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It's a Good Idea . . . Isn't It? The Impact of Complementarity at the International Criminal Court on Domestic Law, Politics and Perceptions of Sovereignty

STEVEN FREELAND

A fundamental element underpinning the structure and operation of the International Criminal Court (ICC or the Court) is the principle of 'complementarity', by which the Court is designed to complement rather than override domestic legal processes. As a consequence, States with appropriate jurisdiction are able to deal with alleged crimes that also fall within the mandate of the ICC instead of the Court doing so itself. Only when such a State is 'unwilling or unable' genuinely to do so will a matter potentially be admissible before the ICC. This principle was intended to diffuse any (perceived) threat to or interference with domestic sovereignty arising from the establishment of this permanent international judicial body. It does, however, mean that the Court may be required to make a judgment as to the integrity of certain domestic and political actions. Moreover, for a State to be able to rely on the principle, its national law must allow for the investigation and prosecution of the relevant crimes. In most cases, therefore, the implementation of the ICC Statute by a State will necessitate that its domestic legislative systems enact appropriate national law to formalise the interaction between the international judicial institution and the relevant national legal order for the purposes of dealing with such crimes.

This chapter examines how the principle of complementarity may impact national law and prosecutorial policy in practice and might therefore be interpreted (sometimes inaccurately) by States in a manner that drives their respective domestic political concerns. This in turn may also politicise the Court itself. By way of illustration, this chapter examines the circumstances leading to Australia's eventual ratification and implementation of the ICC Statute. Australia had, prior to the establishment of the Court, been a strong supporter; however, in the end, it very nearly did *not* ratify the ICC Statute, following an emotional and vitriolic debate amongst Government ranks, but also extending to the broader community. The Australian experience

* Professor of International Law, University of Western Sydney, Australia; Visiting Professor, iCourts Centre of Excellence for International Courts, Denmark; Visiting Professor, University of Vienna, Austria.

demonstrates that, notwithstanding the initial intentions behind its crafting, and the fact that it represented a compromise intended to appease fears that it would unduly impact national political and legal processes, some States may still perceive the principle of complementarity as a threat to domestic sovereignty. As a consequence, therefore, what started out as a foundational principle that facilitated the establishment of the ICC may in fact have come to be (mis)used by States as a tool to oppose aspects of the Court's activities.

4.1 Introduction: A (Re)new(ed) 'Direction' for International Criminal Justice

Following the end of the Second World War, international military tribunals were established in Nuremberg and Tokyo by the victorious powers to deal with crimes perpetrated by certain German and Japanese military and political leaders.[1] Nineteen other countries subsequently adhered to the Charter that established the Nuremberg Tribunal,[2] which has been described as a 'truly international judicial institution' (Scharf 2013, 64), notwithstanding criticisms that it merely represented 'victors' justice'. Such an international approach to accountability for war crimes was unprecedented at the time.[3] Despite their shortcomings, these tribunals established quite revolutionary principles, the most important of which were confirmed by the United Nations General Assembly[4] and were subsequently considered to reflect customary international law.

Yet, almost as quickly as they were established, this experimental form of international criminal justice came to an end, as the impact of the Cold War took effect. These international tribunals were a casualty of the divergent domestic political systems and ideologies that pitted the 'Western' States against the communist bloc. A long period (1945–1990) of impunity then followed during which as many as 170 million people were killed in armed conflicts (Bassiouni 1998, 203), with little if any legal accountability at either the international or national level. There was no political will to address atrocity crimes at the national level, nor

[1] International Military Tribunal for the trial of the German major war criminals at Nuremberg (Nuremberg Tribunal) and International Military Tribunal for the trial of the major war criminals in the Far East.

[2] See London Agreement for the Establishment of an International Military Tribunal (1945) 82 UNTS 279, to which the Charter of the Nuremberg Tribunal was annexed.

[3] For a discussion of earlier attempts to establish international judicial bodies to address atrocity crimes, see Freeland (2010).

[4] See *inter alia* United Nations General Assembly Resolution 488 (V) (12 December 1950) on the Formulation of the Nürnberg Principles.

were there any international institutions to act in their stead. It was not until the early 1990s that the United Nations Security Council (UNSC) was able to play a more active role in addressing international crimes. Only then were the geopolitical circumstances such that a renewed effort to create a system of international judicial bodies to deal with such acts could be developed.

Since then, a paradigm shift in international criminal accountability has taken place. A regime of international criminal justice has (re) emerged, founded upon a number of *ad hoc* international and 'hybrid' courts and tribunals.[5] These judicial institutions initially adopted an *ex post facto* approach to international crimes. Over time, however, the nature of international criminal justice took a further turn in 1998 with the conclusion of the Rome Statute of the International Criminal Court,[6] the world's first *permanent* international criminal tribunal, which would be in a position to deal with events that would take place in the future.

The ICC was established on 1 July 2002, following the requisite number of ratifications of the ICC Statute,[7] and its judicial activities have since gradually developed.[8] These activities continue an emergent trend towards the 'institutionalisation' and 'judicialisation' of international criminal justice, although the Court is still not universally accepted. Only two of the five permanent members of the United Nations Security Council (P5) have thus far ratified the ICC Statute (France and the United Kingdom), and the highly populated Asia-Pacific region remains under-represented among States Parties (Freeland 2013, 1029–57). Moreover, various countries from Africa, from which more than a quarter of States Parties are drawn,[9] have expressed strong reservations as to aspects of the Court's current activities, particularly with respect to the cases that had been initiated against

[5] These include the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Serious Crimes Panels for Timor-Leste (SCPTL), the Special Tribunal for Lebanon (STL) and the International Criminal Court (ICC).

[6] Rome Statute of the International Criminal Court (ICC Statute) (1998) 37 ILM 999.

[7] See ICC Statute, Article 126.

[8] For details of the current situations and cases being dealt with by the ICC, see the Court's website (ICC Website) www.icc-cpi.int.

[9] As of the time of writing, there are 123 States Parties to the ICC Statute, of which 34 are African States: see ICC Website, 'The States Parties to the Rome Statute'. Palestine is the latest State Party, having acceded to the Rome Statute on 2 January 2015. The Rome Statute entered into force for Palestine on 1 April 2015: see ICC Website, 'Palestine' http://www.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/Palestine. aspx (accessed 23 January 2015).

incumbent African political leaders.[10] This domestic 'backlash', coupled with the resultant lack of cooperation with the Court's attempts to exercise its jurisdiction in those cases, has ultimately meant that these cases will not lead to a final determination of criminal accountability with respect to those individuals.[11]

Nonetheless, there continue to be an ever-increasing number of calls for the UNSC to refer other complex matters to the Prosecutor of the ICC.[12] Despite its many critics, the Court has become an increasingly important element of the various (legal and non-legal) tools that address the consequences of conflict and the implementation of criminal justice against those accused of the most egregious crimes.

4.2 Complementarity and Domestic Implementation: Two Sides of the Same Coin?

The coexistence of a dual layer of criminal justice at both the national and international levels gives rise to some overlap in jurisdictional reach. Managing this overlap requires interaction between the national legal system and its international counterpart via a process of priority.

Thus, a general feature of the main *ad hoc* courts and tribunals established by the United Nations[13] has been the notion of 'primacy'. Whilst their jurisdiction is concurrent with national legal systems, they have priority in terms of investigating and/or prosecuting persons who have allegedly committed crimes within their mandate. Thus, they can

[10] See e.g. the Decision of the Assembly of the African Union (AU Assembly), 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', Assembly/AU/Dec.245(XIII) Rev.1, 3 July 2009, www.au.int/en/sites/default/files/ASSEMBLY_EN_1_ 3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf (accessed 7 August 2014).

[11] On 5 December 2014, the ICC Prosecutor filed a notice to withdraw charges against President Kenyatta of Kenya citing, in part, a lack of cooperation by that State. In the same month, the Prosecutor announced that the investigation in the case concerning President Bashir would be suspended: Smith, 'ICC Chief Prosecutor shelves Darfur war crime probe', *The Guardian* (UK), 14 December 2014, www.theguardian. com/world/2014/dec/14/icc-darfur-war-crimes-fatou-bensouda-sudan (accessed 16 December 2014).

[12] See e.g. Office of the High Commissioner for Human Rights, 'North Korea: UN Commission documents wide-ranging and ongoing crimes against humanity, urges referral to ICC', Press Release, 17 February 2014, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14255&LangID=E. (accessed 7 August 2014); Human Rights Watch, 'Syria: 58 Countries Urge ICC Referral', 20 May 2014, www.hrw.org/news/2014/05/20/syria-58-countries-urge-icc-referral. (accessed 8 August 2014).

[13] These are the ICTY and ICTR.

require that the national courts of a State defer any domestic criminal proceedings in respect of that person,[14] although, conversely, they also retain the possibility to refer cases to domestic courts.[15] The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed the legitimacy of its primacy over domestic legal systems in the case involving Dusko Tadić, the very first person to be tried under this new regime of international institutional justice.[16]

By contrast, the 'forward-looking' perspective of the ICC necessitated a fundamental realignment of jurisdictional priorities between that Court and domestic criminal legal systems. To incorporate a system of international primacy over domestic legal processes within the context of the ICC, whose mandate was not 'ring-fenced' around specific situations that were *already* largely identified at the time of its establishment, would not have been acceptable to most States. In other words, a permanent court that could require States to suspend their own investigations and criminal proceedings and instead surrender the relevant person(s) to an international institution would have likely been a bridge too far. In the eyes of States, this would be delegating too much power to an international judicial body.[17]

As a consequence, an alternate system of priority intended to address domestic concerns became a non-negotiable requirement for States (Triggs 2003, 507–534, 511) attending the conference at which the terms of the ICC Statute were to be finalised.[18] After much debate as to the Court's jurisdictional trigger points, a specifically designed 'State-centred' approach, based on the principle of complementarity, was agreed upon.[19] The simple truth is that without the incorporation of

[14] See e.g. ICTY Statute, Articles 9(1) and 9(2) and ICTR Statute, Articles 8(1) and 8(2).
[15] See e.g. Rule 11*bis* of the ICTY Rules of Procedure and Evidence.
[16] See ICTY, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor* v. *Tadić*, Case No. IT-94–1, Appeals Chamber, 2 October 1995, paras. 49–64.
[17] For a discussion of the extent to which the States can be seen to be delegating powers to international criminal courts, see e.g. Wallerstein (2015).
[18] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998 (Rome Conference).
[19] In addition to complementarity, other State-centred features of the ICC Statute include (i) the fact that the Court does not exercise true universal jurisdiction; (ii) the jurisdiction of the Court applying only to *future* crimes; (iii) the powers given to the UNSC to suspend investigations and/or prosecutions (Article 16); (iv) the right of States Parties to declare a 7-year 'grace period' in relation to war crimes (Article 124); (v) the right of withdrawal from the ICC Statute (Article 127), which although not an unusual provision in a multilateral treaty, does not necessarily sit well with basic goal of 'put[ting] an end to impunity' (Preamble para. 5).

complementarity into the Court's structure, there would have been no ICC.

As a result, the ICC has been structured as a 'court of last resort', only able to act when States are unable or unwilling to do so, thus creating in the eyes of some a 'presumption in favour of prosecution in domestic courts' (see e.g. Sarooshi 1999, 387–404, 395). States have the opportunity to undertake an investigation and/or prosecution and, if those actions meet certain standards, the ICC may never be able to try that person 'with respect to the same conduct'.[20]

Article 17 of the ICC Statute incorporates complementarity in terms of the 'admissibility' of a case, rather than as a question of jurisdiction. The concept of 'admissibility' applies to scenarios in relation to which the Court is to refrain from exercising its recognised jurisdiction over a given situation or case. The ICC Statute provides that a case is inadmissible before the Court *inter alia* if it:[21]

(a) (. . .) 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) (. . .) 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.

Article 17(2) specifies those circumstances in which the Court may determine the 'unwillingness' of a State in a particular case. This may arise in the following situations:

(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 (. . .);
(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;

[20] See ICC Statute, Article 20(3).
[21] *Ibid*., Articles 17(1)(a) and (b). See ICC, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Prosecutor* v. *Katanga*, Case No. ICC-01/04–01/07–1497, Appeals Chamber, 25 September 2009, para. 78. A case may also be determined as inadmissible if it fails the third complementarity 'test' set out in Article 17(1)(c), or the gravity threshold specified in Article 17(1)(d).

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

When assessing these circumstances, the Court is to have regard to 'the principles of due process recognized by international law'. In determining a State's 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.[22]

There are, undoubtedly, uncertainties as to precisely how aspects of the complementarity principle will be applied, and the Court itself will ultimately be required to clarify certain issues.[23] Nonetheless, the principle was initially thought to, in most cases, represent a safeguard for States that would wish to exercise jurisdiction over those accused of the relevant crimes, provided that they are 'genuine' in their actions to deal with such situations. This latter point does, however, institutionalise a sense of international judicial oversight of domestic actions, including important legal and political processes. In this way, rather than allow States to address these crimes as they see fit (as long as they address them in *some* way), it facilitates the application of an international standard on those actions, thus potentially impacting significantly on domestic political and legal systems.

In addition, a further 'price' is to be paid for this State-centred priority system: the need to 'upgrade' domestic laws to ensure that the relevant country does not fall within the 'unable' criteria set out in Article 17. A by-product arising from accepting the Court is the incentive it provides for a State to implement appropriate national laws to ensure that its domestic courts have jurisdiction to deal with any alleged international

[22] ICC Statute, Article 17(3).

[23] For example, the Court has clarified the meaning of 'is being investigated' in Article 17(1)(a): see ICC, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', *Ruto, Kosgey and Sang*, Case No. ICC-01/09–01/11 OA, Appeals Chamber, 30 August 2011 (*Ruto* Admissibility Judgment); and ICC, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', *Muthaura, Kenyatta and Ali*, Case No. ICC-01/09–02/11 OA, Appeals Chamber, 30 August 2011.

crime within the jurisdiction of the ICC.[24] Of course, even then, this would not necessarily guarantee that they would be in a position to deal with every aspect of the investigation and prosecution of the 'most serious crimes of international concern' (see Megret & Samson 2013, 571–589).

However, the failure of the domestic legal system to incorporate such adaptations into its laws will mean that the relevant State will most likely not be able to rely on the principle of complementarity to avoid the potential reach of the Court. Thus, the principle of complementarity, designed as it is to allow States to exercise a degree of control over the prosecutorial fate of those accused of serious crimes, can only be brought into play when appropriate domestic law is put into place. Rather than being part of any master plan to reform or 'democratise' the laws of States Parties to the ICC Statute, the incorporation of the principle should instead be seen as a natural consequence of the desire by States to be able (potentially) to avoid the possibility that their nationals are brought before the ICC. In this regard, there is a clear interaction between the domestic political institutions and the international court. The operative capacity of the international court system is thus influenced by domestic laws, which themselves must be adapted to (potentially) avoid the practical reach of the Court.

Therefore, for States to satisfy the criteria for complementarity, their domestic criminal code must provide for crimes that are identical or 'equivalent' covering 'substantially the same conduct' to the crimes within the jurisdiction of the ICC. Interestingly, in contrast to some other treaties,[25] there is no express requirement in the ICC Statute for States Parties to do this. Indeed, State Parties can, of course, choose *not* to enact such laws. Many (still) have not done so. However, this choice (conscious or otherwise) removes one important barrier to the application of the Court's jurisdiction to that State's nationals.

The principle of complementarity thus appears in practical terms to encourage such domestic action (Hay 2004, 191–210), although it is not necessary that a crime is 'prosecuted as an international crime domestically'.[26] The umbrella NGO, Coalition for the International Criminal

[24] These are the crime of genocide, crimes against humanity, war crimes and the crime of aggression: ICC Statute, Article 5(1).

[25] See e.g. United Nations Convention against Transnational Organized Crime (2000) 40 ILM 335, Articles 5 and 6.

[26] ICC, Judgment on the Appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against

Court (CICC), expresses it this way: '[f]or the principle of complementarity to become truly effective, following ratification, States must also implement all of the crimes under the Rome Statute into domestic legislation'.[27] In addition, even in situations where it is the ICC (rather than a State) that is conducting an investigation and/or prosecution, States Parties to the ICC Statute will still have an obligation to 'cooperate fully with the Court'.[28] This requires that they 'ensure that there are procedures available under their national law' to allow for such cooperation,[29] which will also mean that domestic processes facilitating this interaction are implemented.

Thus, formal acceptance of the ICC's jurisdiction through the ratification of the ICC Statute should, in theory, mean that the national law of a State requires amendment and/or addition. Yet, at the end of 2012, almost half of the State Parties had still neither implemented the ICC Statute nor enacted specific provisions within their national laws relating to the practical application of the complementarity principle.[30]

There may, of course, be many reasons why a State has not yet implemented the ICC Statute. The procedure for domestic enactment may itself be a lengthy process and may span the term of different governments in a particular State.[31] Some States may lack sufficient resources to make the implementation of the Statute a priority, particularly when compared to what might be perceived as more pressing issues. In other situations, it may well be that despite ratification of the ICC Statute, there may still be some domestic resistance to the Court. Irrespective of the underlying reason, the current rate of domestic implementation is not consistent with the 'duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[32]

Abdullah Al-Senussi', *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11–01/11 OA 6, Appeals Chamber, 24 July 2014 (*Al-Senussi* Admissibility Judgment), para. 119.

[27] CICC website, 'Ratification and Implementation', www.iccnow.org/?mod=ratimp&utm_source=CICC+ Newsletters&utm_campaign=c36f3b81caDecember_Ratification_Digest_EN&utm_medium=email&utm_term=0_68df9c5182-c36f3b81ca-356525349&ct=t(December_Ratification_Digest_EN12_6_2013) (accessed 1 August 2014).

[28] ICC Statute, Article 86. [29] *Ibid.*, Article 88.

[30] According to CICC, as of late 2012, 65 countries had enacted legislation containing either complementarity or cooperation provisions, or both: see CICC Website, *Asia and Pacific*, 2012, (accessed 10 August 2014).

[31] CICC has also reported that about 35 States are 'in the process of' enacting implementing laws, although this does not take account of potentially fatal roadblocks or delays.

[32] ICC Statute, Preamble para. 6.

Since the ICC's establishment, challenges to admissibility have been initiated by *inter alia* Kenya, Libya, Sudan and Cote D'Ivoire. The judges have therefore had the opportunity to clarify a number of the elements of the complementarity principle. For example, in determining its applicability, the Appeals Chamber has set out some important comparators, holding that the starting point for the interpretation of the word 'case' in article 17 is 'for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the *same individual* and *substantially the same conduct* as alleged in the proceedings before the Court'.[33] Thus, for the purposes of the application of the principle, the Court has concluded that the 'parameters of a "case" [in Article 17 of the ICC Statute] are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute'.[34] As a consequence, the practical application of the principle may well have an impact not only on the domestic law of a particular country (irrespective of its development status and political structure) but also on its national prosecutorial policy. It is not sufficient to investigate/prosecute the relevant person(s) for *any* crime under national law, for example, corruption or other financial crimes. Rather, for the purposes of applying complementarity to domestic action, there needs to be a sufficient nexus between the charges instigated under the relevant national law and the crime for which that person may be indicted under international jurisdiction. It is clear, therefore, that the interaction between the domestic codification and the exercise of domestic criminal jurisdiction, as contemplated by the prioritisation system applicable under complementarity, is crucial. The (possible) involvement of the ICC will often depend upon the relevant domestic political considerations.

From a broader perspective, reference could also be made to the comments of former Judge Hans-Peter Kaul in a dissenting opinion in a case involving Kenya's claims under Article 17. The Judge went so far as to question 'whether the ICC is *the right forum* before which to investigate and prosecute' the crimes that were the subject of the charges

[33] *Ruto* Admissibility Judgment, para. 40 (emphasis added). The 'same conduct' test used by the ICC has been the subject of criticism by a number of scholars: see e.g. Robinson (2012, 165–82, 175–82) and the references in the footnotes thereto. See also ICC, Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11–01/11 OA 4, Appeals Chamber, 21 May 2014 (*Gaddafi* Admissibility Judgment), Dissenting Opinion of Judge Anita Ušacka, paras. 47–65.

[34] *Gaddafi* Admissibility Judgment, para. 61.

initiated by the ICC Prosecutor.[35] He emphasised the need for a clear 'demarcation line' between the crimes within the jurisdiction of the ICC and crimes under national law. In his view, the distinction between these crimes should not be blurred, and that to do so 'might infringe on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute. It would broaden the scope of possible ICC intervention almost indefinitely'.[36] In other words, the judge stressed that the actions of the ICC should be cognisant of domestic legal, jurisdictional and policy considerations. He suggested that even if acts of individuals fall within the jurisdiction of the Court, this should not necessarily mean that the Court should act if it is not to be regarded as 'the right forum'. Reflecting this view, several States have approached the complementarity principle with suspicion, regarding it as a threat to their domestic sovereignty and discretion. In this regard, it is informative to consider the circumstances of Australia's ratification of the ICC Statute.

4.3 Complementarity as a 'Threat' to State Sovereignty? The Case of Australia

Australia was the 75th State to ratify the ICC Statute and became a State Party on 1 July 2002, only a matter of hours before the Court was established. At the same time, it enacted detailed implementing legislation that both established procedures for cooperation with the ICC[37] and amended its domestic Criminal Code to include the crimes listed in the ICC Statute.[38]

From the outset, Australian expertise has played an important role in the development of this new era of international criminal justice, particularly with respect to the work of the respective Offices of the Prosecutor in the *ad hoc* tribunals. Australia has also been a strong financial supporter towards the establishment of the Extraordinary Chambers on the Courts of Cambodia (ECCC). As noted by Lisa Conant in her chapter, during the 1990s, Australia also championed the establishment of the ICC. It aligned itself with, and at times chaired, the so-called Like-Minded group of States, which lobbied for a strong and independent

[35] ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, No. ICC-01/09, Pre-Trial Chamber II, 31 March 2010, Dissenting Opinion of Judge Hans-Peter Kaul, paragraph 6 (emphasis added).
[36] *Ibid*., paras. 9, 10. [37] *International Criminal Court Act 2002* (Commonwealth[Cth]).
[38] *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

ICC. Whilst this was undoubtedly motivated by a desire among some leading Government figures at the time to promote the development of the Court, another relevant factor was Australia's poor record with regard to domestic war crimes prosecutions.[39] In this regard, although not, of course, cited as an official reason, Australia's support for the ICC could be seen, at least partially, as a 'substitute' for its (domestic) inaction to address very serious crimes.

Then Foreign Minister Alexander Downer made a number of pledges to the United Nations General Assembly during the 1990s about the role that Australia saw itself playing when the ICC was eventually to be established. Just weeks before the Rome Conference, Minister Downer argued that 'the international community must seize the historic opportunity presented by the Diplomatic Conference to be held in Rome . . . We must ensure that a truly effective, credible and widely acceptable Criminal Court is established' (Downer 1998). By May 2002, the Government had twice confirmed its intention to ratify the ICC Statute by 1 July 2002 (so as to be able to attend the first Assembly of States Parties in September of that year), and the national Joint Standing Committee on Treaties (JSCOT) had also recommended ratification. However, by June of that year, a very public disagreement had surfaced between those who argued that Australia should not ratify the ICC Statute and those who supported Australia's acceptance of the Court (the latter being branded rather disparagingly as 'internationalists' by the former). As Marlene Wind notes in the Introduction to this book, the initial enthusiasm for the Court was significantly 'dampened' by domestic political concerns by the time the decision was to be made as to whether the country would become a State Party to the ICC Statute.

The main issue of contention stemmed from a (mis-)apprehension among some government members that ratification of the ICC Statute would, in some way, compromise the sovereignty of the country. Australia has a robust military law system that together with the regular legal system, is applied to its defence and military personnel. Yet, an organisation that represents the interests of (former) soldiers and has close links to the Government, the conservative Returned Services League of Australia, argued before the JSCOT that the ICC would constitute

[39] For a detailed account of Australia's failure to instigate effective domestic prosecutions of alleged war criminals, see (Aarons 2001).

> an unjustifiable interference with Australian sovereignty. First of all, in war situations, the Australian Defence Force would be under unreasonable threat of constraint, and secondly, in non-defence and armed force situations, Australian politicians, Australian civil servants and Australians generally would be subject to the possible application of the statute in regard to matters which might be claimed to be genocide . . . and would be at risk of being extradited and tried before this tribunal. [40]

This viewpoint was championed within government ranks by a number of politicians, with a leading opponent of ratification at the time asserting the following:

> [t]he international court has the power to say Australia you haven't done it well enough. Therefore, we deem you to be unable or unwilling to do it and demand that Australia arrest its own citizens and deliver that citizen up to that court . . . This is a fundamental issue about the sovereignty of our nation. We've claimed sovereignty with regard to saying who may come across our borders. This is the same principle to me to say who shall try our people.
>
> (Bishop 2006)

Opposition to the Court even embraced racist overtones, with one member of the Government asserting that the ICC would place Australian nationals at the mercy of 'African and Asian judges' (quoted in Bellamy & Hanson 2002, 7). Reflecting popular public opinion amongst the conservative elements of society, a prominent journalist argued, 'There is no serious argument for Australia to cede further sovereignty to a UN body that will be dominated by bureaucrats. Human rights are protected by States. Democratic governments are accountable and have democratic legitimacy. No one elected the UN' (Sheridan 2002, 17). Not only was this inflammatory, but also incorrect, the ICC is not a part of the United Nations system but rather, as outlined earlier, is a treaty-based body.

Ironically, at about the same time these strident views about the sanctity of national sovereignty were being expressed, the Government began to take unprecedented steps to *limit* Australian sovereignty in relation to the scope of Australia's migration zone.[41] Once again, this

[40] Australian Joint Standing Committee on Treaties, www.aph.gov.au/house/committee/jsct/ICC/ICC (accessed 10 June 2008).

[41] In September 2001, the Australian Parliament passed the Migration Amendment (Excision from Migration Zone) Act 2001 (Cth) and the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth). This legislation had the effect of excising certain external Australian territories from the operation of

was promoted on the back of pro-nationalistic rhetoric[42] and garnered a significant degree of public support.

A further complicating factor was that then Prime Minister John Howard, a strong supporter of the alliance with the United States, and who had been in Washington at the time of the 11 September attack in 2001, had been briefed by the American State Department as to the 'compelling' reasons why the United States opposed the Court. This was also based on a largely misplaced distrust of the powers of the Court (and in particular those of the Prosecutor), and a lack of understanding of complementarity (even though the United States had fought hard to have it included in the ICC Statute in the first place) (see Freeland 2003, 319).[43] Indeed, the ICC Statute *does* contain sufficient 'checks and balances' to counter the possibility of 'arbitrary' prosecutions by a 'rogue' Prosecutor,[44] and it does 'enable States to retain jurisdiction over cases and promotes the exercise of criminal jurisdiction domestically'.[45]

Nevertheless, the Prime Minister was seemingly persuaded by these discussions and performed a virtual *volte-face* from a firm supporter to somewhat of an ICC sceptic. He politicised the issue further by deciding to open the decision as to whether to ratify the ICC Statute to a vote among all Government members.

In the end, the decision to ratify was carried by just one vote.[46] The Prime Minister announced on 20 June 2002 that Australia would ratify

Australia's migration zone so as to deny the ability of 'offshore entry persons' to make an application for a visa.

[42] See e.g. Prime Minster Howard's election speech on 28 October 2001, in which he stated that '[w]e will be compassionate, we will save lives, we will care for people but *we will decide and nobody else who comes to this country*'; http://electionspeeches.moadoph.gov.au/speeches/2001-john-howard. (accessed 2 March 2015) (emphasis added).

[43] There have been more recent indications that the United States is now more supportive of the activities of the Court: see e.g. the expressions of support for the Court by members of the Obama Administration in American Non-Governmental Organizations Coalition for the International Criminal Court, 'General Approach to the ICC', October 2012, www.amicc.org/usicc/administration. (accessed 12 August 2014).

[44] See ICC Statute, Article 61, which calls for a hearing before the Pre-Trial Chamber in which the Prosecutor is required to 'support each charge with sufficient evidence to establish substantial grounds to believe that [a] person committed the crime charged'. If the Prosecutor is unable to do so, the Pre-Trial Chamber can decline to confirm those charges: see e.g. ICC, 'Decision on the confirmation of charges', *Prosecutor* v. *Callixte Mbarushimana*, Case No. ICC-01/04–01/10, Pre-Trial Chamber I, 16 December 2011.

[45] *Al-Senussi* Admissibility Judgment, para. 217.

[46] Under Australian domestic law, the act of ratification is an act by the Executive, whereas implementation is carried out by the Legislature. For details, see Triggs 2003, 516–18.

the ICC Statute, but he also made it clear that it would include a declaration with its instrument of ratification. This had been one of the JSCOT recommendations, specifically as a compromise to appease opposition to the Court. In the Prime Minister's words, the declaration would ensure 'that the decision to ratify does not compromise Australia's sovereignty' (see Howard 2002). As a consequence, Australia lodged the following declaration:

> Australia notes that a case will be inadmissible before the International Criminal Court (the Court) where it is being investigated or prosecuted by a State. Australia reaffirms the primacy of its criminal jurisdiction in relation to crimes within the jurisdiction of the Court. To enable Australia to exercise its jurisdiction effectively, and fully adhering to its obligations under the Statute of the Court, no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes. For this purpose, the procedure under Australian law implementing the Statute of the Court provides that no person can be surrendered to the Court unless the Australian Attorney-General issues a certificate allowing surrender. Australian law also provides that no person can be arrested pursuant to an arrest warrant issued by the Court without a certificate from the Attorney-General.
>
> Australia further declares its understanding that the offences in Articles 6, 7 and 8 will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law.

Several other countries have also lodged declarations asserting national primacy in relation to various aspects arising from the complementarity principle.[47] However, the Australian declaration goes further, seeking to limit the meaning of each crime to the terms of those definitions incorporated into national law. In other words, the declaration indicates an intention to 'domesticate' the scope of the core international crimes. Thus, Australia's interpretation of these crimes may be at odds with (and presumably narrower than) the full scope of these crimes as enunciated by the international courts. Such a limiting domestic adaptation of the evolving nature of international criminal justice runs the risk of falling foul of the broader rationale underpinning this new regime of international courts.

By contrast, this declaration in reality adds nothing of substance in terms of expanding complementarity, instead merely reiterating the

[47] See e.g. the Swiss Federal Law on Cooperation with the International Criminal Court 2001, Articles 3, 6 and 7 and the Danish Act No. 342 of 16 May 2001, sec. 2.

already existing effect of the application of that principle.[48] Simply put, it purports to protect Australia's 'sovereignty' from threats that do not in fact exist. However, from a domestic political perspective, this declaration was considered as crucial, if only to assuage the concerns of those who were suspicious of the ICC and who, frankly, did not understand how the ICC Statute was designed to operate.

The Australian implementing legislation is also conservative in approach. As foreshadowed in the declaration, it gives the Attorney-General considerable powers in relation to (i) whether a domestic prosecution is to be commenced or other proceedings conducted, (ii) the arrest and surrender of any person to the Court and (iii) other aspects of cooperation. Moreover, any request for cooperation may be refused *inter alia* if:[49]

i) the Attorney-General is of the opinion that it may conflict with Australia's obligations under international law, or in relation to an international agreement,[50] unless the necessary waiver or consent of the appropriate foreign State is received;
ii) the information or documents requested by the ICC have been provided by a foreign State (or Intergovernmental or International Organisation) under confidentiality, unless prior consent is received;
iii) the co-operation or disclosure of information or documents would prejudice Australia's national security interests.

In spite of this, for Australia, the enactment of this implementing legislation was particularly significant and symbolic. The legislature had never effectively implemented the 1948 Genocide Convention into domestic law,[51] with the result that it had not previously been possible to assert that a crime of genocide existed under Australian law.[52] Ratification of the

[48] Under principles of general international law, interpretative declarations are not intended to have a 'binding consequence' with respect to the application of the relevant treaty: Shaw (2008, 915). In addition, no reservations (which do have a legal effect) are permitted under the ICC Statute (see Article 120).
[49] See *International Criminal Court Act 2002* (Cth), parts 3 and 4.
[50] See ICC Statute, Article 98.
[51] The Australian Parliament enacted the *Genocide Convention Act 1949* (Cth), the purpose of which was to endorse Australia's ratification of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277 (Genocide Convention) on 8 July 1949. No legislation specifically implementing the substantive elements of the Genocide Convention into Australian domestic law has ever been enacted.
[52] See e.g. *Nulyarimma* v. *Thompson* [1999] 165 ALR 621 (FCA), where the Full Court of the Federal Court of Australia held, by majority, that the crime of genocide was not recognised as part of Australian common law.

ICC Statute has placed Australia in a position where it must accept, albeit for pragmatic reasons, the inevitability that crimes such as genocide and crimes against humanity are, and should be, recognised as fundamental elements of any domestic criminal code. In this way, even a Western democratic country such as Australia had to adapt its domestic laws quite radically in light of a treaty (the ICC Statute) and the operation of an international court to incorporate crimes into national law that are internationally recognised as representing unacceptable behaviour.

That said, a conservative approach was taken with respect to the application of these 'new' crimes under Australian law, so as to avoid any possible domestic judicial revision of the alleged acts of genocide perpetrated in the past against Australia's indigenous people. The Australian implementing legislation does not provide for universal jurisdiction and does not apply retrospectively. This is in contrast to, for example, the implementing legislation of another Western democratic country, neighbouring New Zealand,[53] under which its domestic courts are given universal jurisdiction[54] and have retrospective jurisdiction over genocide and crimes against humanity.[55]

In sum, therefore, in the case of Australia, the effect of complementarity was largely misunderstood and had the initial effect of galvanising suspicion of the Court as opposed to facilitating cooperation. The public debates about the Court were largely ignited by (deliberate) misinformation and misinterpretation. Rather than confirming that the ICC was to play a role only if and when a State itself failed to act, the process of judicial priority represented by complementarity was interpreted very much with domestic audiences in mind. This ultimately was a factor driving the intensely conservative nature of the implementing legislation to suit the domestic political interests of the Government.

4.4 Concluding Remarks

Like many multilateral treaties, the ICC Statute is a 'child of compromise'. The negotiations that led to its conclusion were as much a difficult political process as they were a legal one. Its final terms were the result of

[53] *International Crimes and International Criminal Court Act 2000*.
[54] *Ibid*., sec. 8(1)(c).
[55] In the case of genocide, from 28 March 1979 (when New Zealand became a State Party to the Genocide Convention) and, in the case of crimes against humanity, from 1 January 1991 (the same temporal jurisdiction as the ICTY): see *ibid*., sects. 8(4)(a) and 8(4)(b) respectively. See also Dunworth (2006).

'inevitable political compromise and the enduring tension inherent in multilateral negotiations between sovereignty and universality' (McCormack & Robertson 1999, 635–67). One of the most highly charged aspects of these negotiations focused on the interaction between the international judicial body and the autonomy of domestic criminal jurisdictions. In the words of Tim McCormack and Sue Robertson (1999, 645): '[t]he real question in Rome was one of demarcation – where to draw the line on the guarantee of national court primacy – and of determination – who would decide on which side of that line a particular case fell'. For many States, this demarcation was a fundamental and non-negotiable issue, which required that a structure be put in place that would enable them to feel that they continued to assert 'control' over the investigation and/or prosecution of crimes that fell within their domestic jurisdiction, notwithstanding the establishment of the ICC. The principle of complementarity was thus born, with the ICC Statute stressing that the Court was to be 'complementary to national criminal jurisdictions'.[56]

Yet, notwithstanding the primary importance of this principle in the operation and activities of the ICC, and its role *vis-à-vis* national jurisdictions, the perception of the principle and its practical application remain somewhat controversial. Those States that seek to challenge the admissibility of the ICC with respect to specific cases sometimes appear to utilise complementarity as a tool with which to challenge the integrity of the Court.[57] This is perhaps not entirely surprising given that it is directed squarely towards balancing the impact of domestic law and policy with the reach of an international judicial institution and, in essence, requires an international court to make a judgment as to the 'genuineness' of domestic action at both a political and legal level.

In addition, several aspects of the complementarity regime that had originally been thought to mean one thing have turned out to have alternate applications. As some commentators have noted: 'many of the

[56] ICC Statute, Preamble paragraph 10 and Article 1.

[57] For example, Sudan established a national court, the Special Criminal Court for Events in Darfur (SCCED), the day after the ICC Prosecutor announced that he would commence an investigation into the situation in Darfur. Sudan has subsequently asserted on a number of occasions that the SCCED should be regarded as a 'substitute' for the ICC, and that 'ICC Article 17 stipulates that [the ICC] can refuse to look into any case if investigations and trials can be carried out in the countries concerned except if they are unwilling to carry out the prosecutions': Sudanese Justice Ministry Statement quoted in IRIN, 'Sudan: Judiciary challenges ICC over Sudan', 24 June 2005, www.irinnews.org/fr/report/55068/sudan-judiciary-challenges-icc-over-darfur-cases (accessed 18 August 2014).

things that the field thought it knew [about the complementarity regime] have turned out to be untrue' (Megret & Samson 2013, 5712). No doubt some of this stems from the vagueness of the language of the ICC Statute. Important aspects of the regime still require 'difficult determinations about whether a national proceeding warrants deference' to the jurisdiction of the Court (Robinson 2012, 85).

Indeed, notwithstanding that it was broadly discussed and negotiated, the fact remains that complementarity still represents a challenging concept for States. As a result, the domestic legal and political systems of many States have reacted, at times irrationally, to this unique characteristic of the ICC structure. Their interactions with the Court are often based on mistrust despite the protections that complementarity affords them. The Court has at times galvanised strident opinion amongst different layers of society and in States at various points along the political and economic spectrum. In other words, this suspicion has not been limited to those countries that might be thought more likely, at least at this stage in the Court's evolution, to be involved in cases before the Court. Even democracies such as Australia and the United States have seen political resistance, strong assertions of sovereign rights, changes to domestic law and strong public opinion, both in favour of but also opposed to the Court and its jurisdictional reach.

In the case of Australia, the domestic political and legal structures felt compelled to adapt to the international system. In one sense, it has had to change its laws to incorporate, for the first time, crimes that clearly represent unacceptable behaviour, in essence to 'democratize aspects of its legal system. On the other hand, this process came with a cost: a country that had initially been a strident supporter of the ICC was transformed into a "reluctant ratifier"' (Bellamy & Hanson 2002, 26).

The complementarity structure, envisaged as a friend of the Court at the time of its establishment, has sometimes instead been perceived as a tool with which to challenge its integrity. Experience to date suggests that this will be an ongoing trend, as States seek to protect their sovereignty and attempt to utilise the complementarity regime to suit their domestic priorities. This in turn may impact the ICC's own interpretation of how this principle operates.

All of this means that the true meaning of various aspects of complementarity is still the subject of some conjecture and that, in the interim, there will remain suspicions and misunderstandings as to its impact on national sovereignty, law and politics. It also highlights how complex is this system of interaction between national political and

legal orders and the international court. Yet, neither can operate in a vacuum when it comes to crimes of such gravity as those within the mandate of the Court.

This interaction adds significantly to the already challenging (and perhaps unattainable) goal of addressing impunity. Both national and international legal systems have an important role to play and the difficulty remains in finding the appropriate balance between State-centred priorities and a 'global' approach to issues of concern. The ICC structure highlights the two-way interaction between domestic actors and an international court. Each impacts the other, and each imposes variables that condition the response of the other. By giving the Court the ability to judge the acts of national action, complementarity raises concerns, justified or otherwise, about 'overreach' and unwarranted and unwanted international interference in matters that States might prefer to remain within their (exclusive) domain.

Perhaps, in making these judgments, the Court might increasingly utilise what might be termed a 'flexibility within limits' approach. Yet, this may still not be enough to assuage the scope for nationalistic and sovereignty-related arguments that are increasingly levelled against the Court.

In essence, therefore, what started out as a good idea is looking increasingly like a flawed approach to balancing national political and legal concerns with the rise of international criminal institutions. The assumptions underpinning complementarity that States would accept the opportunity to assume responsibility for international crimes whilst working cooperatively with the Court may have been too ambitious and a little naïve. Whilst there may have been some positive signs, there are also an increasing number of detractors of the ICC. Whether this two-way interaction between the domestic level and this international institution can eventually evolve so as to lessen the friction that complementarity seems to have introduced may determine whether the ICC can ever be 'effective' in meeting the lofty goals and expectations that have been placed upon it.

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