce upon large scale and very grave crimes allegedly perpetrated by political or military leaders. For such cases the rule of complementarity . . . may appear to be questionable. However, since the draftsmen of the

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Equally taken with this pro-ICC ideology, many Western governments have promoted ICC proceedings more than they have encouraged domestic investigations and prosecutions. Officials in such Western governments, the US being the most striking exception, have strong ties with or even consider themselves part of the international-criminal-justice movement.[69] They participated in the creation of the Court, defended it against American antagonism and are determined to see it succeed. This commitment has made European governments, and some sections within the UN, cautious of any move that could be seen as undermining the ICC.[70]

This pro-ICC ideology of Western governments explains their initial reluctance to support the Juba peace talks.[71] Particularly headquarters, legal advisors and human rights activists argued that a state's ratification of the Rome Statute or support for the ICC implied that it could not endorse negotiations concerning persons sought by the Court.[72] More concerned with the implications of the outcome of the negotiations for the ICC than for Uganda and the region, these actors backed the absent though decisive party at the talks: the ICC. In the words of one official of a Western government, the fear was that

Statute have opted for that model, one can only hope that the Court will interpret and apply the relevant rules of the Statute in such a way as to assert the Court's jurisdiction whenever cases in that category are brought before the Court.').

69 See also Simpson 2007:35, Glasius 2006:129 and Tallgren 1999.

70 See, however, Aoun 2012, arguing on the basis of interviews with ICC officials that the EU does not sufficiently live up to its normative preference for the ICC.

71 See also Lomo 2006. Those few European states that did support the talks from the outset were told by other European states that they should not be seen as 'relaxing' their support for the ICC (interview with a European diplomat, Kampala, October 2008).

72 See e.g. speaking notes of a European minister for a phone call with the mediator of the Juba peace talks, August 2006 ('I am not in a position to provide support – in whatever form – to the peace talks, due to our obligations towards the ICC.'). See also a US code cable (Hume 2006c), reporting on a meeting with Swiss Ambassador Bieler, who described 'the paradox of the Swiss position' as that the Swiss 'want to support the talks without undermining the authority or legitimacy of the nascent ICC'. The cable concluded: 'The Swiss Ambassador does not believe there will be an acceptable legal solution to this conundrum, so he would like the international community to find a political one. While difficult, Bieler thinks this is essential for the continued viability of the ICC. He requested US support in finding this solution.' See also 'Interview: Julian Hottinger – Perspectives of a Mediator' 2010.

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'if the ICC did not come out [of the talks] smelling like a rose, the whole international justice project would collapse'.[73]

The Juba peace agreements, particularly the Juba Accountability and Reconciliation Agreement and its Annexure, were therefore at least as much directed to an international pro-ICC audience as to the parties whose conflict it aimed to resolve. The Agreements had to break the prevailing pro-ICC ideology in order to buy Ugandan actors space to assume responsibility for justice. To some extent, they were successful: when a cessation of hostilities was reached and the security dividends became tangible,[74] the voice of the field offices, political advisors and aid workers gained the upper hand over the headquarters, legal advisors and human rights activists.[75] Gradually and grudgingly,[76] the UN and some 'schizo[ph]renic donors',[77] torn between supporting the peace talks or the ICC, provided financial and logistical support,[78] arguing that the ICC's success could take the form of the spurring of domestic proceedings. That said, some states parties to the Rome Statute remained disinclined to support Ugandan trials. For example, asked for his views on the exceptional Canadian offer of assistance to the Ugandan Special Division of the High Court, one European diplomat responded, somewhat surprised, that the Canadians '[were] interested, despite their strong ICC credentials'.[79]

The same countries' and international organisations' desire to protect the ICC has been even stronger in the context of Darfur. Back in 2005, when the Security Council negotiated the referral of the situation there, the Chairman of the African Union launched the option of an alternative *Panel africain pour la Justice criminelle et la Réconciliation*.[80] The panel, to consist of African (including Sudanese) judges,

[73] Interview, Kampala, October 2008.
[74] See also Simonse, Verkoren and Junne 2010:232.
[75] Interview with officials and advisors involved in the talks, May and June 2008. See also International Refugee Rights Initiative 2011:5 on headquarters' being more pro-ICC than field offices, and Simonse, Verkoren and Junne 2010:240 on the different views between diplomats and lawyers. See also Perrot 2010:194 on the different views between foreign and locally based actors.
[76] See also Schomerus 2010b:100 and Simonse, Verkoren and Junne 2010:238.
[77] A term used by a UN official cited in Perrot 2010:199 to refer to donors 'caught in a dilemma between supporting the promising Juba peace process or supporting the ICC implementation of the arrest warrants'.
[78] See also Afako 2010:21.
[79] Interview with a European diplomat, Kampala, October 2008.
[80] See also Elgak 2008:3.

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would punish 'those who committed crimes against humanity and grave violations of human rights and international humanitarian law in Darfur and in the future in other situations'. The panel, 'unlike international justice', would do justice 'the African way' by acknowledging the need for reconciliation and taking into account the sensitive political situation and the specifics of the African context.[81] The argument was that ICC involvement in Sudan would no longer be necessary,[82] even if not on grounds of complementarity in a legal sense. But European countries feared that this proposal would 'weaken' the Court and never seriously considered it.[83]

After the hard-won Security Council referral of the situation in Darfur, states supporting the Court did not want to be seen to be undermining the Court's position, especially as the Court faced immediate resistance from the Sudanese government, and needed to be bolstered. Supporting a deferral by the Security Council under article 16 or assisting Sudan to conduct domestic proceedings have both been construed as undermining or 'politicising' the Court.[84] Field representatives of these Western states and of international organisations frequently resent the pro-ICC ideology of their own institutions. 'At headquarters', they say, 'ICC politics are ruling over Darfur politics.'[85]

The reluctance of donor agencies of Western states to support domestic trials as an alternative to the ICC also stems from a belief that international courts deliver better justice than domestic systems. Donors do not want to be seen supporting, directly or indirectly, proceedings that may violate fair trial rights and result in penalties such as flogging or death. Backing a state-of-the-art international criminal court is considered less risky and easier to sell to domestic constituencies than funding politically sensitive

[81] EU diplomatic correspondence, 16 March 2005.
[82] EU diplomatic correspondence, undated.
[83] EU diplomatic correspondence, 15 March 2005.
[84] Goldstone 2008:5, Human Rights Watch 2009b, Human Rights Watch official Keppler 2013, forthcoming:n. 14 and a diplomat quoted in International Crisis Group 2009:17. See also Oette 2010:354. The argument of 'politicisation' does not seem to take into account, first, that the Statute provides for the possibility of a deferral by the Security Council as much as it provides for the possibility of a referral by the Council, and secondly, that in the event of Sudanese proceedings ultimately ICC judges will decide whether Sudan has conducted genuine proceedings.
[85] Interview with a European diplomat, Khartoum, December 2008.

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national proceedings.[86] It is assumed that proceedings in international courts are exemplary.[87]

To the extent that donors have supported the idea of domestic proceedings, this support has been mostly limited to cases not addressed by the ICC. Misinterpreting the concept of complementarity in the way discussed above,[88] the EU, for instance, has declared itself 'committed to supporting the strengthening of domestic judicial capacity in countries where the ICC has commenced investigations to ensure that local jurisdictions can, according to the principle of complementarity, deal themselves with the crimes which will *not be addressed by the ICC*'.[89]

A final component of the pro-ICC ideology of Western states is that many of their officials at headquarters, like members of the international-criminal-justice movement, consider complementarity to be a concession by international criminal justice (deemed inherently virtuous) to state sovereignty (deemed vicious, at least when seen to protect 'bad' governments).[90] With a commitment to international criminal justice as part of their state's self-image, European ministers find expressions of support for the ICC politically beneficial, as long as it is not their state that is under investigation. Equating structures with outcome, Western politicians and their constituencies often consider promoting the ICC more gratifying than the task of undertaking less visible and more complex attempts to address the causes of the conflicts in which the crimes were committed.[91]

[86] Rule-of-law programmes supporting foreign justice systems have often been politically sensitive in the donor state. Western ministers responsible for development cooperation have been in difficult positions when repressive police operations in the receiving state appeared to have been equipped as part of the donor's rule-of-law programme.

[87] For instance, whereas the GoS would not get financial assistance to address crimes in Darfur, Denmark and Canada established two separate trust funds to assist the OTP in its investigations, after the situation in Darfur had been referred to the Court but not yet budgeted. See ICC-ASP/5/32 (2006)-b:312.

[88] See this chapter, 'Complementarity as primary right: confusion, ambiguity and misrepresentation'.

[89] European Commission 2008:3 (emphasis added, highlighting omitted).

[90] Interview with a European diplomat, Kampala, October 2008 ('[W]e believe that these are international crimes, hence best tried at the international level . . . [W]e consider complementarity as a sacrifice to sovereignty, not as a preference.'). See also former Netherlands legal advisor Bos 1998:259 and Toscano and Pocar in Politi and Gioia 2008b:136–7.

[91] For a similar argument with respect to the human rights movement, see Kennedy 2004:23 and 116.

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The Court itself is the fiercest proponent of the pro-ICC ideology. The structural bias of many of the Court's international criminal lawyers is not so much towards law or international law but towards international criminal justice. While criminal law places a strong emphasis on the procedural rights of the defendant and international law posits state sovereignty as a fundamental tenet of the international system, international criminal justice has become increasingly victim-oriented.[92] State sovereignty is viewed as an unfortunate extra-legal vestige of politics.[93] Echoing the sentiments of the international-criminal-justice movement, influential ICC officials consider complementarity to be the price paid by global justice to state sovereignty in order to secure the establishment of the Court.[94] While some make rhetorical references to concepts such as the 'Rome System', many consider that the ICC should have been granted primacy, just like the ICTY, the ICTR and the SCSL.

The pro-ICC ideology is apparent in the Court's early decisions. As a result of the case law on what constitutes the same 'case', national authorities can render ICC cases inadmissible only if they investigate substantially the same conduct, the same persons and the same incidents as the ICC.[95] It is thus the ICC's OTP, and not domestic prosecutorial policy, that determines which impunity is intolerable and which, given the limited resources to address a universe of criminality, must be accepted. Moreover, the Appeals Chamber has increased the likelihood that cases remain admissible before the Court by characterising complementarity as a right of the parties rather than as a matter of public policy that the judges must consider.[96] Finally, the Chambers seem to have conceptualised the principle of complementarity not as a principle balancing state sovereignty and international criminal justice but rather as a principle that protects sovereignty only to the extent that a state joins in what they consider

[92] See also Robinson 2008:930 *et seq*. On the 'disembodied victim' as the moral platform of international criminal justice, see Clarke 2009:94 and 143–6.

[93] E.g. see Cassese 1998:section 7. On the ICC 'as the triumph of international civil society in favor of the judicialization of that last fortress of sovereignty, criminal law', see Alvarez 2003:407.

[94] See e.g. ICC Judge Kaul 2001:69 and ICC Judge Politi 1997:147.

[95] See Chapter 2, 'The "same case" requirement: same person, same conduct, same incidents?'.

[96] See Chapter 2, 'The complementarity assessment is dynamic'.

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the ICC's object and purpose: the fight against impunity. All other interests of the state are subordinated to this putative goal of the ICC.

Other organs of the Court have also promoted a pro-ICC ideology. The first Prosecutor may well have claimed, as he had before, that 'the absence of trials led by this court as a consequence of the regular functioning of national institutions, would be its major success'; but in the very same speech he stated that, on account of their character, international crimes belong in the International Criminal Court.[97] Deploying the latter argument, the OTP and PTC have uncritically echoed the GoU's argument that the ICC is the most appropriate forum for crimes of the nature committed by the LRA.[98] For its part, the Registry's outreach activities have hardly ever raised complementarity[99] and, when they have, 'we say', according to one outreach officer, 'we are here to do A, B and C, leaving it to the government to do the rest',[100] thus explaining complementarity in the misleading division-of-labour reading discussed above. These respective characterisations may reflect a professional chauvinism summed up in one ICC official's response to a question about complementarity: 'I believe more in the Court than in complementarity.'[101] Taken together, these characterisations of the principle of complementarity tend to assert the *de facto* primacy of the Court's jurisdiction.

The pro-ICC ideology is also present among certain professional groups at the national level. Many of the Ugandan officials who have cooperated with the Court, whether it is in the Ministry of Justice, the police or the army, consider their ICC counterparts as better equipped to deal with conflict-related crimes.[102] The same holds true for many Ugandan and Sudanese human rights lawyers who have been exposed to transnational professional processes concerning the ICC.[103] The

[97] Moreno-Ocampo 2003b.
[98] See Chapter 3, 'Conclusion: complementarity's catalysing effect in Uganda'.
[99] Interview with an ICC outreach officer, Kampala, October 2008.
[100] *Ibid.* ICC in-house training instructs ICC staff that complementarity means that 'the ICC will only investigate or prosecute if a state is unwilling or unable to prosecute' (participant observation ICC induction programme, The Hague, April 2008). This, too, is a problematic summary of article 17, as has been argued in Chapter 2, 'The inadequacy of the shorthand description'.
[101] Discussion with an ICC official, The Hague, April 2008.
[102] Interview with an official in the Ministry of Justice, Kampala, September 2008 and with a Ugandan lawyer involved in ICC–Uganda cooperation in the investigations, Kampala, October 2008.
[103] Interview with Ugandan lawyers trained by the American Bar Association, Kampala, September and October 2008.

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following excerpt from a discussion with a member of the Ugandan Human Rights Commission is illustrative of the mélange of arguments put forward by officials who favour the ICC over domestic proceedings, ranging from the leadership position of the accused and the nature of the crimes to local capacity:

> [Interviewer:] *Does the Uganda Human Rights Commission have a preference for ICC or domestic proceedings?*
>
> High-profile people like Kony and the leaders of the LRA should go to the ICC.
>
> [Interviewer:] *Why?*
>
> Because of judicial precedent: Taylor, Lubanga, Milosevic, [Kony] ranks in that, or even outranks that category. It is also to remove local sentiments. We would need witness protection. These are crimes against *humanity*. Here people want to barter peace for justice. But they are very very local people and they will not understand the complexities of the crime ... If we are going to set a precedent, we'd better do it right. We'd better take these people to the ICC.[104]

This view, revealing the belief that international crimes are better prosecuted in an international court because of the quality of justice and the character of the crimes, counteracts infiltration of the idea that states have a responsibility to conduct domestic proceedings for conflict-related crimes. The domestic context makes it even more difficult for such an idea to infiltrate.

A domestic context inhospitable to a responsibility to conduct proceedings

Legal anthropologists have argued that the likelihood of successful norm promotion increases the more the frame within which a norm is promoted resonates with cultural traditions and narratives of the local context (while acknowledging that the greater the resonance, the smaller the transformative impact).[105] In the Ugandan and Sudanese context, there is little that resonates with a norm according to which the state has the duty to investigate and prosecute conflict-related crimes, thus impeding the reception of such a norm and its catalysing effect.

[104] Interview, Kampala, October 2008.

[105] See Merry 2006b:41, applying insights from legal anthropology to human rights promotion. See also Merry 2006a:5.

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One reason is the dominant conflict paradigm. As Chapters 3 and 4 have argued, the Ugandan and Sudanese governments have perceived the conflicts with the LRA and in Darfur as predominantly political and military issues, not legal ones. This is not unique to these states – from Northern Ireland to Mozambique and from the United States to Indonesia, states have addressed their own conflict-related crimes as acts requiring a political solution rather than a criminal response, particularly in the context of negotiated settlements[106] and particularly when the crimes are ongoing or have only just ceased.

It has also been shown, however, that in Uganda, unlike in Sudan, the ICC's intervention has led to a broadening of the national approach towards the conflict to encompass a legal dimension, as a result of which the environment has become more open to infiltration by the idea of a domestic responsibility to conduct proceedings for conflict-related crimes. An influential factor in whether or not the conflict paradigm has taken on a legal dimension has appeared to be whether national legal professionals have used the ICC's intervention to act as norm entrepreneurs[107] and to assert their own role in any response to the conflict.[108] In Uganda, the search for national alternatives to the ICC has created an opportunity for national lawyers to do so. In Sudan, the ICC's intervention has resulted in the converse, as one senior legal advisor observed:

> I have stopped following the ICC. The government does not listen to you. As a result of our positive attitude towards the ICC in the beginning, [members of the government] now dislike us even more. They feel we support the ICC.[109]

In neither Uganda nor Sudan does the legal profession speak with one voice as to whether law has to play a role in war and, if so, whether the state has a responsibility to investigate and prosecute. In Sudan, some interviewed officials preferred traditional-justice mechanisms.[110] In Uganda, where most interviewed legal officials preferred formal justice,[111]

[106] See, *inter plurima alia*, Huntington 1995.
[107] See Chapter 1, 'The story of complementarity's catalysing effect in Uganda and Sudan'.
[108] See, more generally, Finnemore and Sikkink 1998:899 and 905 and Widner 2001:73.
[109] Interview with a senior lawyer in the Ministry of Justice, Khartoum, December 2008.
[110] See Chapter 4, 'Providing a boost for traditional justice'.
[111] A human rights lawyer in Kampala, for instance, argued against *mato oput* as an alternative to the ICC, stating: '*Mato oput* would not solve accountability. It is

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relevant actors were divided as to which court should exercise jurisdiction over conflict-related crimes. Government lawyers who had been involved in the referral and had cooperated with the Court were more in favour of proceedings in the ICC than domestic proceedings. The same held true for many private lawyers who had been trained by the International Bar Association. Many lawyers involved in the JLOS Transitional Justice Group were in favour of specialised domestic alternatives to the ICC. Those working in the ordinary justice system, however, feared that such special courts would undermine the capacity of the ordinary criminal justice system and were in favour of mainstreaming conflict-related crimes.[112] Human rights activists, both in Uganda and in Sudan, usually preferred the ICC to the national domestic justice systems, as they were fully aware of the drawbacks of the latter and were members of international coalitions promoting the ICC. The various preferences expressed were thus heavily dependent on personal positions and the biases of the transnational processes in which the speakers participated.[113] In sum, lawyers may have become convinced of the legal dimension to internal armed conflicts, but this has not automatically resulted in the acceptance of a norm that the state has a responsibility to conduct domestic proceedings.

Infiltration of an idea that it is the state's primary responsibility to investigate and prosecute conflict-related crimes has also been impeded by the fact that in both states, but in Sudan even more than in Uganda, criminal proceedings depend heavily on victims' initiating them and following them through. In Sudan,[114] the Criminal Procedure Act authorises the police to investigate crimes such as murder and rape on its own initiative,[115] but the practice is, in the words of a police officer in El-Fasher, that of 'without a complaint, no

just a ritual. It does not provide for redress and reparation. It has never been tested. It is something we abandoned ages ago.' (interview, Kampala, September 2008). During a participatory action focus group, conducted in Gulu in September 2008, it was remarkable how, in the group consisting of representatives of the formal justice sector, those who came from the north had to introduce those from other areas of the country to Acholi traditional-justice practices, even though all worked and lived in northern Uganda.

112 Interviews with judges and prosecutors in Kitgum, Gulu and Kampala, September and October 2008.

113 On structural biases, see Koskenniemi 2005:600–15.

114 For a lively account of a victim's pursuit of criminal justice for a conflict-related crime in Uganda, see Rice 2009.

115 Criminal Procedure Act 1991, s. 35(a)(i) and Schedule II.

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investigation'.[116] After the registration of the complaint, the victim or the victim's family must continue pursuing the criminal case, usually through a private lawyer.[117] Lack of representation of the victim at the trial can lead to dismissal of the case.[118] If the injured party and accused agree on the amount of compensation, the Prosecutor does not pursue the case,[119] even in respect of crimes where the law does not grant the right of private relinquishment, for instance rape and murder.[120] In the event of *qisas* (retribution) crimes,[121] such as murder and intentionally causing wounds, victims can opt for *dia* (blood money) instead of retribution, up until the point when the sentence is carried out. The judge may then impose only a minimal sentence.[122] Judges usually try to promote private settlements, instead of imposing public sentences.

In comparison with ICC proceedings, Sudanese proceedings are thus radically more victim-driven, not only in the reparations phase, but also in the determination of the sentence. Indeed, as regards crimes considered a 'private' issue, such as murder, rape and looting,[123] the existence and pursuit of the case depends on the victim's actions. But in conflict situations, many victims do not pursue cases because they lack access to or trust in government institutions. Even if victims do pursue justice, Sudanese police and prosecutors do not follow up on

[116] Discussion, December 2008.

[117] Public prosecutors spend much time on duties other than prosecuting, such as serving on the state security committees.

[118] Special Court, Nyala, 462/2005, 28 August 2005. (On account of the fact that the victim did not appear at the proceedings, the accused was acquitted of armed robbery and intentionally wounding a USAID staff member during an attack against a humanitarian convoy.)

[119] Interview with a prosecutor in El-Fasher, Khartoum, December 2008. In a case in which a 'Janjaweed' killed a man in the market of El-Fasher, the army agreed to pay blood money and the case was closed.

[120] Criminal Procedure Act 1991, s. 36(2) and Schedule I.

[121] *Qisas* crimes are those crimes for which the Quran grants victims the right to choose between retaliation and compensation.

[122] Criminal Act 1991, s. 38 and Criminal Procedure Act 1991, ss. 36(1) and 195(1). See also Chapter 4, n. 426.

[123] Interview with a criminal law professor, Khartoum, November 2008. Theoretically, crime is by definition a public concern; but in Sudan officials take *proprio motu* action usually only in cases of crimes that lack obvious direct victims, such as crimes against the state and against public morality (see also Schacht 1964:177). Crimes against the state are usually suppressed by security agencies, instead of by the ordinary justice system.

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politically sensitive cases, for instance against state officials or state-supported militias, without backing from political superiors. If proceedings are allowed, they involve only the direct perpetrator implied in the victim's report, and not indirect perpetrators or persons bearing command or other superior responsibility. A responsibility to investigate and prosecute conflict-related crimes does not sit well with this professional culture.

None of the above is altered by the fact that both Uganda and Sudan have ratified 'human rights treaties'[124] that contain a formal legal obligation to investigate and prosecute certain international crimes.[125] Uganda has been a serial but also sleepwalking ratifier of such treaties. Sudan has been more cautious, fearing that such treaties may be used against it. But for both states, ratification of human rights treaties has been first and foremost a display of foreign policy. Foreign policy, in turn, is primarily used to enhance the ruling party's authority at home by demonstrating its acceptability to international actors.[126] Ratification of human rights treaties, like participation in photo shoots at diplomatic conferences, sends the message that the state and its statesmen[127] are part of the 'international community', which benefits the reputation of both the state and the statesmen.[128] As one of the longest-serving members of the Sudanese Parliament explained when asked why the GoS had ratified the Genocide Convention in the year that the Darfur conflict was at its peak:

> [We ratify] because we are part of the international community. We cannot say, 'we do not sign this because of our situation back home'.[129]

[124] On the broad lay understanding of this term, see Chapter 3, n. 398 and Chapter 4, n. 383.

[125] See Chapter 2, n. 12.

[126] Clapham 1977:84.

[127] Finnemore and Sikkink 1998:903–4.

[128] See also the question by parliamentarian Beti Kamya in Uganda 2009:[3.47] ('Would the Minister not think, as I think, that some of these treaties are more of PR exercises, to look good but not to be applied at home?').

[129] Interview, Khartoum, November 2008. Similar explanations were given by a Sudanese professor (interview, Khartoum, November 2008) ('This is an issue of foreign policy … You want to be part of the society of states. Signing up to an agreement alters very little.') and a representative of a humanitarian organisation (interview, Khartoum, December 2008) ('Conventions are used to clear the face of the government, they are good for the image.'). On the relationship between ratifying human rights treaties and complying with human rights more generally, see Hathaway 2002.

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Thus, when the Ugandan or Sudanese governments ratified human rights treaties, their focus has usually not been on any ensuing obligations that could limit sovereignty, but on the mere fact that the ratification consolidates the government's representation of that sovereignty – a valuable benefit in states where sovereignty and its representation are in practice heavily dependent on external recognition.

Additionally, financial benefits from donor countries are sometimes conditional upon ratifying 'human rights treaties'. For instance, states can benefit from development cooperation with the EU under the amended Cotonou Agreement only if they 'seek to take steps towards ratifying and implementing the Rome Statute and related instruments'.[130] Put less legalistically by a Ugandan lawyer: 'Sign up the ICC, and you get more donor money, and thus a couple of more jets.'[131] After ratification,[132]

[130] See Chapter 4, n. 157.

[131] Interview with a Ugandan lawyer, Kampala, November 2011.

[132] In Uganda, the President signs treaties and the Cabinet ratifies them (Constitution of Uganda 1995, art. 123, and Ratification of Treaties Act 1998, s. 2). Treaties have domestic effect only if they have been transformed by acts of parliament into municipal law (Uganda 1996:[40]–[41]). In Sudan, the President ratifies treaties with the approval of the National Legislature (INC 2005, art. 58 (1)(k)). In official reports, the GoS has argued that 'Sudan has adopted a common law system, like the United Kingdom, under which the provisions of any treaty to which Sudan is a party become part of domestic law and acquire the same force as national legislation. Also, the Sudan has ratified the Vienna Convention on the Law of Treaties which makes obligations arising from international agreements prevail over other obligations arising from national laws.' (Committee on the Elimination of Racial Discrimination 2000:[197]). However, the system described is not the system of the United Kingdom, and the VCLT does not regulate the status of international treaties in domestic law (VCLT, art. 27 providing only that, on the international plane, a state cannot invoke domestic legislation as an excuse not to comply with international law). Sudanese international lawyers explain that in theory all international instruments that have been ratified are part of the law of the land and are superior to national laws (interviews with Sudanese international lawyers working for the Sudanese government, Khartoum, March and September 2007). Whether one can successfully invoke these instruments in court depends on whether the treaty is considered self-executing. A treaty is self-executing if it is suitable for direct application or where a rule of reference in a domestic act stipulates direct applicability of treaties. Where this is not the case, the treaty must be incorporated into national law to have domestic effect. For a rare example of such direct effect, see *Syrian Arab Airways Corporation* v. *Khadeeja Mohammed El Shaekh*. In almost all instances, however, it is assumed

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little attention is paid to giving the treaty effect in the domestic legal order.[133]

Whilst inhospitable to infiltration of a norm according to which the state has a responsibility to investigate or prosecute, this context begins to reveal the cost–benefit assessments on the basis of which decisions about domestic proceedings are also made.

COMPLEMENTARITY AND THE STATE'S COST–BENEFIT ANALYSIS

The developments in Uganda and Sudan also call for a review of the assumptions concerning states' analyses of the costs and benefits of domestic and ICC proceedings. The expectation of a catalysing effect is based on the assumption that complementarity spurs domestic proceedings because it allows states to avoid the costs of an ICC intervention. Thus, according to William Burke-White:

> Often the most potent means available to the Court to motivate an unwilling State to exercise jurisdiction is to make clear to that State should it continue to abstain from investigating or prosecuting particular crimes, that intervention by the OTP is likely, or even inevitable. Such a possibility of international prosecution is likely to make the alternative of domestic prosecutions appear far less costly and preferable to the high sovereignty costs imposed by ICC intervention.[134]

It is thus assumed that states consider intervention by the ICC in their state as a sovereignty cost.[135] It has also been suggested that the ICC's

that international treaties require implementing legislation, particularly in the areas of international humanitarian law, international criminal law and international human rights law (even though INC 2005, art. 27(3) explicitly provides that international human rights treaties that Sudan has ratified are part of the Bill of Rights). The practice has led Babiker 2007:238 to conclude that, 'as a matter of general practice, the Sudan follows the dualist tradition . . . Thus, any obligations incurred by the Sudan or accorded to its citizens under international law only become national law after being incorporated through a legislative act'. This is also the position adopted in *Abdel Rahman Nugdallah*.

[133] Nonetheless, as the International Criminal Court Act 2010 and the Prevention and Prohibition of Torture Act 2012 have illustrated in Uganda, in states with a relatively well developed civil society, ratification does give domestic activists a starting point for lobbying for implementing legislation.

[134] Burke-White 2008a:71.

[135] Sovereignty costs have been defined as 'the symbolic and material costs of diminished national autonomy' (see Abbott 1999:375). In the event of the ICC's opening an investigation, these sovereignty costs will be mostly symbolic: no

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involvement in a state results in reputational costs,[136] on the ground that 'the accusation shifts from the individual accused of having committed an international crime to the State accused of having tolerated it by not trying him effectively'.[137] As a result of these costs, undertaking domestic proceedings was expected to acquire greater priority, since only national investigations and prosecutions can avoid or end the ICC's involvement on grounds of complementarity.

The Ugandan and Sudanese experiences show a more nuanced story: rather than considering ICC intervention costly, Uganda considered (targeted) ICC intervention as beneficial to its sovereignty and reputation. Moreover, even though Sudan does consider ICC intervention very costly to its sovereignty and reputation,[138] it has refrained from conducting genuine domestic proceedings in the ICC's stead.

Assuming that a catalysing effect will occur if the ICC's intervention decreases the costs of domestic proceedings or increases the costs of refraining from them, two types of costs must be revisited: the costs of domestic proceedings and the costs of ICC intervention.[139] On that basis, the rest of this chapter will argue that complementarity's

actual sovereignty is 'lost'. While a state may be under an obligation to cooperate with the Court, including to execute arrest warrants, no provision in the Statute obliges states to defer to the Court's jurisdiction. In other words, states are not prohibited from initiating or continuing domestic proceedings, even *in absentia*. See Chapter 2, 'A state's jurisdiction to adjudicate is unaffected by ICC intervention'. For a critical discussion of the relationship between sovereignty and international criminal justice more generally, see Cryer 2005a.

[136] Mercer 1996 points out that reputation is not in a state's possession, but is formed by other states. Reputational costs in this context consist of the damage a state perceives to be done to its reputation.

[137] Mégret 2006:11. For others who consider ICC intervention as damaging to a state's sovereignty or reputation, see Chapter 1, nn. 17 and 68.

[138] See e.g. 'Beshir brands ICC warrant "infringement" on Sudan' 2009, citing statements by the Sudanese President on international attempts to prosecute him for war crimes: 'Such a move ushers a new era of domination and infringement upon the independence and sovereignty of Sudan.' A Sudanese human rights activist has reported that Sudan's head of the National Intelligence and Security Services characterised the ICC's role in Sudan as 'the most serious challenge this country has faced since we came to power' (see Fernandez 2008b). The Prosecutor's charges, while based on the notion of individual criminal responsibility, essentially do accuse the entire Sudanese state by arguing that the Sudanese President committed crimes 'by using the state apparatus' (*Application Arrest Warrant Bashir* (*passim*, but in particular [62] and [250]–[343]).

[139] Benefits are discussed only as negative costs. For instance, if ICC intervention is considered to bring benefits, this reduces the costs of ICC intervention.

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catalysing effect on domestic proceedings in Uganda and Sudan has been limited because, first, the costs of domestic proceedings, particularly the political costs, have been prohibitive. Neither the ICC nor donor countries have reduced these costs, the ICC's policy of positive complementarity notwithstanding. Secondly, the costs of ICC proceedings have either not been high enough to encourage domestic proceedings or were able to be avoided by means other than the invocation of complementarity.

High cost of action: obstacles to domestic proceedings

A key reason for the absence of a strong catalysing effect on domestic proceedings for crimes within the Court's jurisdiction is the high cost of domestic action. This cost consists of the sacrifices that must be made either to remove practical and political obstacles to domestic proceedings for conflict-related crimes or to conduct such proceedings.

Some of the obstacles are the same as those discussed as factors impeding infiltration of the idea of a state's responsibility to conduct domestic proceedings for conflict-related crimes,[140] namely, the absence of a legal dimension to the approach to armed conflict, the limited independence of the legal profession and an expectation that civilians will pursue justice themselves. In addition, Chapters 3 and 4 have shown how police and prosecutors have lacked incentives to launch on their own initiative investigations into and prosecutions of politically sensitive conflict-related crimes. Theoretically, the government, if it wished, could remove these obstacles relatively easily, for instance by recognising the legal dimension to the conflict, by giving instructions to investigate and prosecute to law-enforcement agencies, and by lifting the immunity of militia members.

But the conflict has placed further obstacles in the path of criminal proceedings.[141] Large parts of Darfur have at several times during the conflict been beyond government control, and even government-held areas have been dangerous for police, prosecutors and magistrates.[142]

[140] See this chapter, 'A domestic context inhospitable to a responsibility to conduct proceedings'.

[141] Many of these have also prevented the ICC from even requesting the GoS to allow it into Sudan to conduct investigations in Darfur.

[142] According to prosecutors in Darfur, a colleague in South Darfur was killed, another in West Darfur was injured and prosecutors' cars were hijacked (interview, El-Fasher, December 2008).

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Outweighed in manpower and weaponry by the rebel movements, militias and some tribal leaders, police have been unable to trace perpetrators or gather forensic evidence outside the cities.[143] Complaints and witness statements in relation to conflict-related crimes have been difficult to obtain on account of displacement. Accusations against 'some masked armed men on horseback' are difficult to follow-up on: which men and where, in an area the size of France with few roads and a long porous border with Chad and Libya, did they go to?[144] As for Uganda, when the LRA was still present in the north of the country, the GoU faced, *mutatis mutandis*, similar obstacles to the conduct of investigations into conflict-related crimes.[145]

Moreover, no matter how technically presented by lawyers, investigations and prosecutions of conflict-related crimes are in themselves dangerous acts of war that civilians shy away from, particularly when the conflict is ongoing. In Uganda, witnesses have been reluctant to cooperate with government investigators out of fear of reprisals by the LRA or out of a lack of trust in a government that they suspect of aiming to destroy Acholi culture.[146] In Sudan, too, witnesses have refused to assist, lacking trust in authorities accused of backing the militias responsible for the crimes in the first place, or fearing revenge, or having been instructed by rebel movements not to cooperate with the government.[147]

[143] Interviews with lawyers in Darfur, some of whom worked for the government, others being human rights activists, El-Fasher and Nyala, December 2008.

[144] Interview with a prosecutor in El-Fasher, Khartoum, December 2008 and a Sudanese lawyer in Nyala, December 2008.

[145] Since the LRA left for southern Sudan and the eastern DRC, civilian rule has begun to return to northern Uganda, but the recently arrived police and prosecutors focus on current crimes, not on crimes committed by the LRA or UPDF (interviews with police officers and prosecutors in Gulu and Kitgum, September and October 2008). Conflict-related crimes are the domain of headquarters in Kampala, but officials there argue that it would be a waste to spend scarce resources on criminal proceedings against persons that may either never be arrested or benefit from the existing amnesty law (interview with a senior official in the DPP, Kampala, October 2008).

[146] Interview with a senior official in the Uganda Police Force, Gulu, September 2008.

[147] Interviews with Sudanese lawyers working in Darfur, as prosecutors and as private lawyers, El-Fasher and Nyala, December 2008. See also interview with private lawyers in Nyala in August 2011 ('People fear to bring cases because if you file a complaint while the government was involved in the crime, you file against the government and receive many indirect threats.').

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However, even where their identities and locations are known and witnesses keen to testify, key suspects have enjoyed impunity on account of a defining feature of the state in Uganda and Sudan: state institutions are often subordinate to patronage networks.[148] As Christopher Clapham has argued, '[i]n the absence of a genuine national feeling or common ideological identity … clientelism provides the only means short of brute force for binding together the disparate power centres within the state, and creating at least the appearance of legitimacy and effectiveness, the twin requirements for making tolerable the enormous powers which the modern state presumes to exercise'.[149] As a result, in both Uganda and Sudan the government's rule is heavily dependent on the loyalty of powerful groups, both within the constitutional order such as the army, and outside it, for example an abundance of security forces and persons enjoying authority independent of the state. In exchange for loyalty, the patron (the ruling party or a person who himself or herself is a client of the ruling patron) provides a share of the scarce resources to which the state has unique access: government positions, arms, money and security. Security includes impunity.

Thus in Sudan, where Khartoum's control over Darfur has always been limited,[150] successive Sudanese governments have kept Darfur continuously under emergency law[151] and, unable to win wars against resistance on their own, offered militias money, weapons, titles to land, administrative positions and a *carte blanche* to fight the rebellion.[152] Having fostered a climate of impunity, the government cannot easily introduce the rule of law, even if it wished.

Times of competition, whether through elections or armed conflict, render the patronage market more volatile and drive up the price of loyalty,[153] as is illustrated by the story of Musa Hilal, considered the leader of the *Janjaweed*. Thus, when Hilal was in detention for leading an armed robbery of the central bank in the capital of South Darfur,

[148] See, *inter alia*, Clapham 1982a, Clapham 1982b, Mwenda 2007, Omach 2009b, De Waal 2009 and De Waal 2010b.

[149] Clapham 1982b:76.

[150] See also Ibrahim 2005–2006:13 and De Waal and Young 2005:[17].

[151] Emergency and Public Safety Protection Act 1997. Article 5 provides the competent authorities with powers, *inter alia*, to ban gatherings, arrest individuals, expropriate property and 'any other powers which the President of the Republic may deem necessary'.

[152] See also De Waal 2007:33.

[153] De Waal 2009 and De Waal 2010b.

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Sudan's First Vice President secured his release in 2002 in order for him to fight the rebellion in Darfur. In a discussion with a US diplomat, Hilal explains:

> I was let out of prison and was angry at the world. My tribe had been attacked. Khartoum armed me . . . We don't feel we had a choice as our tribal enemies were with the rebels.[154]

In January 2008, Khartoum appointed Hilal as an Advisor to the Ministry of Federal Rule. As the diplomat comments, this was 'a move widely criticized in the West but one seemingly intended to keep him on a short leash after he flirted with joining the SPLM in Juba in late 2007'. Despite Khartoum's insistence on the value of its protection, Hilal sought, according to the leaked US code cable, a better-paying patron:

> Hilal described Darfur's Arab militias as 'disloyal to Khartoum . . . '. Hilal added that the Arab tribes of Darfur were constantly told by Khartoum officials that the Americans were 'out to get them'. There is a rumor that you are taking Zaghawa tribesmen for training in Afghanistan (the fierce Zaghawa make up the bulk of Darfur's rebels and are bitter enemies of the camel herding Arabs) but we know that is not true. 'If we had a choice, we would be with America against the NCP.' . . . Hilal asked for understanding: 'we want a place in the American agenda for Darfur.' We want to see your policy goals succeed there. He said that he wanted to find 'whatever way I can to be helpful to the Americans'. Hilal added that he wanted nothing for himself except the opportunity to travel freely (evidently Hilal feels that he may well be arrested if he travels too far afield). Hilal added that 'we don't understand what is your goal in Darfur, we want to understand and be helpful'. He repeatedly emphasized that the loyalty of Darfur's Arab tribes, and presumably his own, is up for grabs, if the West is interested.[155]

As the diplomat rightly concludes his comment, '[i]f anything, this meeting . . . underscores the shallow, mercurial nature of Khartoum's relationship with their most trusted allies in the field in Darfur'. Similarly, a lawyer in Darfur explained in an interview:

> If one wants to make real money in Darfur, law is not the right business. One has to fight the government. Then the government will buy you to their side. Many of my relatives now have a rank.[156]

[154] Fernandez 2008a. [155] *Ibid.* [156] Interview, Nyala, August 2011.

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This patronage market encompasses virtually the entirety of political life, including that of state institutions. Thus, as Chapter 3 argued with respect to Uganda, donor-funded bodies such as an International Crimes Division and study trips abroad are used to trade loyalty for positions or tickets abroad. In Sudan, as compellingly explained by Alex de Waal, one armed movement refused to sign the Darfur Peace Agreement not because of the substance of the agreement, but because the loyalty fee offered was too low: '[W]hat mattered was the amount of money in the compensation fund, which would be under his personal control (and thus available for patronage purposes) … He also demanded a personal pay-off, reportedly of $5 million, as a signing fee.'[157]

The patronage bazaar also determines the chances for accountability: impunity is one of the currencies in which loyalty transactions are paid. Whether or not someone is prosecuted depends on the value of the suspect's loyalty to the patron and on the prospect of obtaining or maintaining such loyalty. The former is determined by the individual's political or military might and ties to others with such might; the latter depends on the price of the loyalty.

Where the value is high, but the price is prohibitive, for instance in the case of outspoken senior members of the opposition, a prosecution is one way for the ruling party to defeat this (potential) threat factor, if need be without criminal evidence, resulting in the notorious 'political trial'.[158] Thus, in Uganda, opposition leader Kiiza Besigye faced at several times charges of treason, terrorism and rape.[159] Even if he was always acquitted,[160] the proceedings and his detention were successful in inhibiting his electoral campaigns.[161] In Sudan,

[157] De Waal 2010b.
[158] See, *inter alia*, Shklar 1986, Kirchheimer 1961 and Nouwen and Werner 2010a.
[159] See Kobusingye 2010:Chapter 8: 'We Have Culprits, Now Let's Find the Crime'.
[160] With respect to the rape charges, the Ugandan judiciary directed strong words to the prosecution. Justice Katutsi commented: 'The evidence before this court is inadequate even to prove a debt, impotent to deprive a man of his civil rights, ridiculous for convicting of the pettiest offence, scandalous if brought forward to support a charge of any character, monstrous if to ruin the honour of a man who offered himself as a candidate for the highest office in the country. I find that prosecution has dismally failed to prove its case against the accused', adding that the manner in which the investigations were conducted and carried out was 'crude and amateurish and betray[ed] the intentions behind this case' (*ibid.*:107).
[161] *Ibid.* and International Crisis Group 2012:30.

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hundreds of persons have been prosecuted on allegations of support for the armed movements.[162]

Trials are possible but less imperative in cases where the price and the value of loyalty are low. This explains why it was possible for the National Resistance Movement (NRM) to select Thomas Kwoyelo – in contrast to LRA commanders whose loyalty seemed more useful – to serve as the first case for the Ugandan International Crimes Division.

In cases in which both the value and the prospect of obtaining or maintaining loyalty are high, a loyalty transaction results in the reverse of a political trial, namely, in what can be called 'political impunity'. In Uganda, reports of parliamentary and judicial investigations committees implicating senior UPDF officials in looting minerals in the DRC and key NRM figures in diverting foreign loans and government funds to election campaigns have rarely been followed by prosecutions.[163] In Sudan, as Chapter 4 has elaborated, members of the police and army by definition enjoy immunity, which in practice is hardly ever lifted. For militias fighting for the government, immunity is implied. Prosecutors see clear red lines, as the following fragment from an interview with a prosecutor in Darfur illustrates. Asked why the Special Prosecutor for Darfur did not prosecute the so-called border guards (armed men incorporated into a government paramilitary group), he responded:

> We also wonder why the . . . border guards were not arrested. When the conflict started the government established the border guards to fight the rebels. They are illiterate people. They consider themselves government when they support the government. That is why the Prosecutor is afraid to address them.
>
> [Interviewer:] *But prosecutors, you included, are part of the government that they support.*

[162] For instance, alleged JEM members after the attack on Omdurman (see Chapter 4, 'Fostering interest in transitional justice') and an SLA/AW member accused of attempted murder of a person that the GoS wanted to participate in the Doha peace talks.

[163] See Tangri and Mwenda 2003, Tripp 2010:67–8 and International Crisis Group 2012. The charges against Major-General James Kazini for his role in the ghost soldier scandal are a notable exception, but can be explained by his falling out with the President. He was killed by his mistress before a military firing squad could implement the court-martial verdict (see Mwenda 2009).

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> We wrote to the government to arrest [them]. But nothing has been done. The problem is now stuck at the level of the Ministry of Justice and the Military … We have no information on what is going on. It is directly between the ministers.[164]

The Minister of Justice, for his part, also knows the red lines. As one of his advisors explains:

> [The Minister] has been given the green light by the government to move on the justice aspect in Darfur. But he must be careful. First, because he is from Darfur he himself cannot be seen to go after the Arabs; he would be accused of bias. He therefore lets the prosecutors from Khartoum – all Arabs – do that … Secondly, there are red lines that he cannot cross. He focuses on present crimes, but will try to go back. He cannot go after the regime, national security, military intelligence or militias of the Arab tribes. He cannot raise the issue of the Darfurians detained without charge by national security. I advise [the Minister] … not to touch the red lines. It is better to maintain his job than to lose it.[165]

Whether a prosecutor can take the risk of prosecuting someone depends to a large extent on whether the suspect will receive backing from a powerful constituency. In many instances of conflict-related crimes, individuals can rely on the support of their tribes.[166] Musa Hilal's men, for instance, have not been arrested despite the warrants of arrest issued against them in private prosecutions.[167] One of the most senior officials in the Ministry of Justice justified the lack of arrests by arguing:

> Europeans think it is easy to trace suspects. We have tribes. They take every possible step to protect their members. It is not like Europe, where people are well educated and will not protect criminals. In places like Darfur tribes dominate everything. It is not easy to govern.[168]

In a follow-up interview three years later, he elaborated:

> It is difficult to arrest members of powerful tribes. This is not Paris or London. If the government goes after the tribes that are friendly to the

[164] Interview, El-Fasher, August 2011. [165] Interview, Khartoum, February 2011.
[166] E.g. in 2008, a judge and prosecutor withdrew from the town of Kabkabiya having been threatened by members of tribes of convicted militias (discussion with a prosecutor in North Darfur, El-Fasher, December 2008).
[167] Interview with a lawyer bringing these cases, Nyala, August 2011.
[168] Interview, Khartoum, December 2008.

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> government, the tribes may become less friendly towards the government. They have more arms than the government. Tribes are very important in Darfur, more than in northern Sudan: they provide most of the security.[169]

Prosecution is less politically risky if suspects are also considered criminals by their own communities. Thus, some kidnappers were prosecuted because, in the advisor's words:

> these criminals [were] not supported in their crimes by their tribes; they acted as individuals. Moreover, the *wali* [the governor of the state] supports the prosecution. [The Special Prosecutor] will focus on these kinds of crimes; he cannot look into massive attacks on civilians. He cannot do anything that is against the government.[170]

The assessment of the extent of tribal support remains risky. In 2011, the Special Prosecutor brought a case against someone who had first fought for the government, then, feeling neglected by the government when he ended up wounded in hospital, joined a rebel movement, and, then again, feeling discriminated against as a member of the Rizeigat tribe by the rebels from the Fur tribe, accepted the government's offer to return to its side. He helped the government in its efforts to clear the Jebel Marra from rebellion and was given a house in Nyala. While still negotiating his security arrangements, in other words, a position in which he would be part of one of the many security forces and therefore enjoy immunity, he robbed a bank. He was convicted, in response to which his family and troops threatened the government:

> Yes, he committed a bad crime, but he did everything for the government; this is not justice. We are going to join the rebels in their fight against the government.[171]

Thus, even if internationally dismissed as not amounting to the conflict-related crimes included in the Rome Statute, the cases that the Special Prosecutor initiated were related to the conflict in that they could have a huge bearing on political alliances. Illustrative is the following excerpt from a discussion with a Prosecutor in Darfur, who is asked, in the context of a discussion about war crimes, crimes against

[169] Interview, Khartoum, July 2011. [170] Interview, Khartoum, February 2011.
[171] Account of the defence lawyer, interview, Nyala, August 2011.

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humanity and genocide, about the bank robbery case that the Special Prosecutor brought:

> But that case has nothing to do with the conflict in Darfur!
>
> [Interviewer:] *Why is it then prosecuted by the 'Special Prosecutor for conflict-related crimes in Darfur'?*
>
> Because it is politically sensitive. [The suspect] is a Rizeigat who fought for the government. His people can now turn against the government. They are strong.

It was precisely because of their political character that the cases brought by the Special Prosecutor were dealt with by him as opposed to ordinary prosecutors: he has more access to political figures whose consent is required for enforcement of arrest warrants and sentences. But, even where prosecutions were brought and successfully pursued, defendants have subsequently been released, for instance by the Central Reserve Police, another group of pro-government militias integrated into a semi-state institution.

For this reason, the Special Prosecutor did not go beyond investigating ICC suspect Ali Kushayb, a member of the powerful Ta'aisha tribe and incorporated into the same Central Reserve Police. Ahmad Harun, a state minister, has been even more untouchable. Almost every ruling party will consider the political costs of investigating and prosecuting its own members to be too high, especially when individuals will implicate others. When rumours circulated in Khartoum that President Bashir might sacrifice Kushayb and Harun to the ICC to avoid further ICC arrest warrants against government officials, the latter was quick to state publicly that he was merely implementing government policy, thereby signalling the risk of exposure of other government members in the crimes[172] and giving them a good reason to protect him.[173]

[172] *Application Arrest Warrant Bashir*:[47] illustrates the risk for some members of a government of the trial of other members of the government. The Prosecutor claims that 'Ahmad Harun said that [President Bashir] had given him the power to kill whoever in Darfur'.

[173] See also a former (South Sudanese) state minister for justice in the GoS: 'The [special] prosecutor [for Darfur] may find some difficulties taking procedures against them [Harun and Kushayb] because they are being protected by the government' ('Darfur's special prosecutor asks government to accept resignation' 2011).

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Against this background, it is evident that, no matter how high the sovereignty and reputational costs of ICC proceedings may be, the costs of domestic proceedings may remain prohibitive and thus prevent any catalysing effect on the part of complementarity on genuine domestic investigations and prosecutions.

ICC involvement has not reduced the costs of domestic action

In Uganda and Sudan, the costs of domestic proceedings, set out in the previous section, have not been diminished by the ICC's intervention. Reduction of these costs could have been a consequence of implementation of the policy of positive complementarity, designed as it was to help states to overcome obstacles to domestic proceedings, and could thus have contributed to a catalysing effect. However, the policy has been too underdeveloped and erratically implemented to have such a catalysing effect in Uganda or Sudan.

First, the contents of the policy have oscillated between expansive and narrow interpretations, the former including the OTP's assisting states in conducting domestic proceedings and building capacity, the latter limited to the OTP's merely encouraging states to investigate and prosecute. In practice, the implementation of the policy has not gone beyond handing over information to domestic justice systems in a few isolated cases. In interviews, senior OTP officials admit that 'positive complementarity was not well conceptualised when it was launched',[174] and have justified reduced attention on its implementation by arguing that the policy was developed when 'we [did] not [have] much to do ... [but now] the ICC machine has started and we have to focus our time and resources on these tasks'.[175]

Secondly, the importance attached to the policy of positive complementarity as part of complementarity as big idea, expressed in diplomatic, academic and NGO circles, is not reflected in the OTP's and the PTCs' legal positions. In his first statement to the Assembly of States Parties, the Prosecutor stated:

> The principle of complementarity ... compels the prosecutor's office to collaborate with national jurisdictions in order to help them improve their efficiency. That is the first task of the prosecutor's office: make its best effort to help national jurisdictions fulfil their mission.[176]

[174] Interview with a senior ICC official, The Hague, April 2008.
[175] *Ibid.* See also Moreno-Ocampo paraphrased in Waddell and Clark 2007:13.
[176] Moreno-Ocampo 2003b.

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But, six years later, in its response to the first admissibility challenge before the Court, the OTP countered a defence submission that the OTP should have encouraged domestic proceedings rather than having expropriated the case as follows:

> There is no duty on the Prosecutor to assist states in their investigations . . . [T]he Prosecutor is not obliged to consult and assist States in their investigations and prosecutions, and it bears no burden 'to convince the Pre-Trial Chamber [. . .] that it has taken all steps that could be reasonably expected to assist the state in its national investigation/prosecution' . . . There are . . . substantial reasons based on the object and purpose of the Statute for why such a burden, even if remotely conceivable under the statutory language, should be avoided. 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 with a request is discretionary.[177]

Similarly, the Pre-Trial Chamber has, with approval from the Appeals Chamber, confirmed that legally there is no connection between the principle of complementarity as admissibility rule and article 93(10) of the Statute, which the OTP has invoked as the basis of the Prosecutor's policy of positive complementarity.[178] Positive complementarity is thus not a policy that states are entitled to or can rely on – whether and how it is implemented is entirely within the discretion of the Court's organs.

Consequently, the Court's organs are free to apply the policy more with respect to some states than to others, even where both states are, for instance, situation countries. In Uganda and Sudan, this initially led to the paradoxical situation that, while the chances for genuine domestic proceedings were greater in Uganda than in Sudan, the OTP paid more attention to complementarity with respect to Sudan, and by doing so encouraged domestic proceedings there, than it did with respect to Uganda.[179] Uganda had referred the situation, seemed

[177] *OTP Response to Admissibility Challenge Katanga*:[98]–[101] (footnotes omitted).
[178] See also *Admissibility Decision Ruto et al. (PTC)*:[34]–[35] *and Admissibility Decision Muthaura et al. (PTC)*:[30]–[31].
[179] Cf. Chapter 3 ('Compromised complementarity') with Chapter 4 ('Complementarity: the views of the ICID and the ICC').

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willing to cooperate and thus provided the OTP with a situation where it had a good chance of success. Wishing to keep the LRA case on its docket, the Court in many instances did the very opposite of fostering an expectation on the GoU to conduct proceedings for conflict-related crimes.[180] In contrast, the prospects of cooperation, and thus success, in the Darfur situation were gloomy from the start.[181] The Security Council had obliged only Sudanese parties to cooperate with the Court, the situation had been referred against the will of the Sudanese government, and, in view of the experiences of the *ad hoc* tribunals, the chances were slim that the Security Council would enforce the obligation to cooperate.[182] The OTP therefore initially stressed that the GoS still had a chance to end the ICC's involvement on grounds of complementarity.[183] This changed only when it was clear that Uganda was not likely to challenge the admissibility of its cases before the ICC, and Sudan was not going to cooperate under any circumstances.

This paradox can be explained by the fact that the extent to which the OTP, or any other organ of the Court for that matter, pays attention to the policy of positive complementarity in a particular situation is determined more by its institutional interests than by the policy's possible success in catalysing domestic proceedings. As bureaucracies, international organisations are known not only to expand their own mandates, resulting in so-called 'mission -creep', but also to refuse new missions if these could 'take them into politicised areas that might compromise their authority (and thus a source of their autonomy)'.[184] Specifically with respect to international courts, Yuval Shany has argued that international courts' decisions on jurisdiction and admissibility are influenced by strategic considerations as to how the case would affect the court's legitimacy and effectiveness.[185] If this is the case for decisions on jurisdiction and admissibility, which are to a large extent prescribed by law, it is even more so for an entirely discretionary policy such as positive complementarity.

In its first years of practice, the OTP has focused on two institutional interests: (1) to insure its enforcement handicap by nourishing good relations with relevant states in specific situations and with those great powers whose assistance is essential to the Court's effectiveness (such as the permanent members of the Security Council);

[180] See Chapter 3. [181] See Chapter 4. [182] See also Peskin 2009.
[183] ICC-OTP 2005c. [184] Barnett and Finnemore 2004:159. [185] Shany 2012.

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(2) to keep cases in which it has invested substantial amounts of resources on its docket. Thus, in practice, the OTP has stressed the importance of the policy most when it has not yet invested resources in cases, particularly in the phase of preliminary examinations,[186] and particularly with respect to those states (Afghanistan, Colombia, Russia, Georgia) from which cooperation is not likely to be forthcoming or in which intervention would go against the interest of a permanent Security Council member whose cooperation in other situations is essential (US, UK, France and, to a lesser extent, Russia and China).[187]

Once the Court has spent resources on specific cases, it considers it against its interests to risk losing those cases by encouraging domestic proceedings. This is illustrated by an ICC judge who, having taken hundreds of procedural decisions in the three years that the Uganda situation had been before the Court, sighed when referring to the recently concluded A&R Accords of the Juba peace process, remarking: 'Let's hope that they are not going to raise complementarity now.'[188] The fact that the OTP, too, considers losing situations and cases on grounds of complementarity to be against its interests appears from the 'indicators of achievement' of the Office of the Director of the JCCD, one of which is 'a minimal number of challenges to OTP determinations on jurisdiction and admissibility, and upholding of OTP decisions by the Court'.[189] This 'indicator of achievement' does not encourage the JCCD to implement the policy of positive complementarity in situation countries. Consequently, in the context of situation countries the OTP has mentioned the policy of positive complementarity mostly with reference to the division-of-labour reading of complementarity, namely, that states are encouraged to investigate and prosecute domestically cases other than the ICC's.[190] Against this

[186] A good example is the OTP's negotiations with Kenya, prior to the OTP's *proprio motu* investigation. See ICC-OTP 2009. See also Moreno-Ocampo 2011:25: 'Recent years have shown that the preliminary examination phase offers the most promising, or at a minimum the first opportunity, for the OTP to serve as a catalyst for the initiation of national proceedings.'

[187] For instance, Afghanistan, Colombia, Georgia and Russia. See e.g. ICC-OTP 2010a and ICC-OTP 2011c:[30] and [85].

[188] Informal discussion, The Hague, April 2008.

[189] ICC-ASP/3/25 (2004)-a:75.

[190] See e.g. ICC-OTP 2011b:[19] ('Consistent with positive complementarity, the Office supports national investigations of alleged crimes that do not meet the criteria for ICC prosecution.').

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background, it has handed over evidence to the German authorities with respect to suspects in the DRC that it did not intend to prosecute.[191]

Another paradox is that the ICC with complementary jurisdiction has fewer institutional incentives to implement a policy of positive complementarity than the *ad hoc* tribunals with their primacy of jurisdiction. A first reason is the ICC's permanence. The *ad hoc* tribunals became concerned with leaving a legacy only when, under pressure from the Security Council, they adopted completion strategies. The ICC is unlikely to be forced to encourage domestic justice systems to take over its work on account of its prospective demise. In the possibly analogous situation in which the Court is about to end its proceedings in a situation this incentive may arise. However, the Statute does not oblige the OTP to decide that it has ended its investigations – theoretically, once an investigation has been opened, the Court can remain seised of it forever – and, since article 53(4) of the Statute allows the Prosecutor to reconsider a decision not to investigate or prosecute,[192] the question of admissibility may arise again before the Court. In this light, and given the need for the OTP to appear independent when assessing complementarity,[193] ICC officials have been reluctant to engage with legal officials in situation countries with a view to discussing and encouraging national proceedings.[194] For instance, while the Prosecutor identified providing training and technical support as one of the elements of a policy of positive complementarity,[195] the OTP, with an eye to possible future admissibility proceedings, declined to address Sudanese judges and prosecutors present in The Hague on an international law course. A representative of the OTP explained: 'We have to stay at an arm's length [in case] we have to litigate admissibility with them.'[196]

The second component of this paradox is that the complementary character of the ICC's jurisdiction makes it difficult for the Court to

[191] Moreno-Ocampo 2011:27. [192] See Chapter 2, n. 200.
[193] See also ICC-OTP 2003c:3.
[194] Even when the OTP has concluded its own proceedings in a particular situation, there are obstacles to implementing the policy of positive complementarity. For instance, concerns over witness protection and the confidentiality of information have made the OTP hesitant to share evidence with the authorities of situation states. However, these concerns are not related to the permanent or complementary character of the ICC – the ICTY and ICTR had similar concerns.
[195] Moreno-Ocampo 2003b. [196] Interview, The Hague, April 2008.

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implement a policy of positive complementarity by referring cases from the ICC to domestic courts, this being a way by which the ICTY, and to a lesser extent the ICTR, have encouraged national proceedings. Endowed with primary jurisdiction, the *ad hoc* tribunals have been able to set the standards that a domestic justice system in general and the proceedings in a specific case would have to meet for the latter to receive a case from the former. If domestic justice systems and proceedings did not meet these standards, the tribunals could refuse to refer or could reclaim jurisdiction over the case they had referred. With complementary jurisdiction, the only standard the ICC can set is that domestic proceedings are genuine in accordance with the relatively general criteria set out in article 17.[197] Lacking the mandate to supervise domestic proceedings in a manner as stringent as the *ad hoc* tribunals, the ICC may be reluctant to pass on its files to domestic justice systems.

An increasingly important component of the idea of positive complementarity has been that actors other than the Court, for instance states parties to the Rome Statute, would implement the OTP's policy of positive complementarity. It has been argued that the ICC's involvement in a state flags the need for international support and that donors will respond with assistance.[198] If donors do not come in automatically, the OTP could broker such assistance, or at least so it has been suggested.[199] But in the first years of ICC practice, the OTP has not brokered,[200] and donors have not provided, financial or technical assistance to encourage Uganda or Sudan to conduct proceedings for crimes within the Court's jurisdiction with a view to helping these states to fulfil their responsibility.[201] In part this is due

[197] See Chapter 2, 'The ICC does not have a conditional deferral procedure like the ICTY and ICTR'.

[198] Kleffner 2006:96. [199] ICC-OTP 2003c:6.

[200] According to Moreno-Ocampo 2007a, the OTP has brokered assistance, but senior OTP officials confirmed in interviews in The Hague in April and May 2008 that this was done only in the DRC, and consisted of not much more than commenting on a needs assessment conducted by the European Union.

[201] Donors' interest in the Ugandan International Crimes Division seems an exception, but their initial support was not linked to positive complementarity. Rather, they saw such support as a part of their broader rule-of-law programme in Uganda. Other donors interested in supporting the SDHC consider such support as their contribution to the peace process. They are motivated by complementarity in that domestic proceedings could be the key to the peace negotiations by convincing Joseph Kony to sign the FPA (interview with a European diplomat, Kampala,

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to the lack of coherence between donors' diplomatic action and their development programmes.[202] Thus, the units in Western ministries of foreign affairs covering the ICC's involvement in Sudan and Uganda have not associated ICC intervention with a need for support for rule-of-law programmes in those states.[203] The ministries' rule-of-law development specialists, in turn, usually try to stay away from ICC issues.[204] They concentrate instead on long-term projects, wish to address 'technical' issues and need to engage with the receiving governments. The short-term, politically loaded and sometimes anti-government ICC intervention does not fit with this approach, and even threatens it. One representative of a large donor agency from a state not party to the Rome Statute explained this as follows with respect to the creation of the Ugandan International Crimes Division as an alternative to the ICC:

> Our concern is that this will affect a very limited group of people and not on the long term. From an international law perspective it is important to get the ICC away [to allow the peace talks to succeed],

October 2008). But this is different from supporting the SDHC because of a belief that domestic justice systems must be enabled to fulfil their primary responsibility in the prosecution of crimes within the ICC's jurisdiction.

202 See, similarly, Hauser 1999:624, pointing out the inconsistency between donors' political and foreign policy on the one hand and their development programmes on the other in the context of promoting democracy abroad.

203 One official responsible for ICC affairs in a European Ministry of Foreign Affairs explained this disconnect as follows: 'Rule of law has more to do with good governance and ending corruption, while the ICC is a matter of peace and security.' (interview, May 2008). Similarly, an official of the UN Development Programme responded to a question as to whether ICC intervention was a cue for more support to a domestic justice system: 'the ICC affects political issues; not justice' (interview, El-Fasher, May 2010). The offer from the Canadian government to assist in drafting implementing legislation to be applied by the SDHC does stem from a policy related to the ICC, yet it is no exception to the institutional disconnect between rule-of-law and ICC affairs: it is a special programme within the Canadian Ministry of Foreign Affairs to support the universality of the ICC rather than part of the agenda of the Canadian International Development Agency. On this disconnect, see also Open Society Justice Initiative 2010:4 and 9.

204 Similar divisions exist within international organisations such as the EU and UN. While the Office of Legal Affairs and the UNHCHR (who is now and was most recently an ex-official of the ICC and ICTR and of the ICTY, respectively) are generally keen to support the ICC's role, the Department of Peacekeeping Operations and the Department of Political Affairs wish not to be associated with the ICC's work as it complicates the fulfilment of their mandates.

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> but it is not important from a widespread community level, with which we prefer to work . . . Why this Special Division [of the High Court] if access to justice in general is so poor in Uganda? . . . It would be a sacrifice of standard justice for special justice.[205]

By contrast, in departments in which development programmes and ICC policy in fact were coordinated, the pro-ICC ideology often prevented implementation of the policy of positive complementarity.[206]

Finally, the key strategies that the Assembly of States Parties has been developing for the implementation of the policy of positive complementarity appear of little relevance since they are based on incorrect assumptions about the obstacles to domestic proceedings. 'Legislative assistance', 'technical assistance and capacity building' and 'assistance with the construction of physical infrastructure'[207] have been identified as the strategies to overcome the '[t]hree main challenges facing the application of complementarity in practice'.[208] However, the effects observed in Uganda and Sudan show that, if desired, legislation is easily drafted, introduced and passed and courts can be established overnight and that even infinite capacity building does not result in systematic investigations and prosecutions into conflict-related crimes. As the previous section has argued, the real obstacles to domestic proceedings are more ingrained.[209]

Low costs of inaction

A strong catalysing effect on domestic proceedings has been absent not merely because the costs of domestic action are high (and have not been reduced by ICC intervention) but also because in some

[205] Interview, Kampala, October 2008. In Sudan, the concerns of development workers about the possibly disruptive effect of ICC intervention on their programmes were confirmed after the issuance of an arrest warrant against the President. The GoS suspended several international humanitarian programmes on accusations of cooperation with the ICC (see Chapter 4, n. 164), the security situation became too hostile for the implementation of programmes and Western governments reconsidered their development work, contemplating to what extent they wished to support a state whose president had been charged by the ICC.

[206] See also US diplomat Kaye 2004, commenting on the 'potential for Ocampo's "positive complementarity" to work too successfully, from the perspective of committed ICC-backers', by serving 'to undermine the justification for the ICC's substantial growth'.

[207] ICC-ASP/8/Res.9 Annex 4 (2010):[17] (emphases omitted). See also ICC President Song 2010:4, emphasising the importance of legislative assistance.

[208] Bergsmo, Bekou and Jones 2010:801.

[209] See also Moreno-Ocampo 2011:28.

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situations, for instance in Uganda, the costs of inaction have been considered low. Contrary to assumption, states do not necessarily consider the involvement of the ICC to be costly. Accordingly, they do not necessarily conduct domestic proceedings in order to avoid or end ICC involvement. Quite the reverse: as the Ugandan self-referral illustrates, a state can deem the ICC's involvement beneficial to its interests, including its perceived sovereignty and reputation.

With respect to sovereignty, the GoU calculated that it would incur sovereignty benefits, not costs, from ICC involvement. Indeed, the ICC's proceedings against the LRA have given the GoU leverage to convince the DRC and the CAR to allow the UPDF onto their respective territories, (temporarily) dissuaded Sudan from supporting the LRA, and have cautioned the ICC Prosecutor against opening proceedings against the UPDF in the DRC situation. ICC intervention thus came as support, externally strengthening Uganda's sovereignty *vis-à-vis* other states and internally that of the GoU *vis-à-vis* the LRA.

The sovereignty costs of the ICC's intervention, on the other hand, have been limited. Such costs would be high if the ICC were to prosecute state officials, as the statements by President Museveni and Minister Mbabazi guaranteeing domestic proceedings against such persons confirm.[210] But the GoU has not considered the ICC's exercise of jurisdiction over the LRA to be costly in sovereignty terms. This difference in the sense of ownership over crimes committed by state officials and over those committed by the LRA is partly related to whether or not the crimes implicate the government.[211] But it also reflects the weakness of the Ugandan national identity.[212] The GoU may have considered the outsourcing of cases against northern Acholi to an international forum less of an encroachment on sovereignty than if the cases had concerned members of Ugandan ethnic groups more closely associated with power.[213]

[210] See Chapter 3, n. 566.

[211] Although now renamed the Uganda People's Defence Forces (UPDF), the former National Resistance Army is still inextricably intertwined with Museveni's governing National Resistance Movement (NRM). On how the NRM does not make a distinction between the state of Uganda and the NRM regime, see Omach 2009a.

[212] On the lack of post-independence nation-building, see also Commission of Inquiry into Violations of Human Rights 1994:[2.2 vi] and Mutua 2007:26.

[213] On the phenomenon of '[c]osmopolitan law [being] for other people', see also Simpson 2007:44. See also McCormack 2006.

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Equally, the GoU calculated that it could incur benefits from the ICC's intervention with respect to its reputation.[214] The GoU could portray itself as a champion of international criminal justice by providing the ICC with its first situation. In addition, the ICC's accusations against the LRA granted legitimacy to the GoU's military counter-insurgency by branding the LRA an enemy of mankind and changing the GoU's image from that of warmonger to that of defender of humanity. Conversely, any costs to the GoU's reputation were minimised. In the referral letter, the GoU went out of its way to stress the reputation of Uganda's legal sector.[215] It emphasised that its only limitation was its inability to arrest the suspects,[216] which, if it was a confession of weakness, was one with which most states and the ICC were likely to sympathise. Moreover, the referral had the potential to shift responsibility for this shortcoming onto the ICC and show the GoU in a positive light: either the ICC would arrest the GoU's opponents, for which the GoU would also take credit, or the ICC would fail and legitimise Uganda's inability to arrest the suspects.

The Court's actions have confirmed that intervention by the ICC need not adversely affect a state's reputation. Accepting at face value the GoU's claim that it had not conducted and was not conducting domestic proceedings against the LRA, the ICC avoided the question that had the potential negatively to impact on Uganda's reputation, namely, that of its ability and willingness genuinely to investigate or prosecute. Instead, the OTP and PTC implicitly praised Uganda for its referral of the situation by repeating the non-statutory consideration that the ICC was 'the most appropriate and effective forum'.[217] Accordingly, the GoU, rather than being shamed by the referral as an indicator of its unwillingness or inability genuinely to investigate or prosecute the crimes in question, has been able to portray the referral as an illustration of its commitment to international criminal justice.[218] One government minister reasoned:

> Don't you agree that [the fact that Uganda was the state to give the Court its first situation] is the reason why the Review Conference should be here? We deserve it.[219]

[214] See, more elaborately, Chapter 3.
[215] See Chapter 3, 'Compromised complementarity'. [216] *Ibid.*
[217] See *Notification Investigation Uganda*, *Arrest Warrant Kony*:[37] and *LRA Admissibility Decision (PTC)*:[37]. See Chapter 3, opening quotation and 'Compromised complementarity'.
[218] Interview, Kampala, September 2008. [219] Interview, Kampala, October 2008.

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With respect to sovereignty and reputational costs at the sub-state level, lawyers did not consider the ICC's actions to be intervention by a professional competitor claiming cases within their jurisdiction or undermining their reputation. They never considered conflict-related crimes part of their domain in the first place.

All this said, the cost–benefit analysis changed somewhat in Uganda when the ICC's involvement came to be seen as the most significant obstacle to the successful conclusion of the Juba peace talks. For the Ugandan government, the hoped-for benefit of the ICC's securing the arrest of the LRA had not materialised, while the inability to conclude a peace agreement as long as the ICC remained involved emerged as a sovereignty cost. This situation also undermined the government's domestic reputation, as the GoU was blamed for having referred the situation to the Court in the first place. This change in cost–benefit analysis catalysed several moves by the GoU, including, as a concession to the LRA, an undertaking to conduct domestic proceedings.

The Juba talks also altered the calculations of the Ugandan legal sector. As Chapter 3 has demonstrated,[220] the search for domestic alternatives to the ICC led to a broadening of the approach to the conflict in the north to encompass a legal dimension. Since then, some lawyers in the Ugandan JLOS have realised that the need for domestic lawyers provides them with an opportunity to strengthen the position of their profession within the national government and to boost the reputation of Uganda's legal sector within the region. The International Crimes Division attracted international financial support and has been given its first case because the division can enhance Uganda's reputation, problems of legitimacy with the prosecution of that first case notwithstanding. Similarly, the amnesty was abolished, because international opinion had turned against it, despite the Constitutional Court's finding of constitutionality.

The *status quo* may suit the GoU best. It has shown its commitment to both justice and peace, but it has not had to deliver on either. Neither has it needed to backtrack on its cooperation with the ICC[221] nor has it been confronted with unwelcome exposure of UPDF actions

[220] 'Broadening the approach towards the conflict to include a legal dimension'.

[221] Indeed, when PTC II assessed *proprio motu* the admissibility of the LRA case, the GoU's submissions consisted of a mere two pages to the effect that the case was still admissible because the Juba agreements remained without legal force as long

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that is likely to be part of any trial of the LRA. Kony's refusal to sign a peace agreement after two years of internationally funded peace talks has convinced Western states that Museveni's preferred military solution is the only viable option left.[222] Meanwhile, the war against the LRA continues to be used as an excuse for the securitisation of society, covers up patronage scandals and provides a reason for an alliance with the US, which in turn is a lease of life to the NRM. With the abolition of the Amnesty Act, the grant of amnesty has again become a matter of personal discretion for the President. Those whose loyalty is of little value or is unlikely to be maintained or obtained can be brought before the International Crimes Division. The justice talk cannot disguise that in essence much of the practice has remained unchanged in Uganda.[223]

Costs of inaction can be avoided by means other than the invocation of complementarity

Even if the costs of ICC intervention are high, there might still be no catalysing effect on genuine domestic proceedings given the possibility that ICC involvement can be avoided, ended or obstructed by means other than the invocation of complementarity. There are several such confounding and intervening variables, including restrictions on the Court's jurisdiction, the admissibility criterion of sufficient gravity, limitations on the Court's resources, the OTP's prosecutorial policy and the Court's dependence on cooperation, particularly of the state (s) where the crimes are alleged to have been committed and where the suspects reside.[224] In short, the ICC's other in-built limitations have the potential to dilute complementarity's catalysing effect.

These ICC-endogenous confounding and intervening variables go a long way to explaining the absence of a catalysing effect on genuine domestic proceedings for alleged UPDF crimes in Uganda. While Ugandan officials have suggested that the GoU would conduct

as Kony did not sign the FPA (*Observations GoU on Proprio Motu Admissibility Assessment LRA*).

[222] In UN Doc. S/PRST/2008/48 (2008), the UN Security Council 'welcome[d] the joint efforts . . . made [by states in the region] to address the security threat posed by LRA'.

[223] See also Merry 2006b:43 discussing work by Richard Rottenburg ('The universalist facade obscures the fact that things are still being done in local ways.').

[224] See Chapter 2, 'Looking for a catalysing effect: the potentially confounding and intervening variables'.

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domestic proceedings were the ICC to investigate Ugandan state actors,[225] the GoU has had no reason to follow up on these statements, since the ICC has not opened investigations into crimes committed by individuals associated with the government – and this for reasons other than complementarity.

First, many of the GoU's acts in northern Uganda clearly amount to human rights violations, but less obviously so to international crimes incorporated in the ICC Statute. Whilst for victims a legal finesse without justification, this distinction diminishes the risk of ICC proceedings against those who committed the violations and thus the need for domestic proceedings. Secondly, as most of the alleged UPDF crimes were committed before the start of the Court's temporal jurisdiction in 2002, they cannot be investigated by the Court, so that there is again no need for the GoU to pre-empt ICC proceedings by conducting domestic proceedings. Thirdly, the OTP has invoked the standard of gravity as a reason for prioritising proceedings against the LRA over investigations of Ugandan state actors, thereby depriving the GoU of an incentive to conduct proceedings against the latter.[226] Fourthly, the finitude of the Court's resources has compelled it to assign the investigators working on the Uganda file to another situation,[227] with the result that the chances are now slim that the OTP will ever open an investigation into crimes committed in northern Uganda on the government side.[228] The need for the GoU to conduct proceedings in order to block potential ICC cases against state officials is accordingly greatly reduced. Fifthly, as it is the Prosecutor's policy to prosecute only those bearing the greatest responsibility, domestic proceedings aimed at rendering ICC cases inadmissible would be necessary only for this circumscribed group.[229]

Finally, 'endowed with no more powers than any tourist in a foreign State',[230] the Prosecutor is reluctant to jeopardise existing cooperation with the Ugandan government in the LRA case by going

[225] See Chapter 3, n. 566.
[226] See Chapter 2, 'Other jurisdictional provisions: the admissibility criterion of gravity', and Chapter 3, 'The ICC in Uganda: a joint enterprise' and 'Encouraging more trials, prosecutions and/or investigations?'.
[227] ICC-ASP/5/32 (2006)-a:[60].
[228] However, see also ICC-ASP/8/10 (2009):[14].
[229] As is confirmed by statements such as in *Fifth Darfur Report*:6.
[230] Swart and Sluiter 1999:115, commenting on RS, art. 99(4). But see also art. 57(3)(d).

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after state actors.[231] The GoU, for its part, knows that the OTP relies on it to a large extent to execute arrest warrants, to protect witnesses and to provide evidence. Indeed, many in the GoU believe that the 'situation concerning the LRA' is a joint project of the GoU and OTP. They consider the OTP's case their own, given their substantial cooperation with the Prosecutor.[232] These officials do not believe that their ICC 'friends' will go after those who first helped the OTP so generously.[233] Moreover, the GoU enjoys protection from the US, which has been supportive of the OTP's case against the LRA but has pressured it not to deal with UPDF activity.[234] The OTP has reasons to take heed, given its attempts to secure US cooperation in various situations.[235] In short, the OTP's dependence on cooperation has given the GoU the impression that the OTP will not proceed against state actors. Without actual or likely ICC cases against state officials to be rendered inadmissible, there has been no catalysing effect on Ugandan proceedings against state actors.

The Sudanese government's investigative and prosecutorial apathy could initially be ascribed in part to its having pinned its hopes on Security Council deferral under article 16 of the Rome Statute. The GoS insisted that the Security Council, as the cause of its problem, overrule the ICC by 'withdrawing' its referral or suspending indefinitely the ICC proceedings in respect of Darfur.[236] But more and more the GoS has relied on the Court's dependence on it for enforcement. The GoS knows that without its cooperation the arrest warrants are unlikely to be executed, particularly if the individuals who have been charged by the Court do not leave the country and the NCP holds on

[231] A Ugandan lawyer quoted the ICC's Deputy Prosecutor as saying that cases against the UPDF would be opened only after the LRA leaders were in the dock at the ICC (discussion, Gulu, September 2008).

[232] Interview with a cabinet minister, Kampala, October 2008.

[233] Interview with a Ugandan official who had closely cooperated with the ICC, Kampala, October 2008. To underline his partnership with the ICC, this official privately showed pictures in which the Ugandan Defence Minister Mbabazi and his lawyers sit side-by-side with officials of the JCCD on a boat in Dutch canals, with the Prosecutor himself, dressed in leisure wear, at the helm. The JCCD, unofficially known as the OTP's Foreign Office, may organise such diplomatic courtesy outings to encourage cooperation, but the ensuing team spirit makes it more difficult for all to believe that one part of the team will later prosecute the other.

[234] See Perrot 2010:199.

[235] See e.g. Lerner 2010.

[236] See Chapter 4, 'Complementarity: less than a secondary response'.

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to power. This defiance may come at the cost of more international isolation and sanctions; but, as one NCP stalwart put it, 'What's new?'[237] The NCP, or at least the President, may estimate these costs to be lower than the costs of either surrendering to the ICC or conducting genuine domestic proceedings in the same cases as the Court. The Court's dependence on cooperation thus tempers complementarity's potential catalysing effect. States can rely on their ability to impede the Court's proceedings by refusing cooperation, instead of by conducting genuine domestic proceedings. Complementarity is clearly not the only escape route from the consequences of ICC involvement.

Paradoxes of complementarity: cost–benefit analyses combined

Several scholars have observed that the combination of the complementary character of the Court's jurisdiction and its heavy dependence on the cooperation of other actors gives rise to the 'complementarity paradox', that is, that the 'unwilling and unable[238] fora are required to cooperate with the ICC in order to achieve effective prosecution and trial'.[239] With respect to inability, the paradox is illustrated by the requirement that Uganda arrest the LRA suspects. Uganda, having referred the situation to the ICC on account of its inability to arrest the LRA leaders, was subsequently accused by the ICC Registrar of violating its obligation to cooperate with the Court by failing to execute the ICC warrants for the LRA leadership.[240] With respect to unwillingness, the paradox is illustrated by the Sudan situation. Perceiving the cost of ICC prosecutions to be higher than the reputational cost of non-cooperation, the GoS has simply

[237] Interview, Khartoum, November 2008.

[238] In the context of this statement, inability and unwillingness are not the terms of art as defined in art. 17, which indicate the circumstances in which domestic proceedings lack genuineness; rather, the words are used in their lay sense, and can refer to societal circumstances that may equally explain the absence, rather than the lack of genuineness, of domestic proceedings.

[239] Bekou and Cryer 2007:63, who refer to Benvenuti 1999:50, who identifies the problem without calling it the 'complementarity paradox'. For similar observations, see Aptel Williamson 2006:26, Bekou and Cryer 2004:xix, Bergsmo 2000:98, Cameron 2004:92, Cryer 2005b:157, Cryer 2011:1097 and 1103, Eckert 2009:218 *et seq*., Kaul and Kress 1999:160–1, Swart and Sluiter 1999:92, Yang 2003:606 and Yang 2005b:288. On this paradox in international law more generally, see Simpson 2007:46 and Smith 2009:324.

[240] See Chapter 3, n. 148.

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refused all cooperation. Without guaranteed means by which to enforce obligations of cooperation,[241] the ICC can see its proceedings thwarted by an unwilling state's refusal to cooperate with it.

The Ugandan story reveals, however, the need to qualify this complementarity paradox. Willingness and ability, in the context of this paradox used in sociological rather than legal terms, are relative concepts. On one side of the ability-and-willingness spectrum is the state that is willing and able to investigate and prosecute domestically, opposes international involvement and is thus unlikely to cooperate with the Court. Post-Qaddhafi Libya could fit into this scenario. On the other side of the spectrum are situations of almost absolute unwillingness and inability: the state from which cooperation is required is neither willing nor able to conduct domestic proceedings nor supportive of international proceedings, and, by refusing cooperation, also leaves the Court relatively unable. In other words, in these situations the unwillingness and inability concern proceedings at both the domestic and the international levels and there is little the ICC or other external actors can do to offset this. Examples are the Sudan situation, Ugandan proceedings against state actors and Ugandan and international attempts to arrest the LRA. In the middle of the ability-and-willingness spectrum is the scenario of partial unwillingness or ability, in which the unwillingness or inability concern domestic

[241] When states parties refuse to cooperate, the Court may notify the Assembly of States Parties (ASP) (RS, art. 87(7)). In the event of a referral by the Security Council, the Court may notify the Security Council. (RS, art. 87(5)(b) makes provision for the situation where a state not party to the Statute that has entered into an *ad hoc* cooperation agreement with the Court fails to comply with such an agreement. The Statute is silent on the situation where a state not party to the Statute that has not entered into such an agreement fails to comply with a Security Council resolution obliging it to cooperate. But the Prosecutor could report such a failure to the Council should he report to it periodically pursuant to the resolution by which the situation was referred to the Court.) The Statute does not specify the measures that the ASP, on receipt of such notification, can take. On the basis of the general international law of retorsion and counter-measures (see Articles on Responsibility of States for Internationally Wrongful Acts, art. 22, Chapter 2 and commentaries, 180–3 and 324–55), states parties, or some of them, could agree on conditionality of membership of other international organisations or economic sanctions. Such reactions, however, depend on consensus in the specific situation. The Security Council, for its part, could take binding measures, but it does not necessarily prioritise justice by international courts over the other interests it is mandated to safeguard. Moreover, even the ASP and the Security Council rely ultimately on states to enforce their resolutions.

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proceedings only, for which the ICC, and other external actors, can compensate. In other words, the ICC can do what the state concerned will not (or cannot) do. The ICC's case against the LRA, in aspects other than arrest, is an example.

In the first scenario, there is no paradox of complementarity: the state investigates or prosecutes and there is no need for the ICC to intervene. In the second scenario the complementarity paradox is a real contradiction. For instance, a contradiction exists to the extent that Uganda is expected to arrest the LRA leadership, even though Uganda referred the situation to the Court in the first place on account of its inability to arrest the same people. This is a scenario of almost absolute inability since Uganda is unable to arrest while the ICC, and other external actors, prove equally unable and cannot remedy Uganda's inability. In the third scenario, the complementarity paradox is only an apparent contradiction. For instance, Uganda, although itself at the time not preparing domestic proceedings against the LRA leadership, did refer the situation to the Court and cooperate extensively with it. Domestic unwillingness and inability could be compensated by external actors such as the ICC. As regards unwillingness, the ICC provided an opportunity for the GoU to externalise the political costs that impeded domestic proceedings against the LRA. As regards ability, the ICC had at its disposal investigation techniques and resources for witness protection that the GoU did not.

The potential for complementarity to have a catalysing effect on the basis of influencing a cost–benefit assessment differs per scenario. In the first scenario, that of domestic ability and willingness, the catalysing effect is likely to be limited. Domestic proceedings may well occur, but it is unlikely that complementarity is the catalysing factor: the state may well have investigated and prosecuted irrespective of the ICC's complementary jurisdiction. To the extent that complementarity does have a catalysing effect it is likely to be mostly in shaping domestic proceedings on the model of the ICC's (potential) cases in terms of suspects, conduct, crimes and incidents.

In the second scenario, that of (almost) absolute unwillingness or absolute inability, the opportunities for a catalysing effect on genuine domestic proceedings are limited, too. In this scenario, the effect is limited because it is unlikely that there will be any domestic proceedings: the state's unwillingness or inability concerns both domestic and international proceedings and the ICC and other actors cannot remedy the causes of the inability or unwillingness. Take the Bashir

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administration in Sudan, which can be considered absolutely unwilling on account of the fact that it could never externalise the political costs of proceedings, whether domestic or international, where those proceedings target the core of the administration.[242] In these circumstances, the opportunities for a catalysing effect on genuine domestic proceedings are low, since no matter how much Sudan opposes ICC intervention, it is equally unwilling to conduct genuine domestic proceedings in respect of the suspects. Equally, Uganda's almost absolute inability to arrest the LRA leadership is not easily remedied, since the ICC and its supporters are, so far, as unable as the GoU to arrest Kony *et al.*

Partial unwillingness or inability presents most opportunities for a catalysing effect on genuine domestic proceedings. The causes of such relative unwillingness and inability can be remedied by outside assistance. For example, were the LRA leaders to surrender to Ugandan jurisdiction and in doing so cure Uganda's inability to arrest them, international teams could assist the GoU with evidence-gathering and witness protection, addressing one of the causes of Uganda's relative inability and transforming it from 'relatively unable' into 'able'. The possibility of shifting the political costs of LRA proceedings onto the ICC could transform Uganda from 'relatively unwilling' to 'willing'. For example, during the Juba talks, the GoU was in a position to externalise the political costs of possible domestic proceedings against the LRA leadership in that it could have argued that domestic proceedings were necessary since, without them, the admissibility of the OTP's case could not be successfully challenged and the ICC arrest warrants for the LRA leadership would stand.[243]

The OTP's policy of positive complementarity is, in theory, ideal for helping a relatively unable state to become able. The OTP's practice with respect to Uganda, however, has revealed the 'paradox of positive complementarity', by which is meant that the policy is easiest to implement in a state that is willing to cooperate with the Court but

[242] The same scenario of absolute unwillingness exists in Uganda with respect to investigations and prosecutions of senior state officials.

[243] But the LRA's refusal to sign the FPA may have changed the GoU's calculation of the political costs once again. If domestic opposition to trying the LRA leadership were to jeopardise the government's position, the latter may well be unable to externalise these costs and may, as a result, move towards absolute unwillingness, refusing both to hand over the LRA and to conduct domestic proceedings.

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that, given this willingness to cooperate, it is not in the OTP's interest to implement the policy in that state, at least for as long as the OTP needs successful cases.[244] The flipside of the paradox is that a policy of positive complementarity is most difficult to implement in states that refuse to cooperate with the Court, but – by reason of the state's unwillingness to cooperate, which promises little chance of success, especially if the state is backed by powerful allies – the OTP prefers addressing impunity in that state by encouraging domestic proceedings.

The overarching paradox, which includes the paradox of positive complementarity, might be called the 'catalysing effect paradox': that is, defining as it does its own success by pointing to completed cases before the Court, the ICC is most reluctant to give up jurisdiction in those states where it has the best chance of having a catalysing effect on domestic proceedings. The ICC has the best chance of having a catalysing effect in partially unable or partially unwilling states, but in such scenarios it is least likely to relinquish jurisdiction, as it can count on effective cooperation. In its first years of operation, the ICC has wanted to play host to potential success stories, rather than assist in domestic proceedings. Northern Uganda reveals how the ICC has striven to obtain the situation and retain cases arising from it, even after the prospect of possible domestic proceedings emerged.

By the same token, in states in which the ICC is least likely to have a catalysing effect on domestic proceedings, for instance Sudan, it was initially reluctant to exercise jurisdiction, as the chances of successful proceedings were slight. From the perspective of countering impunity, ICC proceedings seem most necessary in just such situations of almost absolute unwillingness or absolute inability, because here the chances of a catalysing effect on genuine domestic proceedings are very limited. But it is precisely here that the ICC is least keen on exercising jurisdiction, since its own chances of success are slim, given its dependence on the cooperation of the absolutely unwilling or unable state.

CONCLUSION: UNRAVELLING THE PARADOXES

Great expectations of a catalysing effect on domestic proceedings attended the creation of the International Criminal Court. These

[244] See for the same paradox with respect to the OTP's focus in DRC, Clark 2011:1192–4.

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expectations were primarily based on assumptions about complementarity's normative character and about states' analysis of the costs and benefits of domestic proceedings in comparison to those of ICC intervention. Whilst normativity and cost–benefit analyses played some role in catalysing effects in Uganda and Sudan, they were not enough to bring about systematic investigations or prosecutions of conflict-related crimes (see Chapters 3 and 4). The assumptions must thus be reviewed and adjusted.

The catalysing effect of complementarity on normative grounds on domestic proceedings in Uganda and Sudan has been marginal since the principle has not been translated into an expectation on states to investigate and prosecute domestically the crimes listed in the Rome Statute. Legally, the explanation is evident: complementarity as provided in the Statute recognises states' primary right to conduct proceedings for conflict-related crimes but does not oblige them to do this. Nonetheless, the preamble to the Rome Statute, the OTP's policy of positive complementarity and the idea of a 'Rome System' could have given complementarity a normative flavour by fostering a non-legal expectation that states will conduct proceedings.

However, the development of such a political expectation on states has been countered by three other factors. First, there has been considerable confusion, ambiguity and even misrepresentation with respect to the content of complementarity as the principle that grants states the primary right to investigate and prosecute crimes within the Court's jurisdiction. The clearest example of misrepresentation is that of complementarity as a division of labour between the ICC and national jurisdictions, the former being responsible for the big cases and the latter for the less serious ones.

Secondly, there has been even more ambiguity with respect to complementarity as big idea entailing the responsibility or duty of states to investigate and prosecute. To some extent this ambiguity reflects the discrepancy between on the one hand the big-idea discourse on complementarity as a reminder to states of their responsibility to investigate and prosecute, and on the other the Rome Statute that creates a court on the very assumption that states do not always fulfil that responsibility. But the Court's interpretation of the Statute and particularly the OTP's policy of inviting self-referrals have further weakened this expectation, giving rise to the normative paradox of complementarity: instead of complementarity's contributing to an expectation on states to investigate and prosecute, the creation of

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the 'Rome System', and particularly its implementation so far, may, by projecting the Court as an institution to take over from states the responsibility to investigate and prosecute conflict-related crimes, actually undermine the expectation on states to discharge that responsibility. By prioritising the fight against impunity over the primary responsibility of the state and by providing too ready a back-up, the Court diminishes the notion of the responsibility of the state.

In addition to the normative paradox of complementarity, the emergence of 'pro-ICC ideology' has caused ambiguity with respect to complementarity as big idea entailing the responsibility or duty of states to investigate and prosecute. Pro-ICC ideology counters any idea of the responsibility of the state because it entails the view that the ICC is the better forum for the adjudication of international crimes.

Finally, a third factor opposing the development of a political expectation on states to investigate and prosecute conflict-related crimes domestically has been a context in Uganda and Sudan that is inhospitable to the infiltration of any such norm.

With respect to expectations of a catalysing effect based on assumptions about complementarity and the cost–benefit analysis engaged in by states, the costs of both domestic action and ICC intervention must be reconsidered. On the one hand, the practical and political costs of investigations and prosecutions in Uganda and Sudan have been so insuperable that the sovereignty and reputational costs incurred by ICC interference have not swayed the outcome of the state's comparative assessment of the costs of domestic inaction. Nor has the policy of positive complementarity reduced the costs of domestic action. On the other hand, the costs of inaction, which were expected to spur domestic proceedings, have not necessarily been high. On the contrary, the GoU calculated that it could gain political favour internationally by referring the situation to the Court and thus by remaining inactive domestically. Even where, as in Sudan, the costs of ICC involvement have been high, this has not automatically resulted in the state's recourse to domestic proceedings. ICC proceedings have also been impeded by Court-endogenous characteristics that function as confounding and intervening variables. Limitations on the Court's jurisdiction, the application of the criterion of gravity in the selection of cases, the Court's prosecutorial policy of focusing on those bearing the greatest responsibility, restraints on the Court's operational capacity, the possibility of the Security Council's requesting

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the deferral of the Court's proceedings and, most of all, the Court's dependence on the cooperation of other actors have all played their part in diluting complementarity's potential catalysing effect.[245]

The ICC itself has been double-faced with respect to encouraging domestic proceedings.[246] Whereas both faces have been presented as parts of, or consistent with, the policy of positive complementarity, in fact only one of them results in the encouragement of domestic proceedings. The other, whilst possibly reflecting or resulting in positive, in the sense of cooperative, relations with states, and thus potentially beneficial for the fight against impunity as defined by the Court, in fact discourages domestic investigations and prosecutions.

One face is that which promotes complementarity as big idea entailing states' responsibility or even duty to investigate and prosecute conflict-related crimes domestically. It was this face that the first Prosecutor put on when he defined in his inaugural address a successful ICC as one with no cases thanks to the complementarity of its jurisdiction.[247] This face was also shown immediately after the situation in Darfur had been referred, when prospects for cooperation were grim and the OTP had not yet invested resources in cases. This face has been most visible in situations which the OTP has had under preliminary analysis but in which it has not yet opened investigations (Afghanistan, Colombia, Georgia, Russia and more recently Guinea).

The other face, however, is that which discourages domestic proceedings through the OTP's policy of inviting self-referrals, the promotion of a pro-ICC ideology, transformation of complementarity into a division-of-labour rule and subordinating complementarity to the fight against impunity as defined by the ICC's organs.

The explanation for this face-changing can be found in the Court's, and in particular the OTP's, perception of its institutional interests. In its first years of operations the Court had to prove its supporters right by showing its effectiveness. At the same time, the OTP felt it

[245] Theoretically, the interpretation of the 'interests of justice' (see Chapter 2, 'No ICC proceedings because of the "interests of justice"') could be another such factor, but, while both the LRA and the GoS have referred to the provision, it does not appear to have played a role in the GoS and GoU's respective calculations.

[246] More international institutions appear to have two faces. See e.g. Verdirame and Harrell-Bond 2005 with respect to the Office of the UN High Commissioner for Refugees.

[247] See Chapter 1, opening quotation.

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had to persuade the world's great powers of the Court's usefulness, or at the least not intensify their suspicion or open hostility towards it, in order to enhance the Court's legitimacy (which, in turn, could enhance its effectiveness). Self-referrals were thus ideal because they not only provided the Court with its first work but also enhanced its legitimacy (states were seen to agree with ICC intervention) and its effectiveness (states promised cooperation). On the other hand, domestic proceedings have been encouraged in those states where cooperation has been unlikely to be forthcoming and intervention would give rise to some great power's objections (Colombia, Russia, Georgia, Afghanistan and possibly post-Qaddhafi Libya). The OTP has thus preferred to exercise its jurisdiction in situations of relative unwillingness or relative inability, namely, where states are unwilling or unable to conduct domestic proceedings but are not opposed to international investigations and prosecutions. Ironically, these are the very situations in which the ICC and its foundational principle of complementarity could have had the strongest catalysing effect on domestic proceedings, in that the states in question could have been propelled from unwillingness and inability to willingness and ability. This illustrates the 'catalysing effect paradox', which is that the ICC is most keen to exercise its jurisdiction in precisely those cases where complementarity has the greatest chances of catalysing genuine domestic proceedings, whether through the implementation of a policy of positive complementarity or by providing an institution to which the political costs of domestic proceedings could be transferred.

The more the ICC has established itself as an institution, and provided the Court is seised of sufficient situations, the more it may be in the OTP's institutional interest to encourage domestic proceedings even in states with respect to which great powers have no objections to intervention: having more situations than it can deal with could undermine its effectiveness.[248] At that stage, the influence of pro-ICC ideology may also diminish and, as the next phase in the

[248] Indeed, the OTP waited almost four years to open an investigation into the third situation that was referred to the Court, that in the Central African Republic, which the OTP had not invited. With respect to Guinea, a state under preliminary analysis, the OTP stated to the press that it 'insisted that Guinea could become a model for Africa and for the world of a State Party that does not require the ICC to fulfil its Rome Statute obligations to investigate and prosecute the most responsible perpetrators of the most serious crimes' (ICC-OTP 2012:1).

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development of the 'Rome System', the Court, the ASP and the international-criminal-justice movement may shift their attention to promoting a norm in accordance with which states have a responsibility to investigate and prosecute conflict-related crimes at the domestic level. The Review Conference suggests this shift may have begun,[249] albeit with a focus on domestic legislation, infrastructure and capacity – issues that, as this chapter has shown, are not the key obstacles to domestic proceedings. Moreover, positive complementarity still seems subject to a division-of-labour reading of complementarity, according to which the ICC prosecutes those bearing the greatest responsibility, while national authorities investigate or prosecute the rest, or hold them accountable by other means; a reading which has nothing to do with complementarity as set forth in the Rome Statute.

The ICC may also become more supportive of the idea of implementing a policy of positive complementarity once it has completed its cases in a particular situation or sub-situation. In shifting its attention to another situation or sub-situation, the OTP may hand over to domestic justice systems files on other suspects.[250] There are some indications of such a development.[251] However, the question remains whether any policy of positive complementarity will ever be able to address the real obstacles to domestic proceedings. No technical assistance can overcome unwillingness and even in situations of inability the question arises whether the ICC is the most appropriate institution for the facilitation of domestic proceedings and whether the Court should be involved in such matters in the first place. In situations of absolute inability, the ICC cannot remedy the essential obstacles to domestic proceedings. For instance, Uganda is not able to arrest the LRA suspects, but the ICC is even less able to do so. The ICC may be able to rely on more international support, but it is unclear why such assistance should not be provided directly

[249] See Chapter 2, n. 286 and surrounding text.

[250] See Burke-White 2008c:328–35. Nonetheless, as has been explained in this chapter ('ICC involvement has not reduced the costs of domestic action') the fact that the Court is permanent and may therefore exercise its jurisdiction in the same situation in the future may reduce its willingness and ability to become involved in supporting domestic justice systems.

[251] The OTP has indicated plans to hand over evidence from its third investigation in the DRC situation to the DRC authorities (Bensouda 2009:5).

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to a state that is willing to conduct genuine proceedings but unable to arrest the suspects.

One paradox, however, is likely to persist. As the analysis of obstacles to domestic proceedings has shown, one of the key causes of impunity, and thus reasons for ICC intervention, is the cycle of impunity that results from patronage networks: ruling parties do not amputate the hands that vote in their favour, whether in elections or by demonstrating other forms of loyalty. Similarly, the ICC is unlikely to amputate the arm that it needs for enforcement. The ICC, judicially independent but practically dependent on cooperation, is thus itself embedded in a *de facto* patronage network in which it accepts impunity with respect to the powers on whose cooperation it depends in order to achieve accountability for others. Just as for the Special Prosecutor for Darfur it is dangerous to prosecute certain individuals if this entails turning their tribes against the GoS, it is dangerous for the OTP to go after the allies of the world's great powers.[252]

This paradox, like the 'catalysing effect paradox' that it produces, stems from the literal double standards involved in complementarity. With respect to states, the principle adopts a realist perspective: it is based on the acknowledgment that states may be unable or unwilling, in the lay sense of the terms, to investigate and prosecute, resulting in the absence of genuine domestic proceedings. This realist perspective is justified: as a guardian against impunity the ICC must take reality as its starting point. However, the ICC does not merely guard; it also intervenes and, effectively, then assumes responsibility for

[252] This may partly explain the OTP's different attitude towards Uganda during and after the Juba peace talks and post-Qaddhafi Libya. In Uganda, it discouraged domestic proceedings; in post-Qaddhafi Libya, it has been positive towards them. In the latter situation, Western powers have made clear diplomatically that 'Libyans should try their former leaders at home' (see Simons 2011). Similarly, the OTP has had a different attitude with respect to different parties within one situation, based on considerations of cooperation and the position of the world's great powers. The OTP did not pay much attention to complementarity when deciding whether to open an investigation into the LRA, whereas it made public statements encouraging Uganda to conduct domestic proceedings for state officials. As it happens, this coincides with US policy according to which the ICC should go after the LRA but take no action with respect to the UPDF. Similarly, in the DRC, the OTP did not open an investigation into persons close to President Kabila, under pressure from foreign donors not to cause political instability (see Clark 2011:1190).

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accountability. But then, with respect to the Court, complementarity's perspective is idealist: it assumes that, but does not assess whether, the Court is willing and able, even though in reality the Court has sometimes proved to be as unwilling or unable as the state, or even more so.

In a case of ICC unwillingness, and thus an absence of an investigation into a situation or a particular case, the ensuing impunity is obviously not caused by the ICC – it would also have existed without it. One can thus defend this situation with the same argument with which the ICC's selective justice is often justified: even though the ICC does not investigate and prosecute all, it contributes some more accountability and this is better than none. Partial justice does come at a price, though: the gains the Court makes in ending the impunity of some could be offset by its seeming legitimation of the impunity of those on whom it depends.[253]

A case of apparent inability on the part of the ICC is even more problematic from an accountability perspective, since it raises the question whether accountability is actually better served at the international than at the domestic level. When the benefits of ICC intervention do not seem to outweigh those of domestic justice, the solution to the problem may be elsewhere than in substituting the ICC for domestic jurisdictions. For instance, the solution to the problem of the inability to arrest the LRA leadership may be better sought in improving traditional state-to-state cooperation than replacing the Ugandan justice system by an international and, in this respect, equally unable forum.

The solution to this mismatch between standards of evaluation is not to find a super-guardian to guard the guardian,[254] or, more tailored to the context of the ICC, a 'court of final resort' to back up the 'court of last resort'. Any such guardian or court will not be able to escape the political reality of patronage either. Instead, the Court should take the political reality as its explicit starting point,[255] both for the definition of its own success and for its evaluation of admissibility.

[253] See e.g. Chapter 3. See also Al-Balushi and Branch 2010, citing Lerner 2010.

[254] See also Verdirame 2011, addressing the difficulty of ensuring accountability of the United Nations for its human rights violations.

[255] For a powerful call for 'Real Politics' as the starting point for political action and political philosophy, see Geuss 2008. The obvious counter-argument is that the Court does not practise politics or political philosophy, but law, and that law must

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With respect to the Court's definition of its own success, taking the political reality as the starting point requires the Court to acknowledge and accept its greatest handicap: in Antonio Cassese's metaphor, the fact that the giant lacks arms and legs and needs artificial limbs to walk and work.[256] At times, ICC officials have rightly argued in this vein that the Court is not to blame if it cannot complete proceedings through the failure of others to cooperate.[257] They have equally argued that the Court can be deemed successful if it is deprived of all cases by genuine domestic proceedings. Yet the amount of attention that ICC officials in practice pay to enforcement indicates that their perception of success still depends on the extent to which proceedings in the ICC can be completed. Inspired by this definition of success, they have tried to cover up the handicap by relying on others as artificial limbs in exchange for *de facto* impunity: one part of the body is unlikely to hurt its newly acquired limbs. The Court could go some way to liberating itself from this self-constructed patronage system by following Martti Koskenniemi in accepting that '[e]ffectiveness, implementation and compliance . . . are not the lawyer's problem – unless the lawyer has internalized the self-image of the political decision-maker's little helper'.[258] For true independence, the Court must internalise another self-image, namely, that of its own statements as to the standard by which the Court's success is to be measured.

With respect to the evaluation of admissibility, political reality as starting point entails that the Court, aware of its own limited willingness and ability, shows some humility – not subordination – towards states struggling with ensuring accountability for a universe of criminality. Recognition of the fact that, for instance, selectiveness is a necessary evil not just for domestic justice systems but also for an

by definition be based on ideals and principles, not on a messy reality. However, whilst this may be (somewhat) true for the Chambers' application of the Statute to defendants, it is not so for the OTP's decisions regarding situation and case selection, in which the legal principle of complementarity, and the OTP's policy of positive complementarity, play key roles. In this regard, as Chapter 2 has shown, the OTP has in practice substantial discretion, which it uses to pursue certain goals (which, as this chapter has shown, are primarily its own legitimacy and effectiveness). Since the use of discretion for the attainment of certain goals is inherently political, a theory that takes the political reality as a starting point is well suited. On other ways in which the Court's work is *inherently* political, see Nouwen and Werner 2010a.

[256] Cassese 1998:13. [257] E.g. see Moreno-Ocampo 2007c:5.
[258] Koskenniemi 2002b:495.

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international court could lead to greater deference for a state's prosecutorial choices than that paid by the Court's same-person–same-conduct requirement for a successful admissibility challenge.[259] This humility would suit an international court, an 'international community' and, indeed, in Michel Quint's words, a 'humanité . . . qui veut enfermer l'univers dans son poing fermé et ne peut y tenir un papillon'.[260]

[259] For a suggestion as to what such 'qualified deference' might look like, see Drumbl 2007:187–94.
[260] See the epigraph to this book, taken from Quint 2004:89–90.

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