CHAPTER 2

THE ROME STATUTE: COMPLEMENTARITY IN ITS LEGAL CONTEXT

> Emphasizing *that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions* . . .
>
> Rome Statute, tenth preambular recital

Complementarity exists by virtue of the Rome Statute. It is the Rome Statute that sets forth the substantive criteria that domestic proceedings must fulfil in order to render cases inadmissible before the ICC on grounds of complementarity and the procedures by which the principle is to be given effect. In theory, it is these provisions that ought to foster the principle's catalysing effect on domestic justice systems.

In practice, however, the principle has been popularly encapsulated in shorthand descriptions, for instance that the Court may not exercise jurisdiction 'unless a State is genuinely unable or unwilling to carry out prosecutions'.[1] The principle is discussed as if it existed separately from the Statute; the provisions that actually generate the principle are ignored.[2] As Chapters 3 and 4 will illustrate, it is frequently popular (mis)understandings of complementarity, rather than the legal principle, that infiltrate the domestic justice system and catalyse domestic changes.

This chapter distinguishes law from popular discourse and provides a legal analysis of those provisions of the Rome Statute that have a bearing on complementarity's catalysing effect. After introducing the key provisions setting forth the complementarity principle, the chapter addresses three popular assumptions concerning the Rome Statute that have fostered expectations of complementarity's catalysing effect. The chapter then goes into the depths of complementarity, discussing in turn its substance and the procedures by which it is given effect. It ends with a discussion of factors other than complementarity that

[1] International Bar Association ICC Monitoring and Outreach Programme 2008:11.
[2] See also Robinson 2010 and Robinson 2011b.

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determine whether the Court exercises its jurisdiction and therefore have the potential to confound any inquiry into complementarity's putative catalysing effect: other jurisdictional provisions in the Rome Statute, the OTP's prosecutorial policy and its policy of 'positive complementarity'.

THE KEY PROVISIONS SETTING FORTH COMPLEMENTARITY

The principle of complementarity is embodied in the Rome Statute in a preambular recital, in the opening article and in a provision on the admissibility of cases. According to the preamble's tenth recital and article 1, the ICC 'shall be complementary to national criminal jurisdictions'. Without referring to the term 'complementarity', article 17, titled 'Issues of Admissibility', gives content to the principle as follows:

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>   (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>   (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>   (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>   (d) . . . [3]
> 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>   (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

[3] RS, art. 17(1)(d) provides as a fourth ground of inadmissibility that '[t]he case is not of sufficient gravity to justify further action by the Court'. Gravity is an independent admissibility criterion, not an element of complementarity. Unless otherwise provided, the observations on the admissibility criteria in this book relate only to the criteria embodying complementarity.

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(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 17(1)(c) is to be read in conjunction with paragraph 3 of article 20 ('Ne bis in idem'),[4] which states:

> No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
> (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

THREE POPULAR ASSUMPTIONS

Three popular assumptions concerning the Rome Statute have fostered expectations of complementarity's catalysing effect. These are a presumed obligation to prosecute, a putative obligation to criminalise the crimes in the Rome Statute in domestic law and a supposed prohibition on the use of amnesties. But to accept such assumptions is misguided. In fact, none of the three assumptions survives an analysis of the Rome Statute.

An obligation to investigate or prosecute pursuant to the Rome Statute?

One of the assumptions that underpin expectations of complementarity's catalysing effect is that the Rome Statute grants states the

[4] See also *Decision Arrest Warrant Lubanga*:[29]. Cf. *contra Judgment Lubanga Jurisdiction Challenge*:[23].

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'responsibility', 'primary responsibility' or even 'obligation' or 'duty' to investigate or prosecute crimes within the Court's jurisdiction. Not only academic commentators and international-criminal-justice activists, but also organs of the ICC have made statements to that effect, referring to the principle of complementarity.[5] For instance, the ICC Prosecutor argued in his first policy paper:

> It should . . . be recalled that the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States. Indeed, the principle underlying the concept of complementarity is that States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction and that national systems are expected to maintain and enforce adherence to international standards.[6]

However, while states may be under an obligation to investigate or prosecute pursuant to *other* rules of international law, the principle of complementarity itself establishes no such legal duty.[7] The articles setting forth the principle, articles 17 and 20(3), provide that a case is inadmissible before the ICC if a state genuinely investigates or prosecutes the case, or has done so. By doing so, the Statute recognises each state's right to investigate and prosecute crimes within the Court's jurisdiction and grants it primacy. But articles 17 and 20(3) do not impose a 'responsibility', let alone an obligation on states. As admissibility rules regulating when the Court may exercise its jurisdiction, located in a part of the Statute entitled 'Jurisdiction, Admissibility and Applicable Law', these articles articulate obligations for the Court, not for states.

The Statute's only provision explicitly referring to a relevant duty of states is the sixth preambular recital, 'recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. Considering the ordinary meaning of the text, the context and the treaty's object and purpose, it is apparent that this recital does not create an obligation.

With respect to the text, the generic wording of the provision militates against its creating an obligation for states parties domestically

[5] See Chapter 1, 'Complementarity's double life', especially nn. 33–39.
[6] ICC-OTP 2003d:5.
[7] See also *Admissibility Decision Katanga (TC)*:[80] ('Sans pour autant que soit méconnu le principe de complémentarité, un État peut s'il le juge opportun, déférer à la Cour une situation concernant son propre territoire, de la même manière qu'il peut décider de ne pas mener une enquête ou de ne pas engager des poursuites relatives à une affaire donnée.').

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to investigate and prosecute the crimes within the Court's jurisdiction. It speaks of a duty of 'every State', whereas a treaty can impose obligations only on states parties.[8] It refers to a duty to prosecute 'international crimes', instead of only the international crimes within the Court's jurisdiction.[9] Moreover, it refers to a state's duty to 'exercise its criminal jurisdiction', which does not necessarily require a state to conduct domestic investigations and prosecutions.[10] Arresting and transferring an accused to the ICC is an exercise of criminal jurisdiction, too.[11] Finally, the text does not establish but merely 'recalls' a suggested pre-existing duty. As it is, in respect of only some of the crimes within the Court's jurisdiction do certain treaties[12] and perhaps, exceptionally, customary international law[13] impose obligations to criminalise and prosecute or extradite.[14]

[8] VCLT, art. 34. [9] See also Bergsmo and Triffterer 2008:margin 17.

[10] See also Robinson 2010:94.

[11] See also *Admissibility Decision Katanga (TC)*:[79] and *Admissibility Judgment Katanga (AC)*:[85].

[12] For relevant provisions, see the Genocide Convention 1948, arts. V and VI, the four Geneva Conventions 1949, arts. 49, 50, 129 and 146, respectively, and their First Additional Protocol 1977, art. 85(1), the Cultural Property Convention 1954, art. 28, and its Second Protocol 1999, Chapter 4, the Convention on the Safety of United Nations and Associated Personnel 1994, arts. 9–16, the Chemical Weapons Convention 1992, art. 7(1), the Anti-Personnel Mines Convention 1997, art. 9, and Protocol II 1996, art. 14. See also the Great Lakes Pact Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination 2006, arts. 8–10.

[13] UN General Assembly resolutions (e.g. UN Doc. GA/RES/2840 (1971) and UN Doc. GA/RES/3074 (1973)) notwithstanding, state practice and *opinio juris* do not bear out the existence of obligations under customary law to investigate and prosecute customary international crimes such as crimes against humanity, some war crimes and certain treaty crimes (see also Cryer 2005b:109). The crime of genocide may be an exception: consider ICJ, *Reservations to the Convention on Genocide*:23, ICJ, *Application of the Convention on Genocide*:[31] and ICJ, *Armed Activities (DRC v. Rwanda)*:[64]. For some of the offences that constitute crimes against humanity, specific treaties contain an obligation to criminalise and prosecute (see the Apartheid Convention 1973 (arts. IV and V), the Torture Convention 1984 (arts. 4, 5 and 7) and the Enforced Disappearance Convention 2006 (arts. 4, 6 and 11)), but the definition of the crimes in the Statute and in the specific treaties diverge. Cf. *contra* International Law Commission 2011:24, where the then Special Rapporteur Galicki proposed an article in which an *aut dedere aut judicare* obligation was derived from the *jus cogens* character of certain international crimes.

[14] Kleffner 2008:26 argues that an independent obligation to prosecute the crimes in the Rome Statute flows from the obligation in human rights treaties to 'ensure' or 'secure' the human rights contained in those treaties in conjunction with the right

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The context of the recital equally counts against its establishing a duty. Considering the lack of a pre-existing obligation to investigate and prosecute all the crimes within the Court's jurisdiction, it is evident that such a fundamental primary rule would have been included in the operative provisions had the states parties to the Statute intended to impose such an obligation. The fact that the reference is made in the preamble and only in the preamble shows that the parties had no intention to create an obligation to investigate and prosecute crimes within the Court's jurisdiction.[15] The recital merely reflects an aspiration, just like many of the other preambular considerations.

Finally, the Statute's object and purpose weighs against interpreting the sixth recital as creating an obligation. The Statute's object and purpose, not to be confused with some of the lofty aims the states parties express in the preamble,[16] is to create a permanent international criminal court, complementary to national criminal jurisdictions, and to regulate the conduct of the court and the obligations of states towards it. The Statute does not create obligations for states independent of the Court's operation. Neither does it provide for a mechanism by which the Court, or any other body, may compel domestic proceedings;[17] it provides only that if states do

to an effective remedy, at least as long as the rights were violated within the state's jurisdiction. However, practice is too equivocal to substantiate such an interpretation. Although some decisions of human rights courts indeed refer to such an obligation in case of certain human rights violations (most notably the rights to life and freedom from torture), there is insufficient evidence for the assertion that there is always a non-derogable obligation for the state to prosecute and punish all the crimes within the Court's jurisdiction. See also Cryer 2005b:103–5.

[15] Indeed, because of the absence of such a duty, Akhavan 2010b proposes an optional protocol obliging states parties to prosecute the crimes within the ICC's jurisdiction at the domestic level and granting the ICC jurisdiction to enforce this obligation.

[16] For such conflation, see e.g. *Admissibility Judgment Katanga (AC)*:[79] ('The aim of the Rome Statute is "to put an end to impunity" and to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished". This object and purpose of the Statute . . .') and ICC-OTP 2011b:[8] ('The Prosecutor's action will be guided by the object and purpose of the Statute, namely: the prevention of serious crimes of concern to the international community through the ending of impunity.').

[17] As was explicitly recognised by the ICC Appeals Chamber in *Admissibility Judgment Katanga (AC)*:[86] ('under the Rome Statute, the Court does not have the power to order States to open investigations or prosecutions domestically').

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not investigate or prosecute crimes within the Court's jurisdiction the ICC is entitled to do so.[18] In sum, neither the sixth recital of the preamble nor any other provision in the Statute obliges states domestically to investigate or prosecute crimes within the Court's jurisdiction.

That said, complementarity could have a catalysing effect on normative grounds. States could *believe* that the rules embodying the principle of complementarity oblige them to investigate and prosecute Rome Statute crimes domestically. The Statute could also remind states of their obligations to investigate and prosecute international crimes pursuant to their participation in other treaties. Or states could interpret their primary right as a political expectation on them to investigate and prosecute crimes within the Court's jurisdiction. As subsequent chapters will demonstrate, the Court's organs, for their part, can both heighten and diminish such a political expectation.[19]

An obligation to criminalise in domestic law?

Another common assumption underpinning expectations of complementarity's catalysing effect is that the Rome Statute requires states parties to adopt 'implementing legislation' that makes the crimes within the ICC's jurisdiction crimes under domestic law.[20] However,

[18] Cf. *contra* Kleffner 2008:249–50. His argument, at 251, that the duty in preambular recital 6 is the legal principle, the exact contents of which should be determined with reference to the legal rules on complementarity as reflected in the admissibility criteria, turns the rules of interpretation upside down. Preambular recitals can be of assistance in interpreting the operative provisions of a treaty (see ICJ, *Asylum Case*:282 and ICJ, *Rights of Nationals*:196), but the operative part cannot be used to interpret open-textured recitals as legal obligations.

[19] So can the Assembly of States Parties. The Review Conference, in its first resolution, '[r]ecognize[d] the primary responsibility of States to investigate and prosecute the most serious crimes of international concern', and '[e]mphasize[d] the principle of complementarity as laid down in the Rome Statute and stresse[d] the obligations of States Parties flowing from the Rome Statute', while refraining from spelling out which 'obligations' were related to complementarity (RC/Res.1 (2010), operative paragraphs 1 and 2).

[20] See Chapter 1, nn. 7 and 48. See also the ICC Registrar in Arbia and Bassy 2011:65 ('Implementing legislation is not only crucial for fair trials at the ICC, however, it is also the anchor for domestic trials of international crimes, and thus for the principle of complementarity to be effective. For this purpose, it is also

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the Rome Statute requires only that national law facilitate cooperation with the Court[21] and criminalise offences against the ICC's administration of justice.[22] It does not oblige states parties to criminalise genocide, crimes against humanity and war crimes in domestic law.[23] Of course, states parties are free to do so and, indeed, many have done so upon ratification of the Rome Statute.[24]

For those states that wish to avoid ICC intervention by taking advantage of complementarity, incorporation of the Rome Statute's crimes into domestic law is necessary only to the extent that existing domestic law does not cover all the conduct within the ICC's jurisdiction,[25] since it suffices for a successful admissibility challenge on the ground of complementarity to charge the relevant conduct as an ordinary crime.[26] Many of the *actus rei* of the crimes within the ICC's jurisdiction will already be criminalised in ordinary penal law, but conduct such as recruitment of child soldiers and treatment of prisoners of war, and modes of liability such as command responsibility, could well require criminalisation.[27]

A prohibition on amnesties?

A third popular assumption fostering expectations of complementarity's catalysing effect is that the Rome Statute bans amnesties.[28]

essential for implementing legislation to incorporate the Rome Statute crimes into national law. Without this, states could be left in the position of prosecuting only for some of the constitutive acts of the crimes, such as murder and rape. This could undermine the basis of national prosecutions, and may invite the ICC's Judges to take jurisdiction where this might not be needed.') and Newton 2011:320.

[21] RS, art. 88. [22] *Ibid.*, art. 70(4)(a).

[23] See also *Prosecution Response to Libyan Admissibility Challenge*:[23].

[24] For an overview, see e.g. Amnesty International 2006, and, for a collection of implementing legislation, the database of the ICC Legal Tools project, at www.legal-tools.org.

[25] The review of domestic legislation may, of course, be an occasion for passing legislation to criminalise and establish broad jurisdiction over international crimes in general, as has been advocated by e.g. Amnesty International 2004a and Human Rights Watch 2001.

[26] See below, this chapter: 'The "same case" requirement: same person, same conduct, same incidents?'.

[27] For other examples, see Broomhall 2003:91.

[28] See Chapter 1, n. 32.

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However, the Statute does not contain any prohibition on amnesties or any obligation on states that is irreconcilable with the use of amnesties.[29] This fits with the character of the Statute more generally, namely, to regulate only the conduct of the Court and the cooperation of states with the Court – the Statute is silent on what states should or should not do independently of the Court. For the Court, the implication of this silence on amnesties is that it is not legally bound to respect amnesty measures – amnesty laws usually derive their legal force solely from domestic law, which as such is not part of the ICC's applicable law.[30] For states, the Statute's silence means that use of amnesties does not amount to a violation of the Statute – they could of course be in violation of treaties that do oblige them to investigate, prosecute and punish.[31]

That said, the Rome Statute could have a discouraging effect on the use of amnesties. First, states parties could consider themselves politically obliged not to use amnesties for crimes within the Court's jurisdiction because they subscribe to its anti-impunity agenda. Secondly, states parties may realise that the ICC's existence has diminished the political value of domestic amnesties since the risk of prosecution on the international plane has increased. Finally, states could refrain from using amnesties because amnesties often obstruct domestic proceedings, thus inhibiting states from avoiding or ending ICC involvement by using their primary right to investigate and prosecute pursuant to the principle of complementarity.[32]

[29] The argument that amnesties are incompatible with the anti-impunity 'spirit' of the Statute is legally not convincing. The Statute does not recognise 'spirit' as a source of applicable law; nor does international law for that matter.

[30] See RS, art. 21. This does not prevent the Prosecutor from taking into account an amnesty in the context of considering the 'interests of justice' (see below on RS, art. 53(1)(c) and (2)(c)), or the Security Council when deciding whether or not to defer ICC proceedings pursuant to RS, art. 16 (see below).

[31] See n. 12 above.

[32] The precise impact of an amnesty law on an admissibility assessment pursuant to art. 17 will depend on the type of amnesty law and its application. If the result is that there are no investigations into a specific case, the case will be admissible on grounds of absence of domestic proceedings (art. 17(1)). If criminal investigations or prosecutions are followed by a decision not to prosecute on account of an amnesty law, the state is likely to be found unwilling or unable genuinely to prosecute (art. 17(1)(b)). See more elaborately, next section, and Dugard 1999, Robinson 2003 and Robinson 2006.

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In sum, many of the great expectations of complementarity's catalysing effect discussed in Chapter 1 are based on popular but incorrect assumptions about what the Rome Statute requires states to do (investigate and prosecute, criminalise Rome Statute crimes in domestic law) or not to do (refrain from issuing amnesties). And yet, as Chapters 3 and 4 will reveal, in practice popular assumptions sometimes can have a stronger impact on complementarity's catalysing effect than the law itself.

THE SUBSTANCE OF COMPLEMENTARITY: THE CRITERIA FOR INADMISSIBILITY

The above-cited articles 17 and 20(3) give effect to the idea of complementarity referred to in the preamble and article 1 by way of an admissibility rule. This section will argue that careful reading of these provisions shows the inadequacy of the shorthand description according to which the complementarity assessment focuses on a state's willingness and ability. Rather, as the Court's early case law confirms, article 17(1)(a), (b) and (c) envisage two basic scenarios in which cases are admissible before the ICC. The first is where no relevant domestic proceedings have been initiated. According to the Court, relevant proceedings require domestic proceedings in relation to the same 'case', requiring identity in person, conduct, and possibly even factual incidents and mode of liability. Reasons will be advanced, however, to depart from this test. Other concepts pertaining to the question whether relevant domestic proceedings have been initiated are that of an 'investigation' and a 'decision not to prosecute'. The second scenario in which cases are admissible before the ICC is where domestic proceedings have been initiated but the state is unwilling or unable to conduct these genuinely. Only then does the question of domestic willingness and ability arise. Neither low punishment nor violation of fair trial rights is *per se* grounds for admissibility of cases before the Court.

The inadequacy of the shorthand description

Contrary to what the omnipresent shorthand description of complementarity suggests – a case is inadmissible 'unless a State is genuinely

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unable or unwilling to carry out prosecutions'[33] – precise reading of article 17 shows that ability and willingness are only of secondary importance to an admissibility assessment. Before mentioning ability and willingness, article 17(1) first provides that the Court shall determine that 'a case' is inadmissible where that case 'is being investigated or prosecuted', 'has been investigated' or 'has already been tried'. The references to ongoing and concluded proceedings reveal that, if there is no state investigating or prosecuting the case or no state which has done so, none of the criteria of inadmissibility can be satisfied. In the absence of ongoing or concluded national investigations or prosecutions, therefore, cases are admissible before the ICC without the need for any determination of a state's unwillingness or inability as defined in paragraphs 2 and 3 of article 17.[34] Only when domestic investigations or prosecutions are being or have been conducted is it necessary in any given case to determine whether the state concerned is or was willing and able to carry out these proceedings in a genuine fashion. In the words of the ICC Appeals Chamber:

> [I]n considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the

[33] International Bar Association ICC Monitoring and Outreach Programme 2008:11. See also, *inter plurima alia*, Arsanjani and Reisman 2005 and Chapter 1, nn. 19 and 20.

[34] This has been consistently upheld by the ICC Chambers. See e.g. *Decision Arrest Warrant Lubanga*:[40], *Admissibility Judgment Katanga (AC)*:[78], *Decision Authorizing Kenya Investigation*:[53]–[54], *Judgment Admissibility Challenge Bemba (AC)*:[107]–[108], *Admissibility Decision Muthaura et al. (PTC)*:[44] and [66], *Admissibility Decision Ruto et al. (PTC)*:[48] and [70], *Admissibility Judgment Muthaura et al. (AC)*:[40], *Admissibility Judgment Ruto et al. (AC)*:[41], *Decision Confirmation of Charges Abu Garda*:[29] and *Authorisation Investigation Republic of Côte d'Ivoire*:[193] and [206]. See also *Admissibility Judgment Ruto et al. (Dissenting Opinion Judge Ušacka)*:[19] and [27] and *Admissibility Judgment Muthaura et al. (Dissenting Opinion Judge Ušacka)*:[19] and [27]. For the OTP's concurrence, see ICC-OTP 2003d:5, Moreno-Ocampo 2004c:2, ICC-OTP 2006c:5 and ICC-OTP 2003c:7–8 and 11. See also Robinson 2010 and Robinson 2011b. More implicitly, see *Decision Arrest Warrant Bashir (PTC)*:[50], *Decision on Summons for Abu Garda*:[4] and *Decision Summonses Banda and Jerbo*:[4].

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> question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1)(d) of the Statute.[35]

Indeed, in the majority of ICC decisions addressing complementarity so far, the Court has not begun to assess states' willingness or ability to conduct genuine proceedings.[36] The Court reasoned that the cases before it were admissible in the simple *absence* of domestic proceedings – there was thus no willingness or ability in any specific procedures to assess.[37]

However, in order to reach the conclusion of domestic inaction, the Court had to engage with the meaning of three terms appearing in article 17 prior to any mention of willingness or ability. Whereas academic literature had brooded over how to measure willingness and ability, in practice the seemingly quotidian terms 'case' and, to a lesser extent, 'investigated' and 'decided not to prosecute' were the focus of the Court's early case law on admissibility.

The 'same case' requirement: same person, same conduct, same incidents?

In fact, many of the ICC's first suspects *were* subject to some form of domestic proceedings. The Court could nonetheless reach a finding of domestic inaction, and thus admissibility, by narrowly defining the word 'case' and then arguing that the domestic investigations did not cover the *same* case as that before the ICC.

[35] *Admissibility Judgment Katanga (AC)*:[78] (correcting *Admissibility Decision Katanga (TC)*, in which the Trial Chamber had employed the shorthand version of complementarity ([74]: '[A]ux termes du Statut, la Cour n'exercera sa juridiction que si les États compétents pour juger des crimes internationaux soit n'ont pas la volonté soit se trouvent dans l'incapacité de mener véritablement à bien une enquête et, le cas échéant, de poursuivre les auteurs de ces crimes.') and had assessed willingness without first assessing whether there were domestic proceedings in the same case).

[36] The exception being *Admissibility Decision Katanga (TC)*.

[37] This is likely to change when the Court considers the admissibility challenge by the Government of Libya. As the Prosecutor notes in *Prosecution Response to Libyan Admissibility Challenge*:[4]: 'This is the first time that a State has submitted an admissibility challenge providing concrete information that it is prosecuting the same case as that pending before the International Criminal Court.'

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This approach was first adopted in *Lubanga*, when the Pre-Trial Chamber (PTC) assessed admissibility as part of a decision on whether to issue an arrest warrant. At that moment Thomas Lubanga was already detained in the Democratic Republic of the Congo (DRC). The DRC authorities had arrested him on charges of crimes against humanity, genocide, murder, illegal detention and torture. Domestic charges notwithstanding, the PTC found the case admissible on the ground of inaction.

The finding of inaction was based on the PTC's determination that the DRC proceedings did not involve the same case as the Prosecutor's. The PTC appeared to divide the concept of same case into two limbs: same *person* and same *conduct*. According to the PTC, it was 'a *conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that the national proceedings encompass[ed] both the *person* and the *conduct* which is the subject of the case before the Court'.[38] The DRC proceedings concerned the same person but, according to the Chamber, not the same conduct. Whilst the domestic charges included genocide and crimes against humanity, they did not include the one (and only) crime on the basis of which the ICC Prosecutor brought charges: the war crime of enlisting, conscripting and using child soldiers. Comparing the charges, the Chamber held that the 'DRC cannot be considered to be acting in relation to the specific case before the Court'.[39] Since it found that no other state with jurisdiction was acting or had acted 'in relation to such case',[40] the PTC considered Lubanga's case admissible before the ICC.[41]

Other Pre-Trial Chambers have adopted the same approach. In *Katanga*, the suspect had been detained in the DRC on the basis of a DRC arrest warrant charging him with crimes against humanity and genocide. The ICC Prosecutor brought charges of crimes against humanity and war crimes. Even though the charges seemed remarkably similar and without explicitly comparing them, the PTC concluded that 'the proceedings against Germain Katanga in … DRC

[38] *Decision Arrest Warrant Lubanga*:[31]. See also [37].
[39] *Ibid.*:[39]. [40] *Ibid.*:[40].
[41] The same reasoning was applied in the decision on an arrest warrant for Lubanga's co-suspect, Bosco Ntaganda. See *Decision Arrest Warrant Ntaganda (PTC)*: [31]–[41].

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[did] not encompass the same conduct which [was] the subject of the Prosecution Application'.[42]

In the Darfur situation, the Prosecutor seemed to suggest an even narrower concept of 'same case'. Like Lubanga and Katanga, Ali Kushayb was in domestic detention when the PTC decided on the Prosecutor's request for a summons to appear. Sudanese investigations appeared to be ongoing into five separate incidents in five communities involving attacks accompanied by looting, burning houses, killing and forced disappearance. The ICC Prosecutor, for his part, accused Kushayb of having committed war crimes and crimes against humanity involving killing, rape, torture, persecution, forcibly displacing civilians, depriving civilians of their liberty, pillaging and destroying property. One of the incidents that the Prosecutor focused on was alleged to have taken place in the same locality as one of the incidents under domestic investigations.

But the Prosecutor pointed out that the domestic investigations into the incident had made 'no mention of rape or other inhumane treatment'.[43] The Prosecutor argued that the case was admissible before the ICC because the domestic investigations did 'not relate to the same conduct which [was] the subject of the case before the Court: the national proceedings [were] not in respect of the same *incidents* and address[ed] a significantly narrower range of *conduct*'.[44] In short, the Prosecutor submitted that the 'same conduct' test required domestic proceedings to involve not merely the same acts, generically speaking, but also the same *incidents*; that is, the same factual allegations.[45] Seemingly in further support of the argument for admissibility, the Prosecutor also averred that the Sudanese proceedings did 'not

[42] *Decision Arrest Warrant Katanga*:[20]. The PTC applied the same logic in the simultaneous *Decision Arrest Warrant Chui*:[21]. Katanga appealed and challenged the appropriateness of the same-conduct test. As will be discussed below, both the Trial Chamber and the Appeals Chamber found the case admissible, both on different grounds, but neither of which related to the same-conduct test.

[43] *OTP Application Harun and Kushayb*:[265].

[44] *Ibid.*:[267] (emphases added). See also [266].

[45] In the context of victim participation, *Decision VPRS 1–6 DRC*:[65] also used incidents as a factor when defining a 'case'. The OTP's description of the test is at times loose. For instance, with reference to Libya, *Prosecutor's Libya Statement SC May 2012*:[6] argued: 'This is the first time in the short history of the International Criminal Court that a State is requesting jurisdiction to conduct a national investigation against the same individual and for the same incidents under investigation by the International Criminal Court.' There was no reference to 'conduct'.

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connect Ali Kushayb to Ahmad Harun',[46] suggesting that, in order to qualify as the same case, domestic proceedings must involve a similar mode of criminal responsibility as in the case before the ICC.

In its eventual decision to issue an arrest warrant for Ali Kushayb, the PTC did not engage with these alleged additional requirements, merely repeating the definition of a 'case' enunciated in *Lubanga*.[47] But, by concluding that the case appeared admissible, the PTC implied that the Prosecutor's formulation of the 'same-conduct' test as requiring the same incidents was correct.[48] The Prosecutor has subsequently maintained the same-incident test in arguing the admissibility of its cases.[49]

In the Kenya situation, the Appeals Chamber affirmed, but possibly also altered, the same-person–same-conduct test. The Kenyan Government's challenge focused on the same-person element of the test. Both the Pre-Trial Chamber and the Appeals Chamber dismissed its argument that the test should involve 'the same conduct in respect of persons *at the same level in the hierarchy being investigated by the ICC*',[50] and confirmed, for the purpose of challenging the admissibility of a case, that the same-person test requires exactly the same persons

[46] *Prosecutor's Darfur Statement SC June 2007*:6. See also, on behalf of the OTP, Seils 2007:2.

[47] *Decision Arrest Warrants Harun and Kushayb*:[24], this time defining the test negatively.

[48] When issuing the first public arrest warrant in the CAR situation (*Decision Arrest Warrant Bemba*), PTC III was equivocal as to on which ground it found the case admissible. On the one hand, it suggested that the case was admissible in the absence of domestic proceedings in the same case when it found that there was no evidence indicating that the accused had been investigated or prosecuted at the national level for the crimes charged by the ICC Prosecutor. On the other hand, the PTC seemed to refer to a decision not to prosecute and unwillingness or inability to conduct genuine proceedings when it observed that the CAR authorities seemed to have refrained from prosecuting Jean-Pierre Bemba because they believed he was immune from prosecution on account of his status as Vice-President. The Trial Chamber decided the case was admissible because of the absence of domestic proceedings (*Decision Admissibility Challenge Bemba (TC)*).

[49] See e.g. *OTP Response to Admissibility Challenge Katanga*:[15] ('[T]he incident with which the Accused is charged at the International Criminal Court ("the Bogoro incident") was not at any stage subject to actual investigation in the DRC for the purpose of satisfying the conditions set out in Articles 17(1)(a), 17(1)(b) or 17(1)(c) of the Statute.') and [59] ('The term "case" should . . . be understood as being constituted by the underlying event, incident and circumstances – i.e. in the criminal context, the conduct of the suspect in relation to a given incident.').

[50] *Admissibility Challenge Government of Kenya*:[32].

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(and not just persons at the same level of hierarchy).[51] However, while the appeal had focused on the same-person limb of the test, the Appeals Chamber in passing transformed the Pre-Trial Chambers' same-conduct limb. It concluded that the '"same person/same conduct" test applied by the Pre-Trial Chamber was the correct test',[52] but nonetheless itself defined the requirement for inadmissibility of the same case as that 'the national investigation must cover the same individual and *substantially* the same conduct as alleged in the proceedings before the Court'.[53] It did not elaborate on the implication of the qualification 'substantially'.

The Appeals Chamber's qualification may refer to the fact that a successful admissibility challenge requires domestic investigations into or prosecution of the same *conduct*, not necessarily the same *crime*.[54] In other words, a successful admissibility challenge does not require the same legal qualification of the underlying conduct in domestic proceedings as in the ICC's case. This is shown by article 20(3) of the Statute, which provides that, as a rule, the ICC may not try a person for '*conduct* also proscribed under article 6, 7, or 8' with respect to which the person has already been tried by another court. The use of

[51] *Admissibility Decision Ruto et al. (PTC)*:[56] and *Admissibility Decision Muthaura et al. (PTC)*:[52] ('a determination of the admissibility of a "case" must *at least* encompass the "same person"'), *Admissibility Judgment Ruto et al. (AC)*:[40]–[41] and *Admissibility Judgment Muthaura et al. (AC)*:[39]–[40]. It did so for challenges of admissibility pursuant to art. 19, leaving open the possibility of a less strict test when admissibility is assessed before opening an investigation (see this chapter, below: 'The complementarity assessment is case-specific').

[52] *Admissibility Judgment Ruto et al. (AC)*:[47] and *Admissibility Judgment Muthaura et al. (AC)*:[46].

[53] *Admissibility Judgment Ruto et al. (AC)*:[40] and *Admissibility Judgment Muthaura et al. (AC)*:[39] (emphasis added).

[54] For this interpretation of the qualification, see *Prosecution Response to Libyan Admissibility Challenge*:[25] ('The term "substantially" indicates that the national authorities are not necessarily required to charge the suspect under the exact same legal qualification. While the conduct itself must necessarily be the same, meaning the underlying acts and incidents concerned, the legal characterisation of such conduct may differ: it must be the same in substance, bearing in mind such factors as those described above.') and *Admissibility Challenge Libyan Government*:[86] ('It is significant that while earlier jurisprudence adopted the general term "conduct" the Judgment on Kenya Appeal referred specifically to "substantially the same conduct". The test therefore is whether the judicial action covers "substantially" the same conduct, indicating that the test to be applied is one of substance rather than form. Charging Mr Gaddafi and Mr Al-Senussi with "ordinary crimes" would not "deprive the alleged offence of its essential features".').

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'conduct' in article 20(3) contrasts sharply with the use of 'crime' in article 20(2), which concerns the situation where a domestic court wishes to try a case after the ICC.[55] The reference to 'conduct' rather than 'crime' indicates that deference should be accorded to states' legal characterisation of the impugned behaviour. In other words, the fact that a state prosecutor characterises conduct as a different international crime than that the ICC Prosecutor would have charged or as an ordinary crime[56] should not render a case admissible before the Court.[57] Genuine domestic prosecution of the same conduct and incident as 500 counts of murder, rather than as an ICC crime

[55] See also ICTY, *Hadžihasanović Judgment*:[257] (concluding that 'the Statute of the International Criminal Court leaves the characterisation of the crimes open to national courts').

[56] UN Doc. A/49/10 (1994):58 describes trial of an 'ordinary crime' as one in which the act is tried as a common crime under domestic law instead of an international crime with the special characteristics of the international crimes as defined in the Statute. The distinction between ordinary crimes and crimes within the jurisdiction of the Court was deliberately omitted from the Rome Statute. See UN Doc. A/50/22 (1995):[43] and [179]. See also Politi 1997:145. In refutation, see Van den Wyngaert and Ongena 2002:725–7, Zahar and Sluiter 2008:489, Yang 2005b:288 and El Zeidy 2008b:286–98.

[57] Arguments to the effect that cases of ordinary crimes are nonetheless by definition admissible before the ICC because absence of domestic criminalisation of the crimes as defined in the Rome Statute is an indicator of *inability* genuinely to investigate or prosecute as defined in art. 17(3) (for such arguments, see e.g. Burke-White 2005:582, Doherty and McCormack 1999:149 and 152, Condorelli 2008:163–4, Greppi 2008:69, Hall 2003:17, Jensen 2006:167, Kleffner 2003:89, Lattanzi 2001:181, Schiff 2008:191, Turner 2005:8–9 and Zahar and Sluiter 2008:489), or that prosecution for ordinary crimes amounts to 'shielding the person concerned from criminal responsibility *for crimes within the jurisdiction of the Court referred to in article 5*' (emphasis added), as defined in arts. 17(2)(a) and 20(3)(a) (on which see this chapter, below), fail to persuade. Absence of international crimes in domestic law does not make a state 'unable to carry out its proceedings' – the state can carry out proceedings by charging ordinary crimes. Secondly, as Heller 2012:206 has argued, 'it would undermine Article 17(2)(a)'s intent requirement to automatically equate the intent to charge a perpetrator with a serious ordinary crime with the intent to shield the perpetrator from criminal responsibility for an international crime.' RS, art. 93(10)(a) also suggests that the Statute's interest is in seeing the conduct investigated and prosecuted, rather than investigated and prosecuted as one of the crimes within the jurisdiction of the ICC. The provision allows the Court to provide assistance to a state party 'conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court *or which constitutes a serious crime under the national law of the requesting State*' (emphasis added).

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eo nomine such as genocide by killing, should still make a case inadmissible before the ICC.[58]

Reasons to depart from the same-conduct test

There are, however, reasons to argue that the Appeals Chamber's qualification should be construed not just as an acknowledgment that admissibility is decided on the basis of proceedings for the same conduct – as opposed to the same crime – but as a departure from the same-conduct test in its strict interpretation as requiring the same person, conduct and incidents. If strictly interpreted, the test will leave complementarity, or primacy for that matter, with little role to play: since there will seldom be complete identity in person, conduct and incidents, there will seldom be complete concurrence of jurisdiction in the same 'case', and thus no need to apply a priority rule.

The same-conduct test originated in cases in which the ICC's role did not clash with the interests of the state: the DRC wished the ICC to prosecute Lubanga, Katanga and Ngudjolo. However, because it pertains to the general interpretation of the word 'case' in article 17, the test also applies if a state opposes the Court's involvement in a case. And the consequence of that test, if strictly applied, is that it is virtually impossible for a state to win an admissibility challenge if opposed by the ICC Prosecutor.

The consequence of strict application of the same-conduct test is that a state cannot be sure that the ICC will end its involvement in a case or refrain from opening a case unless the state selects not only the same person, but also the same factual conduct, incidents and perhaps even mode of liability that form, or could form, the subject of a case before the ICC.[59] Once the Prosecutor has brought a case before the

[58] The Rome Statute deviates in this respect from the respective statutes of the ICTY and ICTR, which explicitly allow the tribunals to retry a case if the conduct has been prosecuted domestically as an ordinary crime (see ICTY Statute, art. 10(2)(a) and ICTR Statute, art. 9(2)(a)). Indeed, the Appeals Chamber of the ICTY has justified the Court's primacy over domestic courts by reference to the risk that domestic courts might prosecute conduct constituting international crimes as ordinary crimes (ICTY, *Tadić Defence Motion Decision (AC)*:[58]). For the ICTY, domestic characterisation of conduct within its jurisdiction as an ordinary crime is an explicit ground for claiming jurisdiction not only after but also during the domestic proceedings (ICTY RPE 1994, as updated, rule 9(i)). Rule 9 of the ICTR RPE 1996, as updated, no longer mentions this ground, but has been amended to the effect that the ICTR can practically always demand that states defer.

[59] See also Rastan 2011.

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Court, the domestic justice system that wishes to render that case inadmissible must literally *copy* the ICC's case in terms of person, conduct, incidents and, possibly, mode of liability. It is even more difficult for the state that wishes to avoid ICC involvement and therefore begins investigations and prosecutions prior to the ICC Prosecutor's formulation of a case. That state must engage in the precarious exercise of *predicting* which person, conduct, incidents and possibly mode of liability the ICC Prosecutor would choose if he or she were to become involved.[60] If it turns out that the ICC Prosecutor focuses on different conduct, incidents and modes of liability, the ICC's case will be admissible on grounds of inaction of the state, no matter how much that state has investigated and prosecuted. As *Lubanga* illustrates, even if the domestic proceedings focus on conduct that constitutes the basis of charges of genocide or crimes against humanity, the ICC's case will be admissible as long as it involves only *one* type of conduct not covered by the domestic proceedings (in Lubanga's case, the charges of war crimes related to child soldiers), including where the ICC's charges are less serious.

A state can thus guarantee avoiding or ending ICC involvement only by investigating *all possible* persons, conduct, incidents and modes of liability, since, if the ICC Prosecutor wishes to pursue a case, he or she can always achieve it by intentionally selecting persons, conduct, incidents and modes of liability that have not been covered by domestic proceedings.[61] Once the Court's jurisdiction has been triggered, the state that wishes to avoid or end ICC involvement thus loses all prosecutorial discretion.[62] The ICC Prosecutor, by contrast, has in practice total discretion in his or her decision which person, conduct,

[60] See also Heller 2012:241 ('the same-conduct requirement expects states to be mind-readers').

[61] See also *Admissibility Challenge Katanga*:[39] ('The ICC Prosecutor could, in many instances, be in a position to put an end to serious investigations and prosecution at the national level, and for what reason? There would be no functional reason as it would merely substitute *bona fide* national proceedings for investigations which are just as selective – in some cases, even more selective. It is to be noted that in the present case the accused was investigated for a far wider range of alleged events.').

[62] See also *Government of Kenya Admissibility Reply Muthaura et al.*:[27] and *Government of Kenya Admissibility Reply Ruto et al.*:[27] (the same-person test 'could be seen as compelling State authorities to surrender independence on the "say-so" of the ICC Prosecutor whose mere identification of possible suspects could embarrass a State to "adjust" its own proper prosecution policy in order to avoid the State

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incident and mode of liability to charge. This inequality in discretion is difficult to square with any idea of primacy of domestic justice systems.

But, as has been argued from the outset, complementarity as a legal principle – as opposed to as 'big idea' – exists only to the extent it is set forth in the Statute: if the erosion of any domestic prosecutorial discretion is a consequence of the way that complementarity is set forth in the Rome Statute, it is still a consequence of complementarity, even if difficult to reconcile with any *idea* one may have of complementarity being intended as primacy of domestic jurisdictions. The question is thus whether the Statute indeed requires the same-conduct test in its strict interpretation of requiring the same acts, same factual allegations and same modes of liability.

The Chambers have not explained why the same-conduct test was, in the Pre-Trial Chamber's words, a *sine qua non*;[63] after its *deus ex machina* appearance in *Lubanga*, the test was simply repeated by other Chambers. But OTP submissions and academic literature on the topic have put forward some cogent textual arguments.[64] First, the same-person-same-conduct requirement is explicit in the *ne bis in idem* scenario: article 20(3) requires trial of the same *person* for the same *conduct* for a case to be inadmissible.[65] Article 17(1)(c) refers to this article, and for reasons of consistency the term 'case' in article 17(1)(a), (b) and (d) should consist of the same two components: same person and same conduct.[66] It could be countered, however, that the

humiliation of having authority wrested away to the ICC for those chosen or identified as suspects by the Prosecutor.').

[63] *Decision Arrest Warrant Lubanga*:[31].

[64] See *OTP Response to Admissibility Challenge Katanga*, (OTP official) Rastan 2008, Rastan 2011 and Robinson 2012.

[65] *OTP Response to Admissibility Challenge Katanga*:[72] and Rastan 2008:437–8 and Rastan 2011:439–41.

[66] See Court of Venice, *Ministry of Defence* v. *Ergialli*:733 for the principle that identical terms used in different places in a treaty are presumed to have an identical meaning in each place. A counter-argument could be that art. 17 does not require consistency in the three inadmissibility scenarios, given that they are structured differently in other respects, too (for instance, inability is relevant for the scenarios in art. 17(1)(a) and (b), but not for (c)). However, in these other respects in which art. 17(1)(c) explicitly differs from art. 17(1)(a) and (b), it is *easier* to win an admissibility challenge after completed domestic trials; an interpretation according to which the strict same-conduct test applies only in the *ne bis in idem* scenario would lead to the paradoxical situation that it is easier to challenge

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same person for the same conduct requirement referred to in the chapeau of article 20(3) does not apply in the application of article 17(1)(c), since the latter provision contains a different and broader criterion, namely, 'conduct which is the subject of the complaint'. It refers to article 20(3) only for the criteria that 'permit' retrial despite the prohibition in the chapeau of article 20(3), namely, the circumstances elaborated in article 20(3)(a) and (b).

The stronger argument is that the structure of article 90, an article in the part of the Statute on cooperation, suggests that admissibility can be challenged only if the case involves the same conduct.[67] In the context of competing extradition requests, subsections 1 to 6 discuss admissibility assessments in a 'case' (article 90(2)–(6)) involving 'the same person for the same conduct' as the ICC's request (article 90(1)). By contrast, article 90 does not refer to admissibility challenges in the scenario of competing requests for the extradition 'of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender' (article 90(7)), suggesting that in such a scenario there is no admissibility to challenge.[68] The same-conduct test thus finds some support in the Statute.

The Statute provides far fewer grounds for a 'same incident' or a 'same mode of liability' requirement as part of the same-conduct test. The only argument that has been put forward for the same-incident requirement is that for the purposes of *ne bis in idem* in domestic criminal law there usually is no *idem* if the suspect (A or B), conduct

admissibility while investigations are ongoing or after a decision not to prosecute than after a completed trial. See also Rastan 2011:440–1.

[67] *Ibid.*:444–5.

[68] *Ibid.*:443–4 and *OTP Response to Admissibility Challenge Katanga*:[77]–[82] have advanced as another argument that the Statute differentiates in Part IX between on the one hand cases in which there is 'an admissibility challenge under consideration by the Court' (art. 95) and on the other hand cases 'different from that to which the [Court's cooperation] request relates' (art. 94) or involving 'a crime different from that for which surrender to the Court is sought' (art. 89(4)). (As pointed out by Stahn 2012a:n. 109, 'crime' in art. 89(4) is a misnomer. It should refer to 'case', as art. 94 (the *lex generalis* with respect to the *lex specialis* in art. 89(4)) does.) However, what follows from this cooperation regime is that the Statute recognises that the ICC's proceedings may affect 'case[s] different from that to which the request relates' and in which there thus is no admissibility challenge. It does not follow, however, that admissibility can be challenged only if the case involves the *same conduct*.

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(murder or rape), date (1 or 2 January), place (village C or village D) and victims (victim E or victim F) are not identical.[69]

This argument reveals the key reason why the same-conduct test, and particularly the same-incident test, makes it practically impossible for a state to win on grounds of complementarity when faced with an ICC Prosecutor determined to be or stay involved: the domestic analogy fails to recognise the different context in which international crimes are typically committed.[70] In the context in which domestic criminal law is ordinarily applied, namely, in situations in which crime is the exception, the same-conduct and same-incident test can be fulfilled relatively easily. The tests are, however, more difficult to fulfil in the context in which most international crimes take place, namely, in situations in which crimes come close to becoming the rule, or at least are so widespread that the literature refers to them as 'mass atrocity'.[71] In the ensuing 'universe of criminality',[72] it will in most circumstances be virtually impossible for any justice system, whether domestic or international, to investigate and prosecute all incidents of crime.

The fundamental question is whether the Statute recognises this different context, or, at least, whether it allows for this different context to be taken into account when interpreting the term 'case' for the purposes of complementarity. The textual arguments in favour of the same-conduct test, discussed above, suggest that the Statute does not make provision for the context of mass atrocity.[73] However, such textual arguments need not be treated as dispositive. As will be elaborated below, the Statute does not seem to allow the ICC

[69] The mode of liability, however, is likely to fall in the *idem* category (after having been convicted of murdering alone, one would not be retried for murdering with another person).

[70] As is acknowledged by Rastan 2008:438–40 and Rastan 2011:441–5, who concludes, however, that '[t]here is no reason that the ICC should compromise on the application of such a well-entrenched legal principle' as *ne bis in idem* (footnote omitted). He also acknowledges that the consequence of the strict application may negatively impact on the design of the complementarity scheme to encourage domestic proceedings, but considers these policy considerations to be addressed by the Assembly of States Parties, not by the Court. For the same view, see *OTP Response to Admissibility Challenge Katanga*:[4].

[71] See e.g. Aukerman 2002:43, Drumbl 2007:3 and Osiel 2009.

[72] Rastan 2008:439 and Rastan 2011:442.

[73] As has been pointed out above, there are fewer textual arguments for the same-incident test.

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Prosecutor any prosecutorial discretion either, suggesting as it does that, in case of referrals, the Prosecutor 'shall' investigate and prosecute unless certain criteria are not fulfilled.[74] Yet in practice it is uncontested that the ICC Prosecutor must and does enjoy discretion given the universality of criminality that he or she faces.[75] Just as textual arguments are not decisive on the issue of the ICC Prosecutor's discretion, so too should they not be decisive for that of the domestic justice system.

Turning to the object and purpose of the complementarity principle, the early case law, public statements and literature explained complementarity as a principle balancing sovereignty and international criminal justice.[76] Given that the focus of the Statute as a whole is the promotion of international criminal justice, the object and purpose of complementarity specifically must be to protect sovereign interests in the wider context of the pursuit of international criminal justice. The principle thus recognises that states that join the anti-impunity struggle can have interests that do not entirely coincide with the pursuit of international criminal justice at the international level. For example, a state may have an interest in the assurance that if it genuinely investigates and prosecutes crimes within the Court's jurisdiction it does not risk ICC involvement. As the discussion on the Juba peace process in Chapter 3 will show, such assurance can be essential for the success of peace negotiations. A state trying to grapple with a past of mass atrocity may also need a moment of closure, a moment when it is accepted that the crimes of the past have been adequately dealt with.[77] In most scenarios of mass atrocity, the same-conduct test will prevent the state from achieving this certainty or closure on the basis of complementarity – given the massiveness of the crimes, there are always other incidents, conduct and modes of liability that the ICC Prosecutor could charge. The object and purpose of complementarity, a principle purposely inserted

[74] RS, art. 53. See further below on prosecutorial policy.
[75] *Ibid.*
[76] See Chapter 1, n. 17 for the literature.
[77] This argument also counters the otherwise compelling argument that domestic proceedings against the same person but for different conduct should be addressed exclusively by the cooperation regime and not by the admissibility regime, since the former leads to sequencing and the latter results in permanent inadmissibility of a case before the ICC (Robinson 2012:179). A state may have sovereign interests in guaranteeing suspects that the national proceedings will come instead of – and not be followed by – ICC proceedings. A state may also require closure of criminal proceedings in order to reach stability.

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into the Statute to protect state sovereignty, thus requires an interpretation of 'case' that gives some deference to prosecutorial choices of the domestic justice system.

The Court's later case law, however, suggests that the Chambers perceive complementarity as a principle that subordinates the protection of state sovereignty to the goal of ending impunity.[78] In response to the Government of Kenya's argument that the Court when deciding on its admissibility challenge should take into account Kenya's sovereign interests,[79] the Pre-Trial Chamber responded, citing a consideration of the Appeals Chamber in *Katanga*:

> The Chamber is well aware that the concept of complementarity and the manner in which it operates goes to the heart of States' sovereign rights. It is also conscious of the fact that 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. If States do not [. . .] investigate [. . .], the [. . .] Court must be able to step in.' Therefore, in the context of the Statute, the Court's legal framework, the exercise of national criminal jurisdiction by States is not without limitations. These limits are encapsulated in the provisions regulating the inadmissibility of a case, namely articles 17–20 of the Statute.[80]

The statement, including the quotation from the Appeals Chamber, is problematic. First, articles 17–20 do not contain any limitations on states; they are rules on the admissibility of cases *before the Court*. The Statute does not oblige states to stop domestic proceedings when a case is admissible before the ICC; states are merely obliged to cooperate with the Court.[81] Complementarity affects states' sovereignty not by depriving them of jurisdiction, but by allowing the ICC to exercise

[78] Ratan 2012.
[79] *Admissibility Challenge Government of Kenya*:[27]–[28].
[80] *Admissibility Decision Ruto et al. (PTC)*:[44] and *Admissibility Decision Muthaura et al. (PTC)*:[40], referring to *Admissibility Judgment Katanga (AC)*:[85].
[81] See below: 'A state's jurisdiction to adjudicate is unaffected by ICC intervention'.

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concurrent jurisdiction under certain circumstances.[82] Secondly, the lofty aspirations expressed in the Statute's preamble are not the same as the Statute's object and purpose: as has been argued above, the object and purpose of the Rome Statute is not to 'end impunity' at any cost, but to create a permanent international criminal court, complementary to national criminal jurisdictions, and to regulate the conduct of the court and the obligations of states towards it.[83] Thirdly, the object and purpose of the Statute is not by definition also the object and purpose of each individual provision in the Rome Statute, in this case the provisions on complementarity. As has been argued above, given the Statute's overall focus on the interests of international criminal justice as pursued by the ICC, it can be argued that the specific object and purpose of complementarity is to protect sovereign interests in the pursuit of justice for crimes within the Court's jurisdiction. In the Appeals Chamber's approach, the purported object and purpose of the Statute as a whole – to 'end impunity' – swallows up the object and purpose of specific provisions. Finally, complementarity does not strike a balance between safeguarding the primacy of domestic proceedings *vis-à-vis* the Court on the one hand and something else; complementarity *is* the primacy of domestic proceedings, subject to the criterion of genuine proceedings.

If the Court's absolute anti-impunity approach persists and all other interests are subjected to the aim of eradicating impunity, the same-conduct test in its strictest interpretation may survive.[84] This test allows one to argue that if the ICC prosecutes a person who has been or is being investigated or prosecuted domestically for different conduct, or for the same conduct but different incidents, it does not compete with the national jurisdiction; all it does is to 'complement' the national jurisdiction to ensure that there is less impunity. This approach does not recognise, and does not want to recognise, that a state that has genuinely investigated or prosecuted that person for different conduct or for different incidents, possibly more serious ones,

[82] See also Ratan 2012:12.

[83] See RS, preamble, and RS, art. 1; see also above 'An obligation to investigate or prosecute pursuant to the Rome Statute?'.

[84] For which the OTP has argued in *OTP Response to Admissibility Challenge Katanga*: [82] ('[T]he "same conduct" test ensures comprehensive accountability for all relevant criminal conduct in a manner which is consistent with the object and purpose of the Statute.').

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may have a legitimate interest in guaranteeing that he or she will not be tried before an international tribunal after a domestic trial.

The ICC is still to decide whether the same-conduct test also requires investigation and prosecution of the same incidents, and, indeed, whether the Appeals Chamber's qualification is an invitation to depart from the same-conduct test. In the latter case, there are alternative approaches that allow states to do their part in ending impunity without making their choices by definition inferior to the seemingly unfettered discretion of the ICC Prosecutor. The defence in *Katanga* has suggested a 'comparative gravity-test' and a 'comprehensive conduct-test'. The former would amount to

> comparing the gravity of the (intended) scope of investigations at the national level and the (intended) scope of investigations by the ICC Prosecutor. Only when the scope of investigations by the ICC Prosecutor would significantly exceed in gravity the scope of national investigations, would the admissibility threshold be met.[85]

The latter would involve comparing

> the factual scope of investigations. Only when the ICC Prosecutor's scope of investigation is significantly more comprehensive than the scope of national investigations, would there be a basis for admissibility.[86]

Each test would require difficult factual comparisons and possibly subjective assessments of 'gravity'. But they would allow more deference to the choices of a state that addresses impunity, particularly when the state investigates the same person and addresses a broader or graver range of facts. Such deference would also show some international humility – a recognition that selectivity is a feature of judicial responses to mass atrocity, whether domestic or international, and that the international selection is not by definition superior.[87]

The requirement of an 'investigation'

In addition to the question as to what amounts to the same 'case', the ICC's early case law on admissibility grappled with the question what

[85] *Admissibility Challenge Katanga*:[46]. [86] *Ibid.*:[47].

[87] For instance, selection to a large extent depends on the availability of evidence. A domestic prosecutor may have more evidence with respect to one incident; an international prosecutor may have more with respect to another incident. This does not make one incident inherently more serious than the other.

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amounts to an 'investigation'. The Statute does not define what kinds of 'investigation' render cases inadmissible before the ICC. However, by referring to an investigation concluded by a decision 'not to prosecute', article 17(1)(b) suggests that investigations must have the potential to be followed by prosecution.[88] Moreover, article 1 provides that the ICC 'shall be complementary to national *criminal* jurisdictions'.[89] Read in this context, 'investigation' in article 17 probably does not cover investigations by commissions of inquiry that can only recommend that other bodies further investigate with a view to prosecution.[90]

What amounts to the opening of a criminal investigation varies from legal system to legal system; the ICC is still to pronounce on what suffices for the purposes of article 17. But, in terms of evidentiary standards, the Appeals Chamber has accepted the Pre-Trial Chamber's requirement that the state must show 'concrete investigative steps' and the Prosecutor's view that the 'Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations'.[91]

It is on this ground that the ICC could and, it is suggested, should have found the cases of Lubanga and Katanga admissible. In those cases, the investigatory activities did not appear to have gone beyond the opening of a *dossier*.[92] Just as the Court found in the Kenya situation that asserting that investigations are ongoing does not suffice,[93] it could

[88] See also Robinson 2006:144. [89] Emphasis added.

[90] Cf. *contra* Cárdenas 2005:58–9. Drumbl 2011:222–31 convincingly argues for an approach of 'qualified deference', which would create a rebuttable presumption in favour of local institutions even if these do not conform to the liberal criminal model. As an alternative to amending the Statute to include this standard, he proposes an interpretative canon. One guideline would be particularly relevant to the interpretation of 'investigation' in art. 17, namely, that of good faith, which 'would encourage a broader vision where transitional justice mechanisms that contemplate neither prosecution *per se* or investigation geared towards attributions of individual penal responsibility or stigma could pass muster in part owing to the good faith motivations behind their adoption' (Drumbl 2011:227–8 and 231–2). See also Drumbl 2007:187–94.

[91] *Admissibility Judgment Muthaura et al. (AC)*:[80] and [62] and *Admissibility Judgment Ruto et al. (AC)*:[82] and [63].

[92] *Transcripts Lubanga 2 February 2006*:39 line 8, Observations *DRC Admissibility Challenge Katanga*:3–4 and *Transcripts Admissibility Challenge Katanga*:77 line 16–78 line 19. See also Rastan 2011:446–8.

[93] *Admissibility Judgment Muthaura et al. (AC)*:[2] and [62] and *Admissibility Judgment Ruto et al. (AC)*:[2] and [63].

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have held in *Lubanga* and *Katanga* that an 'empty file' is insufficient to prove ongoing investigations.[94] Had it done so, the cases would have been admissible on the ground of absence of actual investigations, instead of absence of investigations *in the same case*. Given the DRC's full cooperation with and support of the ICC proceedings, the Court may have tried to circumvent an assessment of the progress of the DRC's investigatory activities since such an assessment is more politically sensitive than the seemingly technical comparison of international and domestic charges. Nonetheless, by assessing whether there were actual investigations, the Court could have avoided developing the technical legal test that has come to dominate the Court's practice and that reduces the practical relevance of the rule of primacy of domestic justice systems almost to nil.

A decision not to prosecute

A case can be inadmissible not just when it is being investigated or prosecuted (article 17(1)(a)) or has been tried (articles 17(1)(c) and 20(3)), but also when it has been investigated but the state concerned 'decided not to prosecute' the person concerned, unless, again, 'the decision resulted from the unwillingness or inability of the State genuinely to prosecute' (article 17(1)(b)). In *Katanga*, DRC proceedings had been terminated because the suspect was transferred to the ICC. According to the Appeals Chamber, this decision did not, however, amount to a decision not to prosecute: 'The thrust of [the decision to transfer someone to the ICC is] not that the [person] should not be prosecuted, but that he *should* be prosecuted, albeit before the International Criminal Court.'[95] In the Chamber's view, there were thus neither ongoing domestic proceedings for the purposes of article 17(1)(a) nor a decision 'not to prosecute' for the purposes of article 17(1)(b), and the case was admissible. The judgment implies that, if a state has referred a situation and transfers a suspect, the case is by definition not

[94] OTP submission on the Congolese Lubanga proceedings: 'the file in respect of Thomas Lubanga Dyilo is empty – it is literally empty' (*Transcripts Lubanga 2 February 2006*:38 line 8).

[95] *Admissibility Judgment Katanga (AC)*:[82]. The reasoning was applied in *Decision Admissibility Challenge Bemba (TC)*:[83] ('a "decision not to prosecute" in terms of article 17(1)(b) of the Statute does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC') and confirmed in *Judgment Admissibility Challenge Bemba (AC)*:[74].

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inadmissible on grounds of complementarity, unless the individual has already been tried in a manner which satisfies article 20(3).

Where domestic proceedings have been initiated: unwillingness and inability

Where a state has initiated relevant proceedings in the same case, the case is nonetheless admissible before the ICC if the state 'is unwilling or unable genuinely to carry out the investigation or prosecution' or its decision not to prosecute 'resulted from the unwillingness or inability of the State genuinely to prosecute'.[96] The emphasis of the test is not on being 'able and willing' – the state would seem to be so, given that proceedings are actually taking place or have taken place – but on the requirement that the proceedings be conducted 'genuinely'.[97] In this light, the attenuated reference in articles 17(2) and (3), respectively, to 'unwillingness' and 'inability' must be taken to be shorthand for 'unwillingness genuinely to investigate or prosecute' and 'inability genuinely to investigate or prosecute'.[98] 'Genuineness' is thus not a criterion independent of unwillingness and inability.[99] In the context of unwillingness, the meaning of 'genuinely' comes closest to 'in good faith' or 'not in a sham manner'. In combination with inability,

[96] RS, art. 17(1) and (2).

[97] See also Robinson 2006:141. One consideration of one Trial Chamber, some ICC officials and some scholars suggest that the adverb 'genuinely' is linked to the adjectives 'unwilling' and 'unable' rather than to the verb 'to carry out' (e.g. *Decision Admissibility Challenge Bemba (TC)*:[239] ('Under this provision, the case is inadmissible if the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute, unless the latter is unwilling or genuinely unable to do so.'), ICC Registrar Arbia and Bassy 2011:56 ('discussion on what amounts to a genuine inability'), El Zeidy 2002:900 (but see differently: El Zeidy 2008b:165), Schabas 2004:87, Newton 2001:*passim* and Newton 2011:320). But recourse to the French text, the context provided by the unequivocal art. 17(1)(b), and the fact that the question of willingness and ability arises only in the case of ongoing or completed investigations or ongoing prosecutions contradict this. The word order 'to genuinely prosecute' must have been avoided on account of the grammatical protocol against split infinitives. See also Robinson 2010:87.

[98] Despite this, *Decision Arrest Warrant Lubanga*:[29] remarkably omitted the criterion of genuineness when setting out the admissibility test. A remark by the PTC in [32] suggests, however, that the Chamber can be taken to have intended to read the criterion of genuineness (art. 17(1)(a) and (b)) into its descriptions of unwillingness and inability (arts. 17(2) and (3) respectively).

[99] Cf. *contra* Newton 2011:317.

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the meaning of 'genuinely' is close to 'effectively', the drafters' attempts to avoid that word notwithstanding.[100]

A determination of unwillingness genuinely to conduct proceedings involves an assessment of a state's intentions. States demanded 'objective' criteria for an assessment of inherently subjective intentions.[101] Article 17(2) provides:

> In order to determine unwillingness in a particular case, the court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Shielding from criminal responsibility is the most subjective ground of unwillingness, necessitating an inquiry into the intent of a state. It is sufficient to establish that the purpose is to shield the person from being held criminally responsible, irrespective of whether there are defensible reasons for that shielding (for instance, an official decision not to prosecute, as in article 17(1)(b), in exchange for the person's participation in peace negotiations).[102] The last two grounds are more objective. The absence of the intent to bring to justice need not be positively proven, but can be inferred from an unjustified delay or lack of impartiality and independence seemingly inconsistent with such an intent.[103]

The three listed indicators of unwillingness confirm that what is at issue is unwillingness to conduct genuine proceedings. In all three circumstances, it is the lack of an 'intent to bring the person concerned to justice' that undermines the genuineness. This is implicit in

[100] See UN Doc. A/51/22 (1996):38, Holmes 2002:673–4 and Politi 1997:142–3.
[101] Holmes 1999:59. [102] See also Kleffner 2008:137.
[103] See also Williams 1999:393–4.

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the first circumstance, namely, proceedings 'made for the purpose of shielding the person concerned from criminal responsibility'. The second and third situations mention this lack of intent explicitly. The definition is not concerned with a general unwillingness to conduct proceedings: in most instances in which a state is unwilling to carry out proceedings, there will be no proceedings and the question of genuineness will therefore not arise. In this light, the decision of Trial Chamber I in *Katanga* – the only Chamber to find a case admissible on grounds of unwillingness so far – that in addition to the unwillingness provided for in article 17(2), a state should also be considered 'unwilling' if it transfers a person to the ICC,[104] is difficult to reconcile with the text of article 17.[105]

Article 17(3) provides criteria for the determination of inability genuinely to conduct proceedings:

> In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Accordingly, the Court shall consider both the causes and the consequences of inability to investigate or prosecute.[106] As to causes, the provision mentions 'a total or substantial collapse or unavailability of its national system'. As regards the consequences thereof, the provision is more open-textured. The expression 'otherwise unable to carry out its proceedings' allows the Court to determine that a state is unable to investigate or prosecute in situations other than that of an inability to obtain the accused or the necessary evidence.[107]

[104] *Admissibility Decision Katanga (TC)*:[77]–[78].

[105] Not too much value should be attached to this decision, particularly since the Appeals Chamber did not adopt this reasoning. The reasoning was rejected in *Admissibility Decision Bemba (TC)*:[243]–[244].

[106] *Admissibility Decision Bemba (TC)*:[245]–[246], to date the only ICC decision in response to an admissibility challenge to engage with inability (albeit *obiter* since the case was found admissible on grounds of inaction), did not do a thorough ability assessment, probably because the Government of the CAR itself had argued it was 'unable' and the CAR's Cour de Cassation had found that 'there can be no doubt that the CAR judicial services are unable genuinely to investigate or prosecute [the charges]' (*ibid.*:[246]).

[107] See e.g. Holmes 2002:678.

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The first two of the listed scenarios for inability to conduct genuine proceedings, namely, total or substantial collapse of the national judicial system, are the most obvious. In such situations, it is unlikely that any proceedings will have taken place, obviating the need for an assessment of their genuineness. However, if proceedings do take place, the state may not be able to conduct them genuinely, as evidenced by its being 'unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'. Were these the only scenarios for inability to conduct genuine proceedings, states could be found unable to do so only in exceptional circumstances.[108]

However, the third scenario for such inability, namely, the unavailability of a national judicial system, expands the scope of the provision considerably and reveals the decisiveness of the factor of genuineness. Not only practical circumstances (for example, a lack of judicial personnel, an insecure environment or a lack of essential cooperation by other states) but also normative factors can render a system 'unavailable' genuinely to conduct proceedings.[109] Examples of such normative factors are the applicability of amnesty or immunity laws,[110] the lack of the necessary extradition treaties and the absence of jurisdiction under domestic law. In many of these situations, it would be far-fetched to argue that the domestic justice system as such is 'unavailable'. But in the particular case the system would be unavailable to conduct proceedings genuinely. Consequently, states with fully functioning criminal justice systems can be found 'unable', provided that, in the particular case, the system is unavailable genuinely to conduct proceedings.[111]

In the third situation of inadmissibility, namely, when the person investigated or prosecuted by the ICC has already been tried by another court,[112] the requirement of genuineness is implicit in the

[108] As is argued in Bassiouni 2005:138 and Olásolo 2005:154 and 166.

[109] In RS, art. 88, the term 'availability' is also used in the context of national legal procedures. Cf. *contra* Cárdenas 2005:126.

[110] ICC-OTP 2003c:15 and its Annex 4.

[111] In circumstances of normative unavailability the factors constituting the unavailability and flowing from the unavailability become hard to distinguish: legislation or absence thereof renders the national justice system 'unavailable' and at the same time makes the state 'unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'.

[112] According to *Decision Admissibility Challenge Bemba (TC)*:[248], being 'tried' requires a 'decision on the merits of the case' and must 'result in a final decision or acquittal of the accused'.

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two exceptions to the prohibition of *ne bis in idem*. These exceptions are nearly identical to two of the circumstances that evince unwillingness genuinely to prosecute as defined in article 17(2).[113] Inability to conduct the proceedings genuinely, however, is no longer an exception to inadmissibility of a case before the ICC once a domestic trial has been concluded. This might be explained by the fact that, in many jurisdictions, the grounds for retrial, especially if they relate to blunders by the prosecution, are very limited. It would have been unacceptable to many states if the ICC had been granted extensive powers to retry. More generally, the states negotiating the Rome Statute wished to preclude the Court from acting in effect as an appellate court.[114] The result of the current arrangement, however, is that it is more attractive to states to wait until a domestic trial has ended before challenging admissibility.[115]

Low punishment or a pardon is not a ground for admissibility *per se*

As is apparent from the limited exceptions to the prohibition *ne bis in idem* embodied in article 20(3) of the Statute, a case which has resulted in an acquittal, insignificant punishment or an immediate pardon is not by definition admissible before the ICC.[116] It must be proved that the proceedings were vitiated from the outset by a lack of genuineness, or more precisely by the absence of an intent to bring to justice, which can be evinced by shielding (article 20(3)(a)) or a lack of independence and impartiality (article 20(3)(b)). It is not easy to prove after the trial the absence at the beginning of the proceedings of such an intent; but the requisite evidence could be provided by, for instance, an agreement that the accused will never be punished or will receive a mild sentence.

[113] Namely, where the proceedings were for the purpose of 'shielding the person concerned from criminal responsibility' or where the proceedings demonstrated 'a lack of independence and impartiality inconsistent with an intent to bring the person concerned to justice' (RS, art. 20(3)(a) and (b)).

[114] UN Doc. A/50/22 (1995):[43], UN Doc. A/CONF.183/C.1/SR.11 (1998):[19] and Holmes 2002:673.

[115] See also Chapter 3, 'Complementarity: the linchpin of the agreement'.

[116] Belgium's suggestion to this effect with respect to pardons (see UN Doc. A/CONF.183/C.1/SR.11 (1998):[28]) did not make it into the Statute.

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The ICC is not a human rights court overseeing compliance with fair trial rights

Nor is the violation of the accused's right to a fair domestic trial an independent ground on which the ICC may or must find a case admissible.[117] Arguments to the opposite effect are founded on interpretations contrary to the text and context of article 17 of the Rome Statute. One argument occasionally made is that 'a national system should be considered "available" [for the purposes of an ability genuinely to investigate or prosecute] only when it incorporates the entire spectrum of substantive and procedural safeguards enshrined in the Statute and by which the ICC is to abide'.[118] However, the fact that the Statute requires the Court's own procedures to be in accordance with international human rights standards does not imply that the Court is entitled to apply the same standards as benchmarks for the genuineness of domestic proceedings.[119] Moreover, during the drafting of the Statute, a reference to fair trial rights was deliberately removed from the criteria for inability genuinely to conduct proceedings.[120]

A second argument sometimes heard is that the violation of fair trial rights to the detriment of the accused amounts instead to an unwillingness genuinely to conduct proceedings. However, the references in articles 17(2) and 20(3)(b) of the Statute and in rule 51 of the Rules of Procedure and Evidence (RPE) to due process principles permit recourse to these principles only by way of guidance in the interpretation of concepts such as an unjustified delay and lack of independence and impartiality. A domestic court's failure to abide by such principles is not an independent ground for finding cases admissible. Moreover, unjustified delay or a lack of independence and impartiality may be grounds for admissibility[121] only if the cumulative requirement that they be 'inconsistent with an intent to bring the person concerned to justice' is fulfilled.[122] A lack of independence and

[117] See also Heller 2006.

[118] Gioia 2006:1113 (footnotes omitted). See, in a similar vein, Ellis 2002:241, Yang 2005a:123 and, implicitly, UN Doc. S/2005/60 (2005):[586].

[119] This is argued in Gioia 2006:1111 and Ellis 2002:226.

[120] Holmes 1999:49.

[121] See RS, art. 17(2)(b) and (c) and art. 17(1)(c) in combination with art. 20(3)(b).

[122] The fact that this is not a ground for admissibility in its own right is apparent from the wording 'which . . . is inconsistent with an intent' in art. 17(2)(b) and from the word 'and' in arts. 17(2)(c) and 20(3)(b). Contrast this with the wording in UN Doc. A/49/10 (1994):57 or e.g. the 2007 Statute of the Special Tribunal for

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impartiality will be inconsistent with an intent to bring to justice only if it has worked to the benefit of the accused.[123]

It could perhaps be argued that the expression 'to bring to justice' in articles 17(2)(b) and (c) and 20(3)(c) means 'to bring to justice in a fair manner', with the result that the domestic violation of due process norms to the detriment of the accused would render a case admissible before the ICC.[124] This interpretation, however, goes against the ordinary meaning of 'to bring to justice', which is 'to catch ... and try [someone] in a court of law',[125] not to try someone in a fair manner. The expansive interpretation also renders redundant the first parts of articles 17(2)(b) and (c) and 20(3)(b),[126] namely, the references to unjustified delay and lack of independence and impartiality, since these are merely examples of inconsistency with an intent 'to bring to justice in a fair manner'. The context, too, militates against the expansive interpretation. Article 17 embodies admissibility criteria which render cases admissible before the ICC when there is a risk that, at the national level, a person will escape investigation and prosecution.

More generally, the ICC's mandate is to prosecute individuals under international criminal law, not to supervise states' compliance with their international human rights obligations. It is true that, according to the Statute, the 'application and interpretation of law ... must be consistent with internationally recognized human rights'.[127] However, this provision neither requires nor justifies an interpretation of 'to bring to justice' that not only turns the Court, whose *raison d'être* is to try individuals, into a court with jurisdiction to monitor domestic observance of fair trial rights but also goes against the ordinary meaning and context of the latter phrase.

A final argument raised in support of the claim that the Court may find a case admissible in the event of a domestic violation of the

Lebanon, art. 5(2), where the factors are alternative. See also Kleffner 2008:150. But cf. *contra* ICC-OTP 2003d:4.

123 See also Carnero Rojo 2005 and Benzing 2003:612. Cf. *contra*, but on different grounds, Gioia 2006:1111–13.

124 In this vein, see Gioia 2006:1101, Schabas 2004:84 and Van der Wilt 2011.

125 *Cambridge International Dictionary of English* 1996:774.

126 On the canon of construction according to which 'a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text', see ICJ, *Anglo-Iranian Oil Co.*:105.

127 RS, art. 21(3).

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accused's right to a fair trial is that the wording 'shall consider whether' indicates that the enumeration of circumstances of unwillingness and inability in article 17(2) and (3) is merely illustrative.[128] However, there are compelling reasons to treat the provisions as exhaustive determinants of a state's unwillingness and inability genuinely to conduct proceedings.[129] There is no explicit indication that the circumstances cited therein are only illustrative.[130] Indeed, each provision directs the Court to consider whether 'one or more of the following exist', a formulation which rather suggests an exhaustive list of (not mutually exclusive) factors.[131] Moreover, as definitions of exceptions to the rule that cases are inadmissible when there are or have been domestic proceedings, articles 17(2) and (3) should be interpreted narrowly.[132] Lastly, the careful negotiations leading to the adoption of these provisions[133] do not support reading the factors cited therein as merely illustrative. In conclusion, violations at the domestic level of the accused's right to a fair trial do not constitute a ground on which the ICC, in contrast to the ICTY and ICTR,[134] may claim primacy over domestic proceedings.[135]

[128] For the argument that the list of circumstances is merely illustrative, see *OPCV Observations on Katanga Appeal on Admissibility*:[22]–[27], Hall 2003:15–16 and Robinson 2003:500.

[129] See also Cárdenas 2005:133 and Human Rights Watch 1998:70.

[130] By way of contrast, arts. 90(6) and 97 use 'inter alia' and 'including but not limited to'. See also Benzing 2003:606.

[131] Holmes 2002:675.

[132] Benzing 2003:606.

[133] Holmes 2002:675. See also L/2773 (1996).

[134] The ICTY can claim jurisdiction during or after, and the ICTR can claim jurisdiction after domestic proceedings on the ground that the domestic proceedings lack(ed) impartiality and independence, irrespective of whether this is to the benefit or detriment of the accused (ICTY Statute, arts. 9 and 10(2)(b), ICTY RPE, rule 9(ii) and ICTR Statute, art. 9(2)(b)). The ICTY and ICTR have also reviewed domestic fair trial standards when considering transferring cases to national courts under rule 11 *bis* of their respective RPE (see e.g. ICTY, *Stanković Referral Decision (AC)* and ICTR, *Bucyibaruta Referral Decision*).

[135] It could be that the ICC interprets and applies RS, art. 21(3) in such a way that it considers itself bound, following case law of the European Court of Human Rights and practice under the International Covenant on Civil and Political Rights, not to transfer an accused to a state on the ground that there is a risk that the person will be subjected to torture or other inhuman or degrading treatment or punishment, or will suffer a flagrant denial of a fair trial. However, this assessment is related to questions of cooperation with states; as set out above, it was intentionally not made part of the admissibility assessment. The fact that the Court cannot transfer a person to a certain state does not mean that it therefore must, indeed

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The argument that, because (in some parts of the world) the death penalty violates international human rights law, a case originating from a country that applies the death penalty is admissible before the ICC founders on the same grounds. Moreover, the Statute explicitly provides that '[n]othing in [the part on penalties] affects the application by States of penalties prescribed by their national law'.[136]

In a nutshell, complementarity's substantive provisions give states that wish to render cases inadmissible before the ICC some guidelines (for instance, there must be genuine criminal investigations in the same case) but also considerable leeway (for example, states must charge the same conduct, but not necessarily the same crime, and the domestic proceedings need not resemble the ICC's in all respects, for instance in sentencing). By providing states with some sort of checklist for inadmissibility, the guidelines have the potential to shape complementarity's catalysing effect. The leeway, however, may limit complementarity's catalysing effect on the substance and procedure of domestic proceedings but may enhance its catalysing effect on domestic proceedings as such.

THE PROCEDURAL ASPECTS OF COMPLEMENTARITY

The procedural aspects of complementarity are as important for its potential catalysing effect as its substantive features. It will be argued that, first, complementarity contains a primary right for *all* states – states not parties to the Rome Statute can thus also invoke the principle to render cases before the ICC inadmissible, and for that reason begin domestic proceedings. Secondly, complementarity may or must be assessed by several actors and at several stages in the ICC proceedings. This is particularly relevant because states are not prohibited from conducting proceedings in parallel with the ICC. Depending on how the Court's jurisdiction is triggered, states can in some instances directly shape the scope of the ICC's investigations on grounds of complementarity. However, a state cannot force the

may, itself exercise jurisdiction over that person by changing the Statute's admissibility rules. See also the ICTR's *Ntuyahaga Referral Decision*, honouring the Prosecutor's request to withdraw the indictment but refusing to hand over the accused to Belgium in the absence of an express legal ground for such a transfer in the Tribunal's Statute or (pre-11 *bis* procedure) Rules.

136 RS, art. 80.

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Prosecutor to end an investigation. Complementarity's potential catalysing effect may also be limited by the fact that the ICC does not have a conditional deferral procedure like the ICTY and ICTR.

Complementarity contains a primary right for *all* states

The references in article 17(1) to 'a State', in contradistinction to 'state party', make it clear that genuine investigation or prosecution by any state, and not just by parties to the Statute, renders a case inadmissible. Accordingly, if Sudan, not a state party, conducts genuine domestic proceedings in the cases that the OTP has selected in the Darfur situation, the cases are inadmissible before the ICC.

The Prosecutor must assess complementarity prior to opening an investigation

The first moment in ICC proceedings when complementarity must be assessed is when the Prosecutor decides whether or not to open an investigation.[137] In cases of referral, article 53(1) provides that the Prosecutor shall initiate an investigation, unless he or she determines that there is no reasonable basis to proceed. For this determination, the Prosecutor must consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
(b) The case is or would be admissible under article 17; and
(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.[138]

Being an aspect of admissibility under article 17, complementarity is thus, in accordance with article 53(1)(b), one of the factors that the Prosecutor must assess when deciding whether to open an investigation after a referral. Article 15(3) provides a special rule in respect of the Prosecutor's *proprio motu* investigations, but the test for opening an investigation ends up the same, since rule 48 of the RPE obliges the Prosecutor to consider the factors laid down in article 53(1) when

[137] See also Rastan 2008:441–2, Rastan 2011:454–8 and Olásolo-Alonso and Rojo 2011.
[138] RS, art. 53(1).

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making the determination whether there is a 'reasonable basis to proceed', as required by article 15(3).[139]

The complementarity assessment is case-specific

The text of article 17 makes clear that complementarity must be assessed on a case-by-case basis. In other words, the question is whether 'the case' identified by the ICC is being or has been investigated, prosecuted or tried; the question is not whether the 'situation' that is or could be subject to the Prosecutor's investigation is or has been domestically investigated or prosecuted.[140]

The Statute provides no different assessment for the stage of the proceedings in which the Prosecutor decides whether or not to open an investigation. Even though the Prosecutor may not yet have identified concrete cases – indeed, the entire purpose of investigations seems to be to identify any such cases – article 53 confirms the case-specific character of the admissibility assessment. Accordingly, when the Prosecutor decides whether to open an investigation, he or she must consider whether '[t]he *case* is or would be admissible under article 17'.[141]

The Pre-Trial Chambers have, however, indicated that the word 'case' must be interpreted differently depending on the stage of the proceedings in which admissibility is assessed. In the view of one Pre-Trial Chamber, this

> reference to a 'case' in article 53(1)(b) of the Statute does not mean that the text is mistaken but rather that the Chamber is called upon to construe the term 'case' in the context in which it is applied. The Chamber considers, therefore, that since it is not possible to have a

[139] See also *Decision Authorizing Kenya Investigation*:[24] and *Authorisation Investigation Republic of Côte d'Ivoire*:[17].

[140] In *Decision VPRS 1–6 DRC*:[65], PTC I made the following distinction between situations and cases: 'Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. Cases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear' (footnotes omitted).

[141] RS, art. 53(1)(b) (emphasis added). Cf. *contra* Ambos 2010, analysing the admissibility of a situation.

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> concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of an investigation, the admissibility assessment at this stage actually refers to the admissibility of one or more *potential cases* within the context of a situation.[142]

The Pre-Trial Chambers have given some indications as to how to assess the admissibility of a case in a pre-investigation stage. According to one Pre-Trial Chamber, at the pre-investigation stage

> the admissibility assessment requires an examination as to whether the relevant State(s) is/are conducting or has/have conducted national proceedings in relation to the *groups of persons* and the *crimes* allegedly committed during those *incidents*, which together would likely form the object of the Court's investigations. If the answer is in the negative, the 'case would be admissible'.[143]

In other words, according to the Pre-Trial Chamber:

> The parameters of a potential case … [comprise] two main elements: (i) the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).[144]

In situations in which crimes within the Court's jurisdiction have been committed on a massive scale, there will almost always be 'cases' that have not been investigated or prosecuted domestically[145] and

[142] *Decision Authorizing Kenya Investigation*:[48] (emphasis added). See also [182], where PTC II found that 'the admissibility assessment at [the situation] stage actually refers to the admissibility of one or more *potential* cases within the context of a "situation"'. The potential-cases approach was confirmed in *Authorisation Investigation Republic of Côte d'Ivoire*:[190]. See also ICC-OTP 2011c:[6].

[143] *Decision Authorizing Kenya Investigation*:[52] (emphases added). In *Admissibility Judgment Muthaura et al. (AC)*:[38] and *Admissibility Judgment Ruto et al. (AC)*:[39], the Appeals Chamber confirmed that '[t]he meaning of the words "case is being investigated" in article 17(1)(a) of the Statute must … be understood in the context to which it is applied'. However, deciding on an appeal concerning admissibility at the prosecution stage, the Appeals Chamber refrained from defining the test at the pre-investigation phase other than acknowledging that 'the contours of the likely cases will often be relatively vague'.

[144] *Decision Authorizing Kenya Investigation*:[182]. See also *Authorisation Investigation Republic of Côte d'Ivoire*:[191].

[145] See e.g. *ibid.* [195]–[200].

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thus 'sufficient information to believe that there are cases that would be admissible'.[146] When a state is investigating or prosecuting crimes within the Court's jurisdiction, the Prosecutor could, for reasons of prosecutorial strategy, refrain from opening an investigation with reference to the principle of complementarity. It is, however, unlikely that the Prosecutor will be *legally* prevented from opening an investigation. The consequence of the case-based assessment of complementarity, even in the pre-investigation phase, is thus that complementarity as such is unlikely to prevent a determined Prosecutor from opening an investigation.

For the ICC to grant a state more discretion as to which incidents and persons it investigates to address impunity in a situation of mass crime, it would probably be necessary to amend the Rome Statute and introduce a situation-based assessment of complementarity, at least in the pre-investigation phase. The test would then be whether the state concerned is conducting or has conducted genuine investigations into the situation as a whole. The selection of cases, including the choice of conduct charged, would then be left to the state, subject to the requirement of a genuine process.

Since in the Rome Statute as it stands the assessment of admissibility concerns a case, the assessment of willingness and ability to conduct genuine proceedings equally concerns the particular cases a state is investigating or prosecuting; complementarity does not require an assessment of the state's overall justice system.[147] The overall

[146] This is how the Prosecutor interpreted the admissibility question in the pre-investigation phase in *First Darfur report*:4.

[147] The Prosecutor has confirmed this in several documents and statements: see, *inter alia*, *First Darfur Report*:4, cited in Chapter 4, n. 93, and *Prosecutor's Libya Statement SC May 2012*:[7]. Other OTP documents (e.g. ICC-OTP 2003b and *Prosecutor's Application Arrest Warrants Libya*:[53]) sometimes nonetheless give the impression of an assessment of the ability of the overall justice sector. So did the Pre-Trial Chamber in *LRA Admissibility Decision (PTC)*:[50] where it observed: 'It remains a fact that the Agreement has not yet been signed and that neither the Agreement nor the Annexure has been submitted to the Parliament. It is not until both documents can be regarded as fully effective and binding upon the parties that a final determination can be made regarding the admissibility of the Case, since the Chamber will only be in a position *to assess the envisaged procedural and substantive laws in the context and for the purposes of article 17 of the Statute* after they are enacted and in force. In this respect, the contents of the envisaged legislation regarding the substantive and procedural laws to be applied by the Special Division, as well as the criteria presiding over the appointment of its members, will be critical.' (emphasis added).

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justice system can influence the ability to investigate and prosecute in a particular case, but in its assessment of admissibility of a particular case the Court cannot find a state unable only on the basis of conclusions about the overall justice system. The reverse is also true: the fact that a state has adequate laws and courts does not prevent the ICC from finding a case admissible because the state is unwilling or unable genuinely to conduct proceedings in the particular case.

Complementarity must be assessed irrespective of the trigger mechanism

Complementarity must be assessed irrespective of whether the situation was referred to the Court by the Security Council or by a state party to the Rome Statute or whether the Prosecutor opened an investigation *proprio motu* with PTC permission.[148]

With respect to referrals of situations by states parties, the Statute does not provide for a different procedure in the event that a state refers a situation in its own territory.[149] Even in this case of a so-called 'self-referral', the Prosecutor must decide whether or not to open an investigation, considering, among other things, whether the referring state or any other is conducting genuine domestic proceedings. A state cannot waive the admissibility assessment:[150] article 17 provides that 'the Court shall determine that a case is inadmissible' if the criteria are fulfilled. Nor does the state referring a situation on its own territory implicitly waive the right to challenge admissibility. Here the difference between 'situation' and 'case' is again relevant: a state may refer a situation and nonetheless wish to challenge the admissibility of a particular case.

Equally, in the case of a Security Council referral, the Prosecutor must decide whether or not to open an investigation[151] and must

[148] On the ways in which situations can be brought within the Court's jurisdiction, see this chapter, below 'Other jurisdictional provisions: the triggers' and Chapter 1, 'The choice of a line-of-fire perspective'.

[149] On self-referrals, see also below 'Other jurisdictional provisions: the triggers'.

[150] Cf. *contra* Gaja 2008:50, El Zeidy 2006:749–50, El Zeidy 2008b:214 and former ICC Judge Politi 2011:147 (asserting that 'the admissibility of waiver of complementarity has . . . been upheld by the Appeals Chamber . . . in *Katanga*'. However, unlike the Trial Chamber and the parties to the proceedings, the Appeals Chamber in its reasoning did not refer to any 'waiver'.).

[151] This is confirmed by the Prosecutor's discussion of the admissibility of cases in the Darfur and Libya situations (see *First Darfur Report*:3–4 and *Prosecutor's*

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consider the admissibility criteria,[152] even if the Council were to make a determination on admissibility in its resolution referring the situation.[153] The Court can act only as provided for in the Statute.[154] A situation referred by the Security Council is subject to different procedures only where the Statute so provides, which it does with respect to neither the Prosecutor's duty to determine whether to open an investigation nor the applicability of the admissibility rules.[155]

A state can directly influence the scope of the ICC's investigation on grounds of complementarity

One area in which the Rome Statute does provide for a different procedure depending on the mechanisms by which the Court's

Application Arrest Warrants Libya:[51]–[54]). But cf. *contra* Condorelli and Villalpando 2002:643 and Ntanda Nsereko 2008:margin 4.

[152] See also Cryer 2006:220. But cf. *contra* Triffterer 2008:margin 20, Bergsmo and Triffterer 2008:margin 22, Doherty and McCormack 1999:151–2, Bassiouni 2006:422, Ratner 2003:447, Sluiter 2008:879, Boot 2002:49–50, 61 and 72 and Yang 2005a:131.

[153] Cf. *contra* Arbour and Bergsmo 1999:19.

[154] According to RS, art. 21(1), the Court 'shall apply: (a) In the first place, [the] Statute, Elements of Crimes and its Rules of Procedure and Evidence, (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'. It is not evident that the UN Charter, pursuant to which a resolution would be adopted, is, in this context, an 'applicable treat[y]'; that application would be 'appropriate'; and that resort to art. 21(1)(b) would be necessary, since the sources mentioned in art. 21(1)(a) are straightforward. See also *Postponement Decision Gaddafi*:[28]–[29] and Cryer 2006:213.

[155] The Security Council could influence the Court's proceedings e.g. by obliging or prohibiting UN member states to conduct domestic proceedings, to allow the ICC to investigate, or to transfer a person to the Court. Pursuant to UN Charter, arts. 103 and 25, such a decision would prevail over states' obligations under the Rome Statute. The Council could also instruct the UN member states that are parties to the Rome Statute to take certain decisions in the Assembly of States Parties (see UN Charter, art. 48). If a Council decision prohibiting states from initiating or continuing proceedings were to be obeyed, the case would be admissible owing to the absence of domestic proceedings or, in the case of stayed proceedings, owing to the domestic justice system's being rendered 'unavailable' (see also Condorelli and Villalpando 2002:640). The Court, however, being neither a member – pursuant to art. 4 of the UN Charter only states can become UN members – nor a subsidiary organ of the UN, is not bound by decisions of the Security Council (see also Sarooshi 2001:40 and Cryer and White 2002:151; but cf. *contra* Lauwaars 1984:1605, 1606 and 1610). If a state has initiated genuine domestic proceedings in spite of the Council's decision, the Court shall declare the case inadmissible pursuant to art. 17(1) (but cf. *contra* Akhavan 2005:411).

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jurisdiction is triggered is the extent to which a state can directly influence the scope of the Prosecutor's investigation on grounds of complementarity. Article 18 provides interested states with an opportunity to compel the Prosecutor to defer to their investigations. This procedure is available if the Prosecutor decides to open an investigation either *proprio motu* or after a referral of a situation by a state party, but not if the situation was referred by the Security Council.[156]

The core of the procedure, set out in article 18(2), is that a notified state has a month to 'inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes [within the Court's jurisdiction] and which relate to the information provided in the notification to States'.[157] If a state so requests, 'the Prosecutor shall defer to the State's investigation of those persons'.[158] If the Prosecutor nevertheless wishes to investigate, he or she must apply to the PTC for authorisation.[159]

Article 18(2) provides that the Prosecutor 'shall defer to the State's investigations of those persons' which the state claims to have investigated or to continue to investigate. The reference to 'those persons' may be taken to suggest that for a successful deferral request the state must have identified specific persons; but the state is obliged to inform the Prosecutor in its request only that it is investigating or has investigated 'criminal acts which may constitute crimes [within the Court's jurisdiction] and which relate to the information provided in the notification to States'.[160] At the same time, the Prosecutor's deferral does not concern the investigation into the situation as a whole. If, in the Prosecutor's view, there are potentially admissible cases not

[156] RS, art. 18(1) provides that, before commencing an investigation, the Prosecutor shall notify 'all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned'. This obligation of notification does not apply to an investigation begun pursuant to a referral by the Security Council. Since according to RS, art. 18(2) the state's right to request that the Prosecutor defer to its investigation is available only '[w]ithin one month of receipt of *that* notification' (emphasis added), the entire procedure under art. 18 is not applicable to situations referred by the Security Council.

[157] RS, art. 18(2), and RPE, rule 53. [158] RS, art. 18(2).

[159] *Ibid.* and RPE, rule 54.

[160] RS, art. 18(2). The periodic information that a state may be required to provide to the Prosecutor relates to the progress of 'its *investigations* and any subsequent prosecutions' (RS, art. 18(5), emphasis added).

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subject to domestic proceedings, he or she may still investigate the situation with respect to those other cases.

The notification that the Prosecutor is obliged to give under article 18 must contain information about the acts that may constitute crimes within the jurisdiction of the Court,[161] but it need not inform states of which cases the Prosecutor intends to prosecute.[162] Indeed, the aim of the investigation to follow is to identify such cases. The procedure under article 18 is thus of little help to a state that wishes to prevent the ICC from investigating the situation as a whole but which itself has not yet identified all the cases that the ICC may wish to prosecute. So far, the procedure has never been used.

A state cannot force the Prosecutor to end an investigation

Once the Prosecutor has opened an investigation, states and other actors have no procedural avenue by which to end his or her investigation into a situation.[163] The Prosecutor can end an investigation, explicitly or implicitly, by deciding not to prosecute. Yet the Statute does not provide a deadline for the Prosecutor to take a decision whether or not to prosecute. The PTC, in turn, has explicit powers to review a decision, but not to compel the Prosecutor to take a decision.[164] Without such a decision, an ICC investigation could be open-ended.

A state's jurisdiction to adjudicate is unaffected by ICC intervention

At the same time, contrary to claims that the ICC deprives states of jurisdiction, there is no provision in the Rome Statute, unlike in the Statutes of the ICTY and ICTR, allowing the Court to request national courts to 'defer to its competence'.[165] The Statute obliges states parties merely to cooperate with the Court,[166] and prohibits them from prosecuting the same crimes only after the Court has convicted or acquitted the person.[167] Until an acquittal or conviction

[161] RPE, rule 52(1).
[162] The OTP's *Notification Investigation DRC*, *Notification Investigation Uganda*, and *Notification Investigation CAR* did not specify the OTP's focus in the respective situations.
[163] This is in contradistinction to the Prosecutor's prosecution of a case, as regards which see below.
[164] See *OTP Submission Status Conference Uganda*.
[165] ICTR Statute, art. 8(2). See also ICTY Statute, art. 9(2).
[166] RS, Part 9. [167] *Ibid.*, art. 20(2).

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by the ICC, states can, in theory, conduct national proceedings simultaneously with those of the Court.

A state may even initiate national proceedings after the ICC has become involved. The fact that the state has initiated its investigations only after the Prosecutor's notification pursuant to article 18 provides no grounds for the OTP to refuse a deferral when requested in accordance with that provision. The fact that a state has started proceedings merely to avoid the Court's doing so does not amount to shielding, as long as the state has the intent to bring the individual to justice.[168] In the absence of any article in the Statute to the contrary, states could initiate domestic proceedings even after the Court has issued arrest warrants in a specific case. If the state launching its domestic investigations were also requested by the Court to arrest and surrender the same person(s) to the ICC, the obligation to comply with the request[169] would be lifted pending the determination of any admissibility challenge.[170] In order to 'catch up' with ongoing proceedings before the ICC, the state must at least open an investigation, demonstrate that this investigation encompasses the same 'case' as the ICC's and, if challenged by the Prosecutor, show that it is willing and able to conduct proceedings genuinely.

The complementarity assessment is dynamic

The possibility for states to commence proceedings also after the ICC has opened its investigation or prosecution is relevant because of complementarity's dynamic configuration.[171] The fact that admissibility is assessed at several stages of the ICC proceedings and that findings can be reviewed gives states a chance to assert their primary right to exercise jurisdiction by conducting genuine domestic proceedings, even when these have been initiated after the ICC has become involved.[172]

After the Prosecutor has decided to open an investigation, a state, in the circumstances described above, can use the procedure in article 18 to pre-empt the Prosecutor's investigation in any given case. If the state does not avail itself of this procedure or is not successful under it, its domestic proceedings could still stay or put a stop to the ICC's involvement given that the Prosecutor may defer his or

[168] See also Sadat and Carden 2000:418. [169] RS, arts. 89 and 86.
[170] *Ibid.*, art. 95. See also *Postponement Decision Gaddafi*. [171] Olásolo 2005:157.
[172] Cf. *contra* Mégret 2006:40 and Swart 2006:174.

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her investigation[173] or may decide not to open a prosecution[174] in light of the domestic proceedings.

Once the Prosecutor has decided to prosecute – a decision which becomes apparent through a request for an arrest warrant or a summons to appear – article 19 entitles a range of actors to raise the admissibility of the specific case before the Court.[175] First, article 19(2)(a) grants the right to challenge admissibility to an accused[176] and to any person in respect of whom the ICC has issued a warrant of arrest or a summons to appear.[177] Secondly, article 19(2)(b) grants a right of challenge to 'a State which has jurisdiction over a case'.[178] Thirdly, article 19(2)(c) provides that 'a State from which acceptance of jurisdiction is required under article 12' may challenge admissibility.[179] Finally, pursuant to article 19(3), the Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. If the Court decides that a case is inadmissible, the Prosecutor may request the Court to review the decision if new facts regarding the admissibility of the case have arisen.[180]

A person for whom a warrant or summons has been issued, an accused person, or a state may challenge admissibility, but only once and 'prior to or at the commencement of the trial'.[181] A state,

[173] RS, art. 19(11). [174] *Ibid.*, art. 53(2).

[175] At this stage, the assessment of the same case is more strict than before the opening of an investigation (see *Admissibility Decision Ruto et al. (PTC)*:[54], *Admissibility Decision Muthaura et al. (PTC)*:[50], *Admissibility Judgment Muthaura et al. (AC)*:[44] and *Admissibility Judgment Ruto et al. (AC)*:[45]).

[176] The Statute does not define when a person becomes 'the accused', and the ICC does not have an indictment procedure as the ICTY and ICTR, but a comparison of RS arts. 61 and 63 bears out that 'the person' becomes 'the accused' after the confirmation of charges. Cf. *contra* Hall 2008:margin 10.

[177] Such a challenge may be based on either complementarity or gravity, or both.

[178] The only ground of inadmissibility this state may invoke is that 'it is investigating or prosecuting the case or has investigated or prosecuted'.

[179] RS, art. 12(2) requires acceptance of jurisdiction from either the state where the crimes were committed or the state of which the accused is a national, but not if the Security Council has referred the situation. In the scenario of a referral by the Security Council, the state where, or by whose nationals, the crimes were allegedly committed can challenge admissibility only under art. 19(2)(b). For the state, the difference is that art. 19(2)(c), unlike art. 19(2)(b), allows challenges on all of the grounds of inadmissibility set out in art. 17, including insufficient gravity.

[180] RS, art. 19(10).

[181] *Ibid.*, art. 19(4). *Decision Darfur Jurisdiction and Admissibility Challenge* confirms that art. 19(2) cannot be invoked by the *ad hoc* defence lawyer in the period

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moreover, must do so 'at the earliest opportunity'.[182] After the commencement of the trial, admissibility findings by the Court, whether *proprio motu* or as a response to a challenge or a request for a ruling, shall be considered *res judicata*, unless a later challenge is allowed in exceptional circumstances. Such allowance can be made only in the event that the person concerned has already been tried.[183]

The Court, for its part, 'may, on its own motion, determine the admissibility of a case in accordance with article 17'.[184] The same article provides that the Court 'shall satisfy itself that it has jurisdiction in any case brought before it'. The difference between 'shall' with respect to jurisdiction and 'may' with respect to the Court's *proprio motu* power to determine admissibility suggests that the Court is not obliged to consider admissibility in the event that neither the accused

before concrete cases have been identified. One Trial Chamber found that the commencement of the trial is not when the hearings begin, but when the Trial Chamber is constituted by the Presidency (*Admissibility Decision Katanga (TC)*: [49], on which see Jacobs 2010). In this Trial Chamber's view, admissibility challenges other than those based on arts. 17(1)(c) and 20(3), must be brought before the charges are confirmed. It may be argued in rebuttal that, until the charges are confirmed, it is difficult for parties to know whether the domestic case concerns the same persons, conduct and incidents as the ICC's and therefore on what grounds to challenge admissibility (see also the defence in *Admissibility Challenge Katanga*:[2] and [8]). In *Bemba*, another Trial Chamber explicitly departed from this interpretation of 'commencement of the trial' and held that 'the commencement of the trial occurs when the opening statements are made, immediately before the beginning of the evidence'. (*Decision Admissibility Challenge Bemba (TC)*:[210]). The Appeals Chamber has not ruled on the question when the 'trial' begins, but, in an appeal in *Katanga*, 'stress[ed] that the fact that [it refrained] from pronouncing itself on [this question] does not necessarily mean that the it [*sic*] agrees with the Trial Chamber's interpretation of the term "commencement of the trial" in article 19(4) of the Statute' (*Admissibility Judgment Katanga (AC)*:[38]).

[182] RS, art. 19(5).

[183] *Ibid*., arts. 19(4) and 17(1)(c). A difficult situation could arise if a domestic court were to acquit or convict an accused *in absentia*. Pursuant to art. 19(4), *ne bis in idem* may be raised as a ground for inadmissibility after the commencement of the trial only in exceptional circumstances and with leave of the Court. A concluded domestic trial could constitute such an exceptional circumstance. The fact that the domestic verdict was rendered *in absentia* would not necessarily render the ICC's case admissible.

[184] 'The Court' in RS, art. 19, must be taken to refer only to the Court's adjudicatory organs (the Pre-Trial, Trial and Appeals Chambers) and not to 'the Court' as defined in RS, art. 34. This interpretation is supported by RS, art. 19(6), which refers to the adjudicatory organs. See also Kleffner 2008:181.

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nor any state challenges it.[185] On the other hand, article 19(1) directs the Court to article 17, which provides, in paragraph 1, that the Court 'shall determine that a case is inadmissible' in the enumerated circumstances. This may oblige the Court to determine admissibility, even if it is not raised.[186]

The Appeals Chamber has found that the Court's *proprio motu* assessment of admissibility is discretionary[187] and that at the issuance of an arrest warrant a Chamber should 'exercise such discretion only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect'.[188] Subsequent case law suggests that this instruction seems to have been directed to assessments of the gravity component of admissibility rather than of complementarity, and towards *ex parte* procedures behind closed doors rather than public ones.[189] Be that as it may, since the publication of the cautionary Appeals Chamber's Judgment, the Pre-Trial Chambers have refrained from *proprio motu* assessing admissibility when deciding on arrest warrants and summonses to appear.[190]

The Appeals Chamber's judgment and the subsequent practice reveal a particular vision of complementarity. The approach that discourages *sua sponte* review treats admissibility, and thus complementarity, more as an issue going to the rights of interested states and defendants than as a matter of public policy to be insisted on so as to avoid duplication of national and international proceedings and to encourage states to play their part in the prosecution of international crimes.

[185] See, in this vein, Hall 1999:408 and Kleffner 2008:181–2.

[186] See *Decision Arrest Warrant Lubanga*:[43]. Support for this view can also be found in UN Doc. A/50/22 (1995):[159], but this debate concerned an article that still combined the current arts. 17 and 19.

[187] *Judgment Arrest Warrant Ntaganda (AC)*:[48].

[188] *Ibid.*:[2]. See also *Decision Arrest Warrants Harun and Kushayb*:[18].

[189] *Judgment Proprio Motu Admissibility Assessment Uganda (AC)*:[85]. See also *Admissibility Judgment Katanga (AC)*:[85].

[190] See e.g. *Decision on Summons for Abu Garda*:[4], *Decision Arrest Warrant Bashir (PTC)*:[51], *Decision Summonses Banda and Jerbo*:[4], *Decision Arrest Warrant Muammar Gaddafi, Saif Gaddafi and Al-Senussi*:[12], *Decision Arrest Warrant Gbagbo*:[23]–[24], *Decision Arrest Warrant Mbarushimana*:[9], *Decision Arrest Warrant Hussein*:[10], *Decision Summonses Muthaura et al.*:[12], *Decision Summonses Ruto et al.*:[12], *Decision Arrest Warrant Mudacumura*:[18], *Decision Second Arrest Warrant Ntaganda (PTC)*:[13].

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The procedures to challenge and review admissibility imply that the Court's findings on admissibility remain preliminary until the actors with a right to challenge admissibility are involved in the proceedings.[191] The Statute is less clear on whether the facts on the basis of which the Court decides on admissibility are also dynamic or whether they are frozen at the moment of the Court's first admissibility assessment. The Appeals Chamber has decided the former, namely, that 'the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory'.[192] Consequently, 'a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and *vice versa*'.[193]

The ICC does not have a conditional deferral procedure like the ICTY and ICTR

Unlike the ICTY and ICTR, the ICC cannot conditionally defer otherwise admissible cases to domestic jurisdictions. As part of their completion strategies, the ICTY and ICTR have created a mechanism according to which the Tribunals can refer cases on their docket to domestic jurisdictions.[194] The ICTY and ICTR make the 'referrals' of

[191] See also *Arrest Warrant Kony*:[38] (representative of the approach in all LRA arrest warrants, referring to cases 'appear[ing]' to be admissible), *Decision Arrest Warrant Lubanga*:[20], *Decision Arrest Warrant Ntaganda (PTC)*:[20], *Decision Arrest Warrant Harun and Kushayb*:[25], *Arrest Warrant Harun*:2, *Arrest Warrant Kushayb*:2, *Decision Arrest Warrant Katanga*:[21], *Decision Arrest Warrant Chui*:[22] and *Decision Arrest Warrant Bemba*:[22].

[192] *Admissibility Judgment Katanga (AC)*:[56]. While the Statute permits this interpretation, the Appeals Chamber's reasoning does not serve to refute arguments of the Defence (*Admissibility Challenge Katanga*:[28]), and e.g. Bassiouni 2005:194, that the factual basis should be frozen at the moment of the arrest warrant. On the dynamic nature of the admissibility assessment, see also *LRA Admissibility Decision (PTC)*:[28].

[193] *Admissibility Judgment Katanga (AC)*:[56]. It could be argued, applying art. 18(7) *per analogiam*, that, once actors with a right to challenge admissibility have participated in proceedings which resulted in a finding of admissibility, they are thereafter estopped from challenging it unless they can show additional significant facts or a significant change of circumstances. But a significant additional fact or change of circumstances, which need not be unforeseen, could be that a state has started proceedings.

[194] The terms 'defer' and 'refer' are used in different contexts in the ICTY and ICTR Statutes on the one hand and the Rome Statute on the other, and sometimes within the Rome Statute. The ICTY and ICTR Statutes employ 'defer' for domestic jurisdictions' yielding to the tribunals' jurisdiction (ICTY Statute, art.

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these cases conditional upon the receiving domestic jurisdiction's fulfilling certain criteria. The tribunals hand cases over only when they are satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. The Tribunals' Prosecutors may send observers to monitor the domestic proceedings and can request the relevant Tribunal to revoke an order referring the case to the domestic courts.[195] After all, the case was admissible before the tribunal and this is unaffected by the referral.

With complementary jurisdiction, the ICC is in a different position. It *must* defer when a case is inadmissible before it and can therefore set no more conditions for a deferral than that the domestic jurisdiction continues to fulfil the criteria for rendering a case inadmissible before the ICC, namely, to conduct genuine investigations or prosecutions in the same case or to have done so.

The Rome Statute provides for two types of 'deferrals' by the ICC Prosecutor.[196] The first is the above-mentioned article 18 procedure, in which the ICC Prosecutor 'defers to' (in the sense of 'yields to') domestic proceedings.[197] The Prosecutor may review such a decision to defer and request the PTC to authorise his or her investigation despite a previous deferral. For the purpose of the review, the Prosecutor may request that the state concerned periodically inform the

9(2), and ICTR Statute, art. 8(2)) and 'refer' for transferring a case from the tribunal to a domestic jurisdiction (RPE, rule 11 *bis*). The Rome Statute uses 'defer' sometimes in the sense of to 'yield to' national jurisdictions (RS, art. 18(2) and (3) and the final sentence of art. 19(11)) and sometimes in the sense of 'to postpone' (RS, art. 16, by the Security Council, or the first sentence in art. 19(11) when the Prosecutor defers proceedings) and 'refer' for triggering the ICC's jurisdiction (RS, arts. 13 and 14). Neither 'refer' nor 'defer' denotes a 'transfer' of jurisdiction – cases may be transferred, but the jurisdiction stays where it is; it is just not exercised in the particular case (cf. *contra* Bekou 2009–2010:730).

195 ICTY RPE and ICTR RPE, rule 11 *bis*.

196 Robinson 2012:178 mentions two other ways in which the Court can defer (in the sense of postpone) its case: the consultation mechanism under the cooperation regime (in particular arts. 89(4) and 94(1)) and the interests of justice test pursuant to art. 53. However, the provisions in the cooperation regime allow the state to postpone execution of a request for cooperation; they do not affect the Court's jurisdiction, nor does it force the Court (temporarily) to stop investigating or prosecuting the case. The interests of justice can be a ground for not opening an investigation or a prosecution; it is not a ground for transferring a case.

197 RS, art. 18(5), (6), (3) and (2).

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Prosecutor of the progress of its investigations and any subsequent prosecutions. The standard for review must be the same as the admissibility assessment of article 17.[198]

The second deferral option is under the discretionary power granted to the Prosecutor in article 19(11). In this scenario, the Prosecutor 'defers' – in the sense of 'postpones' – his or her own investigations because it appears that the OTP's cases will be inadmissible under article 17.[199] The Prosecutor may ask for information from the investigating or prosecuting state.[200] The Prosecutor may thereafter decide to proceed with an investigation, but only on the ground that there are cases that would be admissible pursuant to article 17, in other words, that have not been genuinely investigated or prosecuted domestically.[201] Domestic fair trial standards and guarantees of no application

[198] See RS, art. 18(3) (with an unfortunate reference to the shorthand definition of complementarity: 'the State's unwillingness or inability genuinely to carry out the investigation'), art. 18(5) ('the Prosecutor may request that the State concerned inform the Prosecutor of the progress of its *investigations and any subsequent prosecutions*' (emphasis added)) and RPE, rule 55(2) ('[t]he Pre-Trial Chamber shall examine the Prosecutor's application and any observations submitted by a State that requested a deferral in accordance with article 18, paragraph 2, and shall consider the factors in *article 17* in deciding whether to authorize an investigation' (emphasis added)).

[199] The English text of art. 19, particularly the third sentence, could also support an interpretation of 'defer' in the sense of 'yields to'. The French text, however, suggests a different meaning of 'defer' in arts. 18(2) and 19(11), speaking of, in art. 18(2), 'le Procureur lui défère', and in art. 19(11), 'le Procureur sursoit à enquêter'.

[200] Pursuant to RS, art. 53(4), the Prosecutor may reconsider a decision not to investigate (or prosecute) 'at any time ... based on new facts or information', without needing to seek the PTC's authorisation. The Statute does not provide for an expiry date for the right to reconsider, but, since future situations cannot be referred, there must be a connection between the facts the Prosecutor wishes to investigate (or prosecute) and the time-period when the referral was made. Bergsmo and Kruger 2008:margin 40 suggest that the word 'whether' in art. 53(4) means that the Prosecutor could also reconsider a decision to open an investigation (or prosecution). However, the word 'initiate' suggests that the Prosecutor can reconsider only a decision not to investigate (or prosecute), since he or she cannot undo an initiation: having opened an investigation, he or she can decide only not to continue an investigation (or prosecution), which should be equated with the decision not to prosecute of art. 53(2). If Bergsmo and Kruger's analysis is correct, however, it stands to reason that for a reconsideration of a decision to investigate (or prosecute) the same criteria and review processes apply as for a decision not to investigate (or prosecute), as provided for in art. 53(1) (or art. 53(2)).

[201] RS, art. 19(10), *per analogiam*.

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of the death penalty – conditions applied by the ICTY and ICTR in their rule 11 *bis* procedure – cannot be criteria for considering or ending a deferral pursuant to article 19(11) of the Rome Statute, since these are not grounds for admissibility in the first place. Nor does the Statute endow any ICC organs with powers to monitor domestic proceedings beyond, where provided, requesting information from the state to which the case has been deferred.[202]

In sum, with their (almost absolute) primacy of jurisdiction,[203] the ICTY and ICTR have been able to make referrals of cases to domestic justice systems conditional upon whatever criteria they wished to set; with its complementarity jurisdiction, the only conditions that the ICC can set are those that would render a case admissible before the ICC.

Taken together, the procedural aspects of complementarity thus in some ways increase its potential catalysing effect (for instance, complementarity must be assessed irrespective of the mechanism that triggered the Court's jurisdiction, states are not prohibited from conducting proceedings in parallel with the ICC and the assessment of admissibility is dynamic), while in other ways limiting it (for example, it is difficult for a state to prevent or end ICC investigations on grounds of complementarity and the complementarity assessment does not concern the entire justice system).

LOOKING FOR A CATALYSING EFFECT: THE POTENTIALLY CONFOUNDING AND INTERVENING VARIABLES

Factors other than complementarity also determine whether the Court exercises its jurisdiction and therefore have the potential to confound any inquiry into complementarity's putative catalysing effect. Chief among these factors are other jurisdictional provisions in the Rome Statute, the OTP's prosecutorial policy and the OTP's policy of 'positive complementarity'.

Other jurisdictional provisions: the triggers

The first additional factor determinative of when the Court may exercise its jurisdiction, a factor preliminary to the question of

[202] See also *OTP's Libya Trip Report*:[12] ('The Prosecutor reiterated that . . . if Libya were authorized to proceed with the trial, the OTP would not monitor the fairness of the domestic proceedings, as this is not the role of the Prosecutor.').

[203] See Nouwen and Lewis 2013.

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admissibility, is the trigger – or, more precisely, triggers – for the Court's jurisdiction specified in article 13. In accordance with this provision, a situation may be brought before the Court in one of only three ways, namely, referral by a state party, referral by the Security Council or the *proprio motu* initiation of an investigation by the Prosecutor with the approval of the PTC. In the event of referral by a state party or the Prosecutor's *proprio motu* initiation of an investigation, a precondition to the exercise by the Court of its jurisdiction is the acceptance of the Court's jurisdiction either by the state on the territory of which the impugned conduct is alleged to have taken place or the state of which the suspect is a national.[204]

Article 13(a) and (b) allow states parties and the Security Council to trigger the Court's jurisdiction by referring a 'situation in which one or more of such crimes appears to have been committed'. The phrase was inserted to exclude referrals of specific *cases*.[205] The Pre-Trial Chamber has explained that the phrase means that

> a referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated.[206]

The Pre-Trial Chamber's elaboration was given in the context of a referral by a state party, but it may be assumed that it has the same meaning in the context of a referral by the Security Council since the relevant provision contains exactly the same phrase.[207]

The Statute does not specify the consequences in the event that the referring entity nonetheless tries to focus the Court's investigation on particular individuals by limiting the parameters of the Court's jurisdiction. According to an approach that emphasises the consent of the entity that refers, the referral would be null and void, unless the referring entity does not object when the Prosecutor informs it that

[204] RS, art. 12. States parties recognise the Court's jurisdiction by becoming party to the Statute. States not party to the Statute may accept the Court's jurisdiction in respect of a specific situation by way of a declaration lodged under art. 12(3).

[205] See more elaborately, Cryer 2006:212.

[206] *Decision on Jurisdiction Challenge Mbarushimana*:[27].

[207] Indeed, *ibid.*:n. 41 refers to the Court's response to a Security Council referral as an argument for its above-quoted consideration.

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he or she will investigate the entire situation.[208] According to a more objective approach, the referral would trigger the Court's jurisdiction; any elements in the referral that try to set the parameters of the Court's jurisdiction would be severed.

The Court's practice to date is ambiguous. As Chapter 3 will elaborate, when the Government of Uganda referred the situation 'concerning the Lord's Resistance Army', the Prosecutor informed the government that he would investigate all sides to the conflict. Since the government did not object, it is not clear whether the information procedure was to seek the government's (implied) consent, confirming the consent approach, or merely to notify the government of the Prosecutor's subsequent actions, supporting the objective approach.[209] Any objection from the Ugandan Government would ultimately not be able to prevent the Prosecutor from opening an investigation as he could always have decided to use his *proprio motu* powers to trigger the Court's jurisdiction with respect to this state party, treating the referral merely as a communication of 'information on crimes within the jurisdiction of the Court' in the sense of article 15(1).

That is not an option, however, if the Security Council attempts to limit the parameters of the Court's jurisdiction in a situation concerning a non-state party that it refers – the Prosecutor has no *proprio motu* powers with respect to a non-state party. The fact that the Court's organs *have* acted upon the Council's resolutions referring the situations in Darfur and Libya – in both of which the Council decided to exclude certain foreign nationals from its jurisdiction[210] – could thus

[208] This approach is analogous to the one in the situation that a state lodges a declaration that it accepts the Court's jurisdiction only with respect to a specific crime. According to RPE rule 44, 'the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 *of relevance to the situation*' (emphasis added). But rule 44 does not specify the consequence of a state's objection to such information.

[209] *Decision on Jurisdiction Challenge Mbarushimana*:n. 41's reading of the Prosecutor's action with respect to Uganda appears to support the objective approach, stressing as it does that 'the Prosecutor disregarded the limitation and, consistently with the Principles of the Rome Statute, opened an investigation "into the situation concerning Northern Uganda", regardless of who had committed the crimes', without mentioning the Prosecutor's communication with Uganda to that effect.

[210] UN Doc. S/RES/1593 (2005):[6] and UN Doc. S/RES/1970 (2011):[6].

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lend support to the objective approach[211] (unless the Court has in fact treated the exemption clause as valid).[212]

With respect to the trigger mechanism of referrals by states, the Statute does not forbid states to refer situations on their own territory to the Court. The fact that the literature had not anticipated these so-called self-referrals does not affect their legal validity.[213] Nor does it conflict with any duty to prosecute in the Statute.[214] The Appeals Chamber went a step further, reasoning that

> there 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.[215]

More problematic than the finding of compliance with the duty is the Appeals Chamber's use of the concept of 'relinquish[ing] its jurisdiction'. A self-referral is a trigger mechanism; the referring state does not relinquish any jurisdiction. If the state wishes, it can continue exercising its jurisdiction, including over crimes within the Court's jurisdiction in the same situation, even in the same case, until the person has been tried for the same crimes by the ICC.[216]

[211] See also Cryer 2006:214.

[212] Whether it did is difficult to assess since no foreign national falling into the exempted category has publicly been the subject of ICC proceedings. Abdullah Al-Senussi, for whom an arrest warrant has been issued in the Libya situation, is likely to meet the criterion of the exemption clause that he is a foreign national of a non-state party (he was born in Sudan), but not the other criterion that his were 'acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council'.

[213] See also Robinson 2011a.

[214] See also Nouwen and Werner 2010b, Kress 2004, Gaeta 2004, and, jubilant on self-referrals, Akhavan 2010a.

[215] *Katanga Admissibility Judgment (AC)*:[85] (with a reference to Kress 2004). The Trial Chamber considered in a similar vein, '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' (*Admissibility Decision Katanga (TC)*:[79]). The reference to 'obligations au regard du principe de complémentarité' is inappropriate: as has been argued above, the complementarity principle as such is an admissibility rule for cases before the Court and does not contain 'obligations' for states.

[216] See above: 'A state's jurisdiction to adjudicate is unaffected by ICC intervention'.

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Finally, a referral by a state or the Security Council triggers the Court's jurisdiction; it does not oblige the Prosecutor to open an investigation. He or she may refrain from doing so if there is 'no reasonable basis to proceed' pursuant to article 53. As discussed above, complementarity is part of the assessment, whether the referral was made by the Security Council or a state, and whether a state refers a situation on its own territory or elsewhere.[217]

Other jurisdictional provisions: a deferral requested by the Security Council

A second factor that may influence when the Court exercises its jurisdiction is the Court's obligation to accede to a request by the United Nations Security Council to defer its proceedings. Pursuant to article 16, '[n]o investigation or prosecution may be commenced or proceeded with under [the] Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.' Other than that the resolution must be adopted under Chapter VII of the Charter, the Statute provides no criteria for such a decision – the Council's authority to make such a request derives not from article 16 but from the Charter. Article 39 of the Charter requires an act of aggression, breach of the peace or a threat to the peace before the Security Council may take a decision under Chapter VII and, as the ICTY Appeals Chamber held in *Tadić*, the Council has discretion in deciding whether something is a threat to the peace, what measures to take and whether these measures are necessary to maintain international peace and security.[218]

Other jurisdictional provisions: the admissibility criterion of gravity

The Court may not exercise its jurisdiction if '[t]he case is not of sufficient gravity to justify further action by the Court'.[219] According to articles 17 and 53, the assessment of gravity, like that of complementarity,[220] is at

[217] See above: 'Complementarity must be assessed irrespective of the trigger mechanism'.
[218] ICTY, *Tadić Defence Motion Decision (AC)*:[30]–[32] and [39].
[219] RS, art. 17(1)(d).
[220] See above: 'The complementarity assessment is case-specific'.

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all stages of ICC proceedings case-specific rather than situation-based. In other words, even at the stage of deciding whether or not to open an investigation, the Prosecutor must assess whether there would be cases that meet the criterion of sufficient gravity, rather than assessing whether the situation as a whole meets the same criterion.

That said, so far the OTP has used the criterion of sufficient gravity to assess and compare situations,[221] in apparent disregard of the text of article 17(1)(d).[222] The PTC, too, has determined that 'at the stage of initiation of the investigation of a situation the relevant *situation* must meet [the] gravity threshold'.[223] Similarly, the OTP has used gravity as an instrument for comparing and selecting cases for prosecution rather than as a minimum standard for admissibility of an individual case. In the Uganda situation, in justifying why the OTP has issued arrest warrants only for members of the Lord's Resistance Army (LRA), the Prosecutor has argued that the crimes committed by the LRA 'were much more numerous' than the crimes allegedly committed by the government's forces.[224] Arguably, however, a state's involvement in the commission of crimes against civilians is an independent and sufficient indication of gravity, because of the high risk of impunity for such crimes.[225] The Uganda case study will show that the way in which the ICC Prosecutor has, with respect, wrongly applied the criterion of sufficient gravity has influenced complementarity's catalysing effect.[226]

No ICC proceedings because of the 'interests of justice'

When deciding whether to open an investigation or prosecution, the Prosecutor may decide to refrain from proceedings if he or she considers that these would not serve 'the interests of justice'.[227] Some

[221] See e.g. Moreno-Ocampo 2007b:4 (mentioning as one of the challenges '[h]ow to select the *gravest* situations to investigate' (emphasis added)), ICC-OTP 2006b:9, Moreno-Ocampo 2005b:11, Moreno-Ocampo 2006 and ICC-OTP 2006d:6–7.

[222] See also Seils 2011:992–5, pointing out (995): 'At best, the idea of situational gravity is a legitimate prioritizing rule, not an exclusionary rule.'

[223] *Decision Arrest Warrant Lubanga*:[44] (emphasis added). In *Decision Authorizing Kenya Investigation*:[189], PTC II followed the Prosecutor's practice of assessing the gravity of a situation.

[224] Moreno-Ocampo 2005a:2. See also Moreno-Ocampo 2005b:9 and Agirre Aranburu 2009:154. See further Chapter 3, 'Encouraging more trials, prosecutions and/or investigations'.

[225] See also Schabas 2008a:45–6 and Schabas 2008b:748.

[226] See Chapter 3.

[227] RS, art. 53(1)(c) and (2)(c).

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have interpreted the term to allow the Prosecutor to factor in the impact of proceedings on, for instance, the conclusion or implementation of a peace agreement or to consider alternative accountability mechanisms within a state, such as amnesty in exchange for truth-telling.[228] The OTP, however, has argued against a broad interpretation of the 'interests of justice' that would encompass the interests of peace.[229]

Whilst both the interests of justice and complementarity are grounds on which ICC proceedings can be halted, the authority to invoke and decide on these grounds is allocated differently. Unlike complementarity, the interests of justice are not justiciable for the accused or states. In terms of decision-making, whether or not to investigate or prosecute in the interests of justice is left to the Prosecutor's discretion – the Pre-Trial Chamber can review his or her decision not to prosecute on this ground but it cannot oblige him or her actually to use this discretion or *proprio motu* apply the interests-of-justice criterion.

The OTP's prosecutorial policy

A well-known prosecutorial policy may alert states to the instances in which they need not fear the exercise of the Prosecutor's power, and may therefore influence states' recourse to domestic proceedings in order to render potential ICC cases inadmissible. Prosecutorial policy can exist only to the extent that the Rome Statute grants the Prosecutor a degree of discretion. It does so with respect to certain decisions.[230] Of particular relevance for complementarity's potential

[228] See e.g. Boot 2002:55, Razesberger 2006:108, 178–9 and Chapters 11 and 12, and Bourdon 2000:166–8. But cf. *contra* Amnesty International 2005.

[229] ICC-OTP 2007:1 emphasised '[f]irstly, that the exercise of the Prosecutor's discretion under Article 53(1)(c) and 53(2)(c) is exceptional in its nature and that there is a presumption in favour of investigation or prosecution wherever the criteria established in Article 53(1)(a) and (b) or Article 53(2)(a) and (b) have been met. Secondly, the criteria for its exercise will naturally be guided by the objects and purposes of the Statute – namely the prevention of serious crimes of concern to the international community through ending impunity. Thirdly, that there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor.' See also ICC-OTP 2011b:[8].

[230] These include whether to initiate an investigation; the personal, temporal and geographical parameters of the situation he or she investigates; whether or not to

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catalysing effect are the OTP's policies with respect to opening an investigation, whom to charge and with which crimes to charge them.

According to article 53(1), the Prosecutor must open an investigation, unless certain exhaustively[231] listed conditions are not fulfilled.[232] However, in the Prosecutor's view, the OTP, 'in the light of its limited resources', has substantial discretion as to whether to open an investigation.[233] The OTP has declared itself willing to consider, '[i]n addition to ... the factors listed under Article 53',[234] the availability of evidence, the security of victims, witnesses and staff,[235] the feasibility of conducting an effective investigation in a particular territory[236] and whether 'the necessary assistance from the international community [will] be available, including on matters such as the arrest of suspects'.[237]

Whether or not in accordance with the Statute, a decision taken by the Prosecutor for reasons other than the ones listed in article 53(1) is

challenge a state's assertion of inadmissibility; whether there are 'reasonable grounds' to submit a request for the issuance of a warrant of arrest or summons to appear; whether to request a warrant of arrest or a summons to appear; whether to close a preliminary inquiry; whether to conclude an investigation; which persons to charge with which crimes; what evidence to bring; and during which phase of the proceedings to bring this evidence.

[231] See the discussion whether the word 'consider' in art. 17 indicates an exhaustive list of factors to be taken into account (this chapter, 'The ICC is not a human rights court overseeing compliance with fair trial rights'). See also McDonald and Haveman 2003:3–4.

[232] See this chapter: 'The Prosecutor must assess complementarity prior to opening an investigation'. See also the 2003 Draft Regulations of the Office of the Prosecutor:19, [12.2].

[233] ICC-OTP 2003a:1.

[234] ICC-OTP 2006e:8. It could be argued that the Prosecutor has more discretion when deciding whether or not to open an investigation by using his or her *proprio motu* power than after a referral. According to art. 15(1), the Prosecutor 'may' initiate an investigation, and according to art. 15(3) 'shall' submit a request for authorisation if he or she concludes that there is a reasonable basis to proceed (taking into account, pursuant to rule 48, the criteria of art. 53). After a referral, art. 53 determines that the Prosecutor 'shall' initiate an investigation, *unless* certain criteria are fulfilled.

[235] ICC-OTP 2006e:8. [236] ICC-OTP 2003a:1.

[237] ICC-OTP 2003d:2. But cf. *contra* ICC-OTP 2006e:1–2 ('[T]he duty of independence goes beyond simply not seeking or acting on instructions. It also means that the selection process is not influenced by the presumed wishes of any external source, nor the importance of the cooperation of any particular party, nor the quality of cooperation provided. The selection process is independent of the cooperation-seeking process.').

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likely to stand on account of the limited nature of the judicial review provided for in the Statute. The PTC's powers to review arise only when the Prosecutor requests authorisation for a *proprio motu* investigation or decides not to proceed after a referral or an investigation. In the case of potential *proprio motu* investigations, the PTC decides whether to authorise an investigation, but cannot review the Prosecutor's decision *not* to open an investigation.

In the event of referrals, the situation is the reverse: the PTC may review only the Prosecutor's decision not to open an investigation into a situation that has been referred to him or her. It may do so *proprio motu* only if the Prosecutor bases his or her decision solely on the 'interests of justice' ground.[238] Otherwise, it reviews only at the request of the entity (namely, the state party or the Security Council) that referred the situation to the Court.[239] Only in the case of *proprio motu* review does the Chamber have the power to reverse the Prosecutor's decision. If reviewing upon request, it can only request the Prosecutor to review his or her decision.[240] Neither the Statute nor the Rules sets the Prosecutor a time limit for deciding whether to open an investigation. Consequently, the Chamber has no power to review any absence of a decision, for instance when the Prosecutor refrains from deciding whether to open an investigation.[241]

In contrast to the relatively narrow discretion as to whether to open an investigation, the Statute grants the Prosecutor broad leeway as to whom to charge and with which crimes to charge them. Review of a decision not to prosecute is particularly limited. Article 53(2), applicable where a situation has been referred to the Court either by a state party or by the Security Council,[242] provides:

> If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

[238] RS, art. 53(3)(b). [239] RS, art. 53(3)(a). [240] *Ibid.*

[241] But see *Decision Requesting Information on Preliminary Examination* CAR:4 (in which the Pre-Trial Chamber put pressure on the Prosecutor to inform it about whether or not he was going to open an investigation into the CAR and considered: 'the preliminary examination of a situation pursuant to article 53(1) of the Statute and rule 104 of the Rules must be completed within a reasonable time from the reception of a referral by a State Party under articles 13(a) and 14 of the Statute, regardless of its complexity').

[242] The Statute does not provide for judicial review of a decision not to prosecute if the decision follows a *proprio motu* investigation.

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(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
(b) The case is inadmissible under article 17; or
(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

It is unclear whether the phrase '[i]f, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution' refers to a decision not to open any cases at all, or to a decision not to prosecute specific cases.[243] But, even if article 53(2) is taken to oblige the Prosecutor to notify the PTC of every case he or she decides not to prosecute, the Prosecutor has little incentive to comply. Notification of the Chamber and the entity (i.e. a state party or the Security Council) that referred the situation may result in review and interference by the PTC. If the Prosecutor does not notify the Chamber, the latter, lacking the information available to the former, cannot determine that he or she should have notified it and cannot force the Prosecutor to conclude that he or she has 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'.[244] Consequently, regardless of what article 53(2) may or

[243] The ground sub (a) suggests that the Prosecutor must inform the Chamber only if he or she decides not to prosecute at all, since it is unlikely that he or she would have to report all instances that he or she decides not to prosecute for want of sufficient legal or factual basis – in other words, where there is no case. The grounds sub (b) and (c), however, are case-specific, and the Prosecutor could indeed be obliged to report that he or she has decided not to prosecute a particular case even though there is a sufficient legal and factual basis. The limited relevant case law implies that the PTC considers the provision to oblige the Prosecutor to report every case that he or she does not prosecute (see *Amicus Curiae Decision DRC (PTC)*:[5], *Decision Status Conference Uganda*, and, on the OTP's part, *OTP Submission Status Conference Uganda*).

[244] It could do so only if it infers from information that is available to it, for instance as a result of victims' participation, that the Prosecutor must have taken a decision not to prosecute. In doing so, the Chamber would usurp much of the Prosecutor's discretion. In *Amicus Curiae Decision DRC (PTC)*, the PTC implicitly declined a request to do so and suggested that a negative decision pursuant to art. 53(2) must be explicit.

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may not say, in practice the Prosecutor enjoys substantial discretion as to which cases he or she prosecutes. The Prosecutor also enjoys discretion as to which crimes to charge or, more precisely, as to which crimes not to charge. Only the crimes charged are subject to review[245] – at the moment of the issuance of the arrest warrant or summons to appear,[246] at the confirmation of charges[247] and, ultimately, in the judgment.[248]

Enjoying as it does some discretion as to whether to open an investigation and substantial discretion as to whom to charge with which crimes, the OTP has stated or revealed parts of a policy as to how it intends to use its discretion. While policy is subject to change, some features of the stated and apparent policy could influence complementarity's catalysing effect. With respect to the opening of an investigation, the first Prosecutor stated that, while he was willing to use his *proprio motu* power to trigger an investigation, he preferred referrals, on account of the fact that they increase the chances of state cooperation.[249] With respect to prosecutions, he indicated that it was 'the policy of the OTP to bring only a few cases from each situation'.[250] The OTP announced a 'sequenced' approach to selection, 'investigating specific cases within a situation one after another rather than all at once'.[251] With respect to the substance, '[i]n principle, incidents will be selected to provide a sample that is reflective of the gravest incidents and the main types of victimization'.[252] Finally, the first Prosecutor announced that he would focus on 'those who bear the greatest responsibility'.[253] In his view, the Court 'was created to investigate and prosecute the worst perpetrators, responsible for the worst crimes, those bearing the greatest responsibility, the organizers, the planners, the commanders'.[254] This focus does not flow self-evidently from the Statute,[255] but the Prosecutor derived it from '[t]he global character of the ICC, its statutory provisions and

[245] Cf. *contra Amicus Curiae Request Women's Initiatives for Gender Justice DRC*.
[246] RS, art. 58(1)(a) and (7). [247] *Ibid.*, art. 61(7). [248] *Ibid.*, art. 74.
[249] ICC-OTP 2003a:5 and ICC-OTP 2006d:7. [250] ICC-OTP 2006e:12.
[251] *Ibid.*:10. [252] ICC-OTP 2006d:8.
[253] ICC-OTP 2003d:7. See also ICC-OTP 2003d:3, Moreno-Ocampo 2004b, ICC-OTP 2006e:10, ICC-OTP 2006d:23, and, adding a caveat, ICC-OTP 2003d:3 and ICC-OTP 2006e:13.
[254] Moreno-Ocampo 2007b:8.
[255] Unlike e.g. ICTY RPE, rule 28(A), and SCSL Statute, art. 1, the Rome Statute does not single out a particular group of perpetrators.

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logistical constraints'.[256] These aspects of the Prosecutor's policy could influence complementarity's catalysing effect by indicating which cases the Prosecutor will focus on and hence with respect to which cases a state must proceed domestically if it wishes to avoid or end ICC proceedings.

The policy of positive complementarity

Soon after beginning its operations, the OTP launched the policy of 'positive complementarity', a policy presented as explicitly aiming to boost complementarity's catalysing effect.[257] Accordingly, the OTP 'will encourage national proceedings wherever possible'.[258] Some OTP or OTP-supported documents provided ideas for implementing the policy. Without going into detail, they mentioned the OTP's providing states with information received from public sources,[259] with evidence (gathered by the Court),[260] with advice regarding national proceedings[261] and with training and technical support;[262] acting as an intermediary between states, brokering assistance and facilitating situations where states may assist one another in carrying out national proceedings;[263] promoting national proceedings, traditional mechanisms or other tools;[264] and developing legal tools to facilitate cooperation and empower domestic criminal jurisdictions.[265]

The reference to 'complementarity' in the name of the policy is misleading. The rationale for the policy may be helping states to use their primary right to exercise jurisdiction over crimes within the Court's jurisdiction, as recognised by the complementarity principle. The effectuation of the policy, however, comes down to cooperation, albeit not the type of cooperation that dominates the Statute: rather than states assisting in the Court's proceedings, the policy requires the

[256] ICC-OTP 2003d:7. The statutory provisions referred to are recitals and articles on the substantive jurisdiction of the Court, on the requirement of sufficient gravity and on the interests-of-justice clause as a ground for refraining from proceedings.
[257] See, *inter plurima alia*, the OTP's Special Advisor on Crime Prevention Méndez 2011:50 ('Under its policy of positive complementarity, the Office of the Prosecutor can act as a catalyst for national action.').
[258] Moreno-Ocampo 2004c:1.
[259] Moreno-Ocampo 2003b, ICC-OTP 2003d:5, and, not referring to 'public', ICC-ASP/5/6 (2006):3.
[260] ICC-OTP 2006a.
[261] ICC-OTP 2003c:3–4. But cf. *contra* Moreno-Ocampo 2011:25.
[262] Moreno-Ocampo 2003b.
[263] ICC-OTP 2003c:6.
[264] ICC-OTP 2006c.
[265] ICC-OTP 2006d.

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Court to facilitate domestic proceedings. But such a policy of assisting domestic jurisdictions is not inherent in complementarity – courts with primacy of jurisdiction could also have, indeed have had,[266] similar policies.[267]

Moreover, the Statute puts important limitations on the Court's, in particular the OTP's, capability to implement such policies. The organs of the Court enjoy only those powers that the Statute grants them, explicitly or impliedly.[268] Only for some of the suggested aspects of the policy of positive complementarity does the Statute explicitly provide the OTP with powers. For instance, the Prosecutor could use his power under article 15(2) and rule 104 to seek additional information from states when considering whether or not to open an investigation in order to alert states implicitly to the OTP's close monitoring of a situation. The notification procedure under article 18 also gives states a chance to claim their primary right to investigate and prosecute and allows the Prosecutor, if he or she defers, to request information on the domestic proceedings.[269] The most explicit power for action that could be classified as a form of positive complementarity is provided by article 93(10) of the Statute:[270]

> (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.
> (b) (i) The assistance provided under subparagraph (a) shall include, *inter alia*:

[266] See e.g. Tolbert and Kontić 2011.

[267] Nonetheless, the ICC's use of the term 'complementarity' to describe its (potential) assistance to domestic jurisdictions seems to have been so successful that the ICTY Prosecutor describes the *ICTY's* cooperation with national jurisdictions as 'complementarity' (RC/11 Annex V(c) (2010):[14]: 'He recalled that, at the inception of the *ad hoc* tribunals, complementarity was a "side-product" while today it had become a main priority'). For similar usage of the term, see El Zeidy 2008a:406 and Stahn 2011a:2.

[268] Cf. *contra* Bassiouni 2005:194.

[269] See this chapter, 'A state can directly influence the scope of the ICC's investigation on grounds of complementarity', and RS, art. 18(5). If the Prosecutor defers to national proceedings pursuant to art. 18, he or she is not under an obligation to share information or evidence with the state requesting the deferral. See also Arsanjani 1999:71.

[270] See, on the discretionary nature of this power, UN Doc. A/51/22 (1996):72–3.

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a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and
b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b)(i)a:
a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;
b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68 [relating to the protection of victims and witnesses].

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

While the forms of assistance listed in article 93(10)(b) are merely illustrative,[271] the text[272] and context[273] of article 93(10)(a) leave no doubt that the envisaged cooperation and assistance are limited to judicial assistance and do not extend to general or technical assistance. The text also makes clear that the state must take the initiative and request the specific assistance or cooperation with respect to that specific investigation or trial:[274] the article does not provide for the Court *proprio motu* to supply the state with information to encourage domestic proceedings. Moreover, the state concerned must have started some form of investigation with respect to specific conduct: the Court cannot just hand over all or part of its evidence regarding crimes committed in the entire situation. Apart from its powers to seek information from states and to provide judicial cooperation and assistance at a state's request in specific domestic proceedings, the OTP lacks explicit powers to encourage or facilitate domestic proceedings.[275]

[271] See also Moreno-Ocampo 2011:24 and Ciampi 2002:1742.
[272] The provision refers to a request by a state 'conducting an investigation into or trial in respect of conduct which . . .'.
[273] The other paragraphs of art. 93 also concern specific requests for cooperation, albeit requests from the Court to states.
[274] See also Kress and Prost 2008:margin 61. Note that national legislation may not allow the use of ICC evidence in national proceedings, on account of its not having been acquired in accordance with domestic rules of evidence.
[275] Burke-White 2008b:81–2, mentions art. 54(3)(d) as another legal basis for a power of the Prosecutor to encourage domestic prosecutions. However, art. 54,

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Neither does the Statute provide a strong basis for the argument that powers to encourage or facilitate domestic proceedings may be implied. Implied powers are 'those powers which, though not expressly provided . . . are conferred . . . by necessary implication as being essential to the performance of [the ICC's/OTP's] duties'.[276] The Statute contains no duty that necessarily implies a power on the part of the Prosecutor to engage in discussions with states over national proceedings (beyond receiving information about such proceedings),[277] let alone a power to act as a state's advisor in national proceedings.[278] Nonetheless, if the OTP were to appropriate and exercise powers that it has not been explicitly or impliedly granted, its actions might in time become lawful if the ASP consistently acquiesces in them.[279]

Instead of implying powers to encourage and facilitate domestic proceedings, the mandate the Statute grants the OTP may actually limit the possibilities for implementing a policy of positive complementarity. The OTP must at all times be in a position impartially to

and in this context art. 54(3)(d), clearly concern cooperation by states to facilitate the Court's proceedings, not *vice versa*. Burke-White 2008a:68's response that this distinction 'is not legally significant' fails to explain why not. The argument that 'such strategic use of interactions is fully in keeping with the object and purpose of the Rome Statute' is too weak a straw in light of the analysis above ('An obligation to investigate or prosecute pursuant to the Rome Statute?') on the Statute's object and purpose. Burke-White 2008a:65 also argues that 'affirmative authority on the Prosecutor to engage in positive complementarity' can be conferred by a 'conception of the Rome System of Justice' according to which complementarity is 'a broader principle [than an admissibility rule] that allocates authority among concurrently empowered institutions at different levels of governance within an international justice system'. However, doctrinal conceptions are not a source of institutional powers.

276 ICJ, *Reparation for Injuries*:182.

277 Cf. *contra* Burke-White 2008b:80, referring for such a legal basis to art. 42 of the Statute (on the task of the OTP) and to the Statute's presumed object and purpose of ending impunity (see also Burke-White 2008a:69). However, art. 42 exclusively concerns proceedings before the Court and, even if the Court's object and purpose were to 'end impunity' (see above section, 'An obligation to investigate or prosecute pursuant to the Rome Statute?'), it is to end impunity by means of a court vested with the powers specified in the Statute. The preambular reference to this or any other aim does not allow an organ of the Court freely to arrogate powers to itself only because such powers would promote, in its opinion, the aims stated in the preamble.

278 See also Bitti 2007.

279 See PCIJ, *Serbian Loans*:38, ICJ, *South West Africa*:[22] and PCA, *Eritrea–Ethiopia Boundary Delimitation*:[3:8].

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assess whether a state is genuinely conducting domestic proceedings. Some forms of assistance to states, for instance substantial involvement in domestic capacity-building, gathering evidence for domestic proceedings or providing advice on domestic legislation or prosecutorial policies, may threaten the Prosecutor's required impartiality, or appearance of impartiality, in making such an assessment, particularly if the assistance affects cases that the OTP considers prosecuting.[280]

Finally, even to the extent the Statute allows the Court to assist domestic justice systems, human and financial resource constraints limit its capacity actually to do so. Turning over evidence can be relatively cheap.[281] Equally, the budget may provide sufficient resources for the OTP's Jurisdiction, Complementarity and Cooperation Division (JCCD) to communicate to states the Prosecutor's potential involvement and to explain the relevant procedures.[282] However, sending staff as trainers, conducting investigations for the benefit of domestic proceedings or providing the physical infrastructure for domestic trials would be more difficult to bring within the budget.

To date, positive complementarity has not received endorsement from the ICC's Chambers. With respect to the only possible statutory basis for the policy, one Chamber refused to acknowledge any connection between article 93(10) and complementarity. In response to the Government of Kenya's argument that it could properly challenge admissibility only after the Court had decided on, and granted, a request for the OTP's sharing of evidence with the Kenyan authorities, the Chamber categorically separated article 93(10) as a provision on cooperation from complementarity as a rule of admissibility.[283]

[280] See also ICC-OTP 2003c:3 and 7 and Seils 2011:1011–13.

[281] Witness protection, which, pursuant to RS, art. 93(10)(b)(ii)(b), continues to be available if the ICC transmits evidence provided by a witness or expert to a state, could be expensive, but, according to RS, art. 100(1)(a) and (2), the state requesting the evidence would have to bear the costs of such protection.

[282] Arguing that 'the Office of the Prosecutor must have a strong capacity to conduct external relations activities as required by the complementarity regime of the Rome Statute [which] involves, *inter alia*, a complementarity dialogue with relevant states' (ICC-ASP/2/10 (2003):174), the Court has several times requested extra staff for the relevant section within the OTP. By and large, none or only a few of the requested extra positions have been granted. See, *inter alia*, ICC-ASP/3/25 (2004)-b:13, ICC-ASP/3/25 (2004)-c:193, ICC-ASP/4/32 (2005)-a:14 and ICC-ASP/4/32 (2005)-b:192–3.

[283] *Admissibility Decision Ruto et al. (PTC)*:[34] and *Admissibility Decision Muthaura et al. (PTC)*:[30] ('[T]he Cooperation Request ... is actually a request for

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Nonetheless, the Chamber then denied the Government of Kenya's request on grounds remarkably similar to those used to reject the admissibility challenge, namely, lack of proof of domestic investigations:

> [T]he Government of Kenya has not satisfied the first requirement of the test [of article 93(10)], namely that there is or has been an ongoing investigation with respect to either 'conduct' constituting a crime set out in article 5 of the Statute, or in relation to 'a serious crime under the national law of the requesting State'. The Government submitted to the Chamber a two-page Cooperation Request, which lacked any documentary proof that there is or has been an investigation, as required pursuant to article 93(10)(a) of the Statute.[284]

Too strict an application of this evidentiary test[285] could result in a Kafkaesque situation. Confronted with ICC proceedings against persons with respect to whom a state has not opened a case because of a lack of evidence, a state may wish to ask the ICC for such evidence – but in order to obtain such evidence from the ICC it must first prove that it has investigated the person, for which it requires the evidence that it lacks. Even if conceptually and procedurally separated, the complementarity proceedings of articles 17 to 20 and the 'positive complementarity' proceeding of article 93(10) thus share in practice the characteristic that they make it difficult for a state confronted with a Court that is unwilling to let go of a case or of evidence.

assistance which falls within the pure ambit of part IX of the Statute regulating the cooperation between the Court and States or other intergovernmental organisations. As such, the request for assistance has no linkage with the issue of admissibility, which is regulated under part II of the Statute. Ergo, a determination on the inadmissibility of a case pursuant to article 17 of the Statute does not depend on granting or denying a request for assistance under article 93(10) of the Statute. This conclusion finds support in the fact that a State may exercise its national jurisdiction by way of investigating or prosecuting, irrespective of and independent from any investigative activities of the Prosecutor.'). See also, respectively, *ibid.*:[35] and [31].

284 *Decision Cooperation Request Government of Kenya*:[34].

285 Even more so if combined with the same-person test that the OTP proposed in its submissions (*OTP Submission Art. 93(10) Request in Ruto et al.*:[4]: 'Kenya has not established that there is an investigation ongoing in Kenya against *the same individuals* under investigation before the ICC. If there is no investigation, the request for assistance does not satisfy the statutory language in Article 93(10)(a).').

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The Assembly of States Parties, for its part, has appropriated 'positive complementarity', thereby simultaneously endorsing the concept and divesting the Office of the Prosecutor of its monopoly on the policy. The preparatory report shaping the discussions at the Review Conference's 'stocktaking exercise' on complementarity limited the OTP's role in positive complementarity by definition:

> positive complementarity refers to all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, *without involving the Court* in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.[286]

It continued by stressing that it was 'important to note the Court's core mandate and function which is a judicial one and to emphasize that the Court is not a development agency'.[287] Instead, the report shifted positive complementarity to the action radius of states and their development agencies, international organisations and 'civil society'.[288] The concluding resolution, without using the term 'positive complementarity', embraced the ideas of the report, '[r]ecogni-[sing] the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level',[289] and '[e]ncourag[ing] the Court, States Parties and other stakeholders, including international organizations and civil society, to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern as set out in the Report of the Bureau on complementarity, including its recommendations'.[290] In the Conference's 'Kampala Declaration', the states parties resolved 'to continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in

[286] ICC-ASP/8/Res.9 Annex 4 (2010):[16].
[287] *Ibid.*:[4]. Reiterated again in [42] ('The role of the organs of the Court is limited. It is not envisaged that the activities described here would entail additional resource for the Court, nor should the Court become a development organization or an implementing agency.') and [52] ('The aim is not to create new roles for the Court.').
[288] *Ibid.*:[17] and [42]. [289] RC/Res.1 (2010):[5]. [290] *Ibid.*:[8].

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accordance with internationally recognized fair trial standards, pursuant to the principle of complementarity'.[291] Nonetheless, since Kampala, both the OTP and the Registry have continued to stress their roles in 'positive' or 'proactive' complementarity.[292]

In sum, whilst without a solid legal basis in the Rome Statute, the policy of positive complementarity, whether implemented by ICC organs or states, international organisations or non-governmental organisations, could be influential for complementarity's catalysing effect, as the policy's explicit aim is to catalyse developments at the domestic level.

CONCLUSION: COMPLEMENTARITY AND ITS POTENTIAL CATALYSING EFFECT

The principle of complementarity is, as a matter of law, not imbued with strong normativity *vis-à-vis* states; complementarity is embodied in an admissibility rule that binds the Court. Neither complementarity nor any other provision in the Statute obliges states parties to investigate or prosecute crimes within the Court's jurisdiction. Nor can the Court adjudicate upon or enforce any obligation under customary law to that effect. The Chambers have thus found no legal objection against states referring situations on their own territory to the Court. Nor does complementarity or any other provision in the Statute oblige states to proscribe genocide, crimes against humanity or war crimes as defined in the Statute.[293] In other words, the legal context in which the principle of complementarity operates does not require amendments to domestic criminal law.[294] Finally, the Statute does not prohibit states from using amnesties. These facts should reduce expectations of complementarity's catalysing effect on normative grounds.

If states do want to make use of their primary right to investigate and prosecute crimes within the Court's jurisdiction and displace the

[291] RC-4-ENG-04062010 (2010):[5]. The linkage of complementarity with general 'internationally recognized fair trial standards' is an example of complementarity as 'big idea' departing from complementarity as legal principle (see above: 'The ICC is not a human rights court overseeing compliance with fair trial rights').

[292] See e.g. Moreno-Ocampo 2011 and Arbia and Bassy 2011.

[293] The Statute obliges states parties to proscribe only crimes against the ICC's administration of justice: RS, art. 70(4).

[294] The Statute only requires states to ensure that domestic law facilitates cooperation with the Court: RS, art. 88.

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Court on grounds of complementarity, some of the criteria set forth in articles 17 and 20(3) set clear standards for domestic proceedings to meet in order to render cases inadmissible before the ICC. For instance, the Statute suggests that only criminal investigations and prosecutions, and not alternative mechanisms, count as domestic proceedings. By providing states with a sort of checklist for inadmissibility, these criteria have the potential to shape such proceedings.

At the same time, these provisions give states considerable leeway. States must charge the same 'conduct', but not necessarily the same 'crime', as the ICC. Equally, they need conduct only a 'genuine' (in the sense of '*bona fide*' and 'effective') domestic investigation or prosecution: they need not conduct their proceedings the same way as the ICC, so that, for instance, they need not apply the same fair trial rights or the same punishments. This may limit complementarity's catalysing effect on the substance and procedure of domestic proceedings but may at the same time enhance its catalysing effect on domestic proceedings as such by allowing states to join a global anti-impunity struggle by following their own procedures.

Some of complementarity's procedural aspects are also conducive to a catalysing effect. First, complementarity must be assessed irrespective of the mechanism by which the situation has come within the Court's jurisdiction. States have the primary right to investigate and prosecute even if the Security Council has referred a situation to the Court. Secondly, states are not prohibited from conducting proceedings in parallel with the ICC. Finally, the assessment of admissibility is dynamic. The Statute allows the Prosecutor and judges to review admissibility at several stages of the proceedings.[295] States can influence the factual basis on which admissibility is decided by beginning domestic proceedings in order to render ICC cases inadmissible, even after the ICC has begun proceedings.[296]

On the other hand, it is difficult for a state to prevent or end ICC investigations into a situation on grounds of complementarity. Since

[295] On the other hand, the Appeals Chamber's treatment of complementarity more as an issue going to the rights of interested states and defendants than as a matter of public policy to be insisted on so as to avoid duplication of national and international proceedings does not encourage states to play their part in the prosecution of international crimes.

[296] The case law that confirms this, *Admissibility Judgment Katanga (AC)*, stems, however, from the opposite scenario, namely, one in which an ICC case becomes admissible because a state stays domestic proceedings.

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the admissibility assessment is case-specific at all stages of ICC proceedings, the Prosecutor may decide to open an investigation when there are 'cases' that may be admissible, even if a state is investigating or prosecuting other cases emerging from the situation in question. Once the Prosecutor has opened an investigation into a situation, a state can render a specific case inadmissible before the ICC by conducting domestic proceedings, but has no way of obliging the Prosecutor to end his or her investigations into that situation.

The fact that the complementarity assessment is case-specific and not situation-specific may also limit the catalysing effect on a state's overall criminal justice system. In order to render a case inadmissible before the ICC, a state need prove not that its criminal justice system meets 'international standards' but merely that it is capable of conducting genuine proceedings in the particular case. At the same time, this could enhance a catalysing effect on proceedings as such: for a state the task of conducting such proceedings may be less daunting when it has to conduct genuine investigations and prosecutions only in the case at hand rather than overhaul its entire justice system.

In sum, as embodied in the Statute, complementarity does not give states concrete instructions, but allows states to displace the Court in a particular case (rather than a situation) by conducting genuine proceedings in that case. In terms of shaping domestic proceedings, complementarity's potential catalysing effect is thus limited, at least on the basis of the Statute. This may, however, at the same time encourage domestic investigations and prosecutions: various types of domestic criminal proceedings could be successful in rendering cases inadmissible before the Court. *Ex pluribus unum*, diverse domestic proceedings could all contribute to the same anti-impunity ideal symbolised by the Statute: in combating impunity, all roads lead to Rome.

However, the Court's case law on the definition of the same 'case' has significantly reduced this leeway should states wish to pre-empt future ICC proceedings or stymie ongoing proceedings before the Court. In finding all the cases before it to date admissible on grounds of complementarity, the Court has mostly relied on the ground that domestic proceedings did not cover the same 'case' as the one before the ICC. The Court has defined the term 'case' so narrowly that domestic proceedings are not considered to have taken place in the same 'case' unless they cover the same person, conduct, incidents and, possibly, mode of criminal responsibility as the case before the Court.

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This case law was developed in scenarios in which the state with national and territorial jurisdiction perceived that it was in its interest that the ICC conducted the proceedings. A finding of inadmissibility before the ICC thus might well have resulted in impunity. But, instead of finding the case inadmissible on the basis of the real problem – a lack of actual investigations – the Chambers developed an interpretation of the word 'case' that makes it almost impossible for a state successfully to challenge admissibility on the basis of genuine domestic proceedings, also in scenarios where a state does not consider ICC intervention in its interest.

The case law is based on a vision in which there is no 'concurrence' in the sense of overlapping claims to jurisdiction, and therefore no reason to apply the priority rule of complementarity if the same person, conduct or incident has not been or is not being investigated or prosecuted domestically. In situations in which crimes within the Court's jurisdiction have been committed it usually is impossible for any prosecutor, domestic or international, to investigate and prosecute all suspects, criminal conduct and criminal incidents. Procedurally, it is also difficult for a state to 'catch up' with the ICC. On the one hand, the Statute requires the state to challenge admissibility 'at the earliest opportunity',[297] but the state can be sure of the contents of the ICC's case only after the confirmation of charges. As the Kenya decisions have borne out, for a successful admissibility challenge the state must show evidence of investigations into the same persons and (substantially) the same conduct. On the other hand, if a state investigated and prosecuted before the ICC opened a case it cannot be sure that it will keep the ICC at bay since the ICC Prosecutor can always choose different conduct or incidents. In practice, it is thus virtually impossible to render cases inadmissible before the ICC.

From an exclusive anti-impunity perspective, this is precisely why the Court was established: to eradicate every remnant of impunity. This vision counters the argument that there always is some subjectivity in the availability of evidence, whether to a domestic or international prosecutor, with the argument that this is even more a reason for domestic and international proceedings to complement each other (in the literal sense): more impunity will be combated.[298] This vision

[297] RS, art. 19(5).

[298] See *Admissibility Judgment Ruto et al. (AC)*:[43]–[44] and *Admissibility Judgment Muthaura et al. (AC)*:[42]–[43] ('Kenya [counters] that a national jurisdiction may

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refuses to acknowledge that a state may have other interests (for instance, stability) that require some domestic discretion or avoidance of, or an end to, ICC involvement. In the Court's approach, complementarity thus protects sovereignty only to the extent that the state joins in a total war on impunity. Rather than encouraging domestic proceedings, this case law potentially dissuades states from trying to pursue cases in the ICC's stead. After all is said and done, the ICC prevails: all roads seem to lead to The Hague.[299]

Whilst this case law developed, ICC organs proclaimed outside the courtrooms a policy of positive complementarity with the explicit purpose of catalysing domestic proceedings. According to this policy, the OTP, and according to itself also the Registry, will do everything within their capabilities to ensure that states can and will investigate and prosecute international crimes. Given its purpose, this policy has an obvious potential to encourage complementarity's catalysing effect.

And yet, the fact that positive complementarity is based on policy rather than law makes its catalysing effect difficult to predict.

not always have the same evidence available as the Prosecutor and therefore may not be investigating the same suspects as the Court. This argument is not persuasive for two reasons. First, if a State does not investigate a given suspect because of lack of evidence, then there simply is no conflict of jurisdictions, and no reason why the case should be inadmissible before the Court. Second, what is relevant for the admissibility of a concrete case under articles 17(1)(a) and 19 of the Statute is not whether the same evidence in the Prosecutor's possession is available to a State, but whether the State is carrying out steps directed at ascertaining whether these suspects are responsible for substantially the same conduct as is the subject of the proceedings before the Court. Kenya also argues that there should be a "leeway in the exercise of discretion in the application of the principle of complementarity" to allow domestic proceedings to progress. This argument has no merit because, as explained above, the purpose of the admissibility proceedings under article 19 of the Statute is to determine whether the case brought by the Prosecutor is inadmissible because of a jurisdictional conflict. Unless there is such a conflict, the case is admissible. The suggestion that there should be a presumption in favour of domestic jurisdictions does not contradict this conclusion. Although article 17(1)(a) to (c) of the Statute does indeed favour national jurisdictions, it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level. If the suspect or conduct have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible' (footnotes omitted)).

[299] The Court could head in a different direction by interpreting the Appeals Chamber's use of the phrase 'substantially the same conduct', instead of the Pre-Trial Chambers' requirement of the 'same conduct' in order to adopt a more general assessment of whether impunity has been sufficiently addressed.

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Whether or not and if so how and when it is implemented is for the discretion of the Court's organs. States cannot rely on it. Indeed, as the Kenya cases show, the life of positive complementarity in public statements may be at odds with that in the courtroom. In public statements, 'positive complementarity' is a policy of cooperation with states inspired by states' primary right to investigate and prosecute. But, according to the Chambers, the only explicit legal basis for such a policy in the Statute, article 93(10), must be assessed separately from complementarity. And the Prosecutor, who first based the policy 'on the duty to cooperate established by art 93 10 and the principle of complementarity',[300] later submitted to the Court that it *disagreed* with the Government of Kenya that 'the Court is obligated to assist the Government of Kenya in order to promote complementarity and the State's effort to establish that the ICC prosecutions are inadmissible'.[301] The OTP continued by citing the Pre-Trial Chamber's dismissive statements in response to Kenya's invocation of the policy of positive complementarity, seemingly with approval, when arguing:

> This Chamber has previously held that 'the request for assistance has no linkage with the issue of admissibility'; 'a determination on the inadmissibility of a case pursuant to article 17 of the Statute does not depend on granting or denying a request for assistance under article 93(10) of the Statute'; 'a State may exercise its national jurisdiction by way of investigating or prosecuting, irrespective of and independent from any investigative activities of the Prosecutor'; '[t]hese domestic proceedings should be in principle carried out without the assistance of the Court'; and 'national investigative activities are conducted independently from this Court and based on the national laws of the Republic of Kenya'.[302]

Outside the courtroom, however, the OTP continues to express its commitment to its policy of positive complementarity.

[300] *Prosecution's Response Art. 93 Request Original Ruto et al.*:[13]. Note that the OTP seemed to backtrack on the obligatory character of its providing cooperation when amending this paragraph in *Corrigendum Prosecution's Response Art. 93 Request Original Ruto et al.*:[13] to read: 'Since 2003, the Prosecution has defined a policy of "positive complementarity" based on the provisions on cooperation established by article 93(10) and the preamble of Rome Statute.'

[301] *Prosecution's Response to Art. 93 Request in Kenya Situation*:[24] (footnotes omitted).

[302] *Ibid.* See also [6].

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As the following chapters will illustrate, positive complementarity is only one illustration of the fact that complementarity's life as a legal principle in the Statute adjudicated upon in the courtroom has little to do with its life as 'big idea' in the wider world. And yet, it is particularly complementarity as 'big idea', and not as legal principle, that has spurred its catalysing effect. Undefined, devoid of judicial scrutiny and not legally binding as they are, big ideas are invoked, promoted and applied inconsistently and by various actors with various agendas. As a result, it is highly questionable that the effects catalysed by the 'big idea' of complementarity help in winning admissibility challenges adjudicated on the basis of the legal principle.

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