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COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW

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POSITIVE COMPLEMENTARITY

I. Introduction

In this final report, the Committee brings together its work on two questions of its mandate, here rephrased as:

- (a) What are the obstacles to domestic investigations and prosecutions or alternative accountability processes for crimes within the jurisdiction of the International Criminal Court *at the domestic level*?
- (b) (How) could a policy of so-called ‘positive complementarity’ overcome any obstacles and which actors are best placed to implement such policy?

The Committee intentionally first looked at the obstacles to domestic accountability processes and only then to the policy of positive complementarity. Most of the literature on positive complementarity starts with the question of whether the International Criminal Court (ICC) or its Assembly of States Parties (ASP) should have such a policy and, if so, what it should entail. The usual starting point of the inquiry is thus the international level (specifically, the ICC or ASP). However, this starting point predetermines the understanding of the problem and, therefore, the ensuing recommendations. Paraphrasing Maslow’s law, if all one has is a team of carpenters, everything looks like wood requiring nails. For instance, much international attention has been directed to helping states adopt laws that criminalise genocide, crimes against humanity and war crimes at the domestic level. But what if the core elements of the crime(s) had already been criminalised in the relevant municipal system, and those statutes had never been used in situations where they were applicable? In such a scenario, new laws incorporating international crimes are unlikely to address the real, or more fundamental, obstacles to accountability. In other words, to enhance accountability at the domestic level, it is necessary to study—rather than presume—the obstacles to domestic processes. The Committee’s first report, hereinafter referred to as ‘the Sydney report’, did exactly that and identified a whole range of obstacles to domestic accountability procedures.⁴ It did so based on ‘country reports’ submitted by Committee members.⁵

This final report combines the key findings of the Sydney report with answers to the second question: (how) could a policy of so-called ‘positive complementarity’ overcome (some of) the obstacles and which actors are best placed to implement such policy? To that end, the report first introduces the concepts of complementarity and positive complementarity (section II). It then goes through the various obstacles that the Committee discussed in its Sydney report in order to see whether and how a policy of positive complementarity could address them (section III).

As a final preliminary matter, the Committee’s references to ‘core crimes’ should be explained. The Committee had extensive debates about the best way to refer to the crimes within the jurisdiction of the ICC: genocide, crimes against humanity, war crimes and the crime of

⁴ See International Law Association, ‘Sydney Conference: Complementarity in International Criminal Law’ (2018) 78 *International Law Association Reports of Conferences* 233 (hereinafter ‘Sydney report’).

⁵ As to who wrote which country report, please see *ibid*, p. 240. This report will in places also refer to those country reports.

aggression. Many favoured the term ‘core crimes’, but others objected that there is nothing inherent in the crimes within the ICC’s jurisdiction that makes them ‘core’: those crimes have been included as a result of political negotiations, while other crimes could also have made that cut, but have not (yet). The term ‘core crimes’ can thus be used as long as it is recognized that ‘core’ does not refer to an inherent feature of these crimes, but to the fact that states have agreed to make them the crimes within the subject-matter jurisdiction of the world’s only permanent international criminal court.

II. Complementarity and positive complementarity

A. Complementarity

Complementarity is the name of the jurisdictional priority rule in the Rome Statute that establishes and governs the ICC. Such a rule is necessary because domestic courts continue to have jurisdiction over the core crimes. The ICC thus has concurrent, rather than exclusive, jurisdiction. Complementarity is the label for the priority rule according to which, in a situation of competition over jurisdiction, the domestic justice system in principle takes precedence. It stands in contrast to the priority rule commonly referred to as ‘primacy’, according to which the relevant international criminal tribunal has the stronger right.

The Rome Statute gives effect to complementarity by way of a rule according to which the Court may not exercise its jurisdiction over a case if that case is being or has been genuinely investigated or prosecuted by a state which has jurisdiction over it.⁶ This is an admissibility rule to be applied by the judges. It is also one of the factors that the Prosecutor must consider when deciding whether or not to open an investigation into a situation or to prosecute a case.⁷ The rule applies even when the United Nations Security Council has referred a situation to the Court, and also with respect to proceedings before domestic courts of states that are not parties to the Statute.

While formulated in the Statute as a rather technical matter—an admissibility rule determining when an international criminal court can exercise its jurisdiction—, complementarity, in fact, answers a fundamental question: what is the best level, domestic or international, for investigating and prosecuting international crimes? This question is thus a manifestation of a key issue in global governance more generally: at which level are matters of global concern (the environment, human rights, intellectual property) best addressed? Whereas the Statutes for the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) prioritised the international level, the states creating the ICC favoured the domestic. They invoked a variety of reasons for this shift,⁸

⁶ See *Rome Statute of the International Criminal Court* (RS), A/Conf.183/9, 17 July 1998, as subsequently amended, Articles 17 and 20. Pursuant to Article 126, following the deposit of the 60th instrument of ratification with the UN Secretary-General, the Rome Statute entered into force on 1 July 2002.

⁷ RS, Article 53; *Rules of Procedures and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (ICC-ASP/1/3 and Corr.1), as subsequently amended, Rule 48.

⁸ See more elaborately S.M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, Cambridge, 2013) 16. For more references on this point, see the Committee’s 2018 Sydney report (n 4), p. 234.

the most prominent argument being state sovereignty.⁹ As Frédéric Mégret has argued, ‘[a]lthough crime is obviously something that societies are keen to eliminate, it is also curiously something about which they feel a strong sense of ownership, especially when competing claims for jurisdiction arise’.¹⁰ Moreover, the fact that the Rome Statute would ultimately permit an ‘independent prosecutor’ to begin investigations made states more concerned about sovereignty than they had been with the establishment of the *ad hoc* international criminal tribunals.¹¹ The Court would also be permanent and with prospective jurisdiction, making it less ‘safe’ for states than the *ad hoc* courts of which it was far more predictable which situations and people they were likely to try. States thus had to be convinced to ratify the Rome Statute—a consideration that did not concern the drafters of the Statutes of the ICTY and ICTR, since all states were bound to accept the jurisdiction of those tribunals by virtue of obligations in Security Council decisions. Seen as reconciling state sovereignty and international criminal justice, complementarity became a ‘cornerstone’ of the Rome Statute. Complementarity’s fundamental importance is borne out by the fact that both the Statute’s preamble and its opening article refer to it.¹² The Statute promotes the ideal of *states* addressing international crimes mostly negatively, by determining when *the Court cannot* exercise its jurisdiction due to a lack of admissibility. Whilst the preamble ‘[r]ecall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’,¹³ the Statute itself contains no obligation on states parties to investigate or prosecute.¹⁴ Thus, while setting forth the ideal of accountability at the domestic level, the Statute promotes this ideal primarily through a duty on the Court to refrain from action if there are domestic proceedings in a case within its jurisdiction.

However, people both inside and outside the Court have taken the view that the ideal of accountability at the domestic level should be supported more directly. Policies to this effect have been labelled ‘positive complementarity’.

⁹ On complementarity as a principle protecting state sovereignty, see, e.g., *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a), ICC-01/04-01/07-949, Defence, 11 March 2009, paras 48 and 78, https://www.icc-cpi.int/CourtRecords/CR2009_05171.pdf (last accessed 6 June 2022). See also all the references in the Committee’s Sydney report (n 4), p. 235.

¹⁰ F. Mégret, ‘In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice’ (2005) 38(3) *Cornell International Law Journal* 725, 739.

¹¹ L.N. Sadat & S.R. Carden, ‘The New International Criminal Court: An Uneasy Revolution’ (2000) 88(3) *Georgetown Law Journal* 381, 408-17.

¹² See tenth recital of the preamble (‘Emphasizing that the International Criminal Court ... shall be complementary to national criminal jurisdictions’) and article 1 (‘An International Criminal Court ... is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions...’). Article 17, the admissibility rule that gives effect to the complementarity principle, refers to the preamble and article 1, but does not actually mention the term.

¹³ Sixth recital of the preamble.

¹⁴ Nor does the Court have jurisdiction to establish state responsibility for a state’s failure to comply with such obligations, unlike, for instance, the International Court of Justice pursuant to certain suppression treaties. See, for instance, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422. See also Payam Akhavan, ‘Whither National Courts? The Rome Statute’s Missing Half’ (2010) 8(5) *Journal of International Criminal Justice* 1245.

B. Positive complementarity

The term ‘positive complementarity’ makes no appearance in the Rome Statute, but the term was coined and used in internal discussions in the Advance Team setting up the ICC.¹⁵ The Court’s Office of the Prosecutor (OTP) began to refer to it soon after the Court became operational. Its meaning has shifted over the subsequent years.

1. *The early days of positive complementarity*

Already the 50-page report ‘The Principle of Complementarity in Practice’ (which the Advance Team prepared in April 2003 on the basis of) highlighted ‘partnership’ between the Court and national jurisdictions as one of two ‘guiding principles’: ‘*Partnership* highlights the fact that the relationship with States that are genuinely investigating and prosecuting can and should be a positive, constructive one’.¹⁶ The idea was that because the Court’s jurisdiction is only complementary, it should forge positive partnerships with states parties so that they will be in the best possible position to investigate and prosecute genuinely.

In a 2004 speech to the Diplomatic Corps in The Hague, the Court’s first Prosecutor announced that one of the strategic decisions that his office had taken was to adopt a ‘positive approach to complementarity’. This, he stated, meant that: ‘Rather than competing with national systems for jurisdiction, we will encourage national proceedings wherever possible.’¹⁷ In its 2006 Report on Prosecutorial Policy, the OTP specified that a positive approach to complementarity meant that it ‘encourages genuine national proceedings where possible’.¹⁸ In that report, it referred to this policy as ‘positive complementarity’.¹⁹

How exactly the OTP intended to encourage national proceedings was not developed in a single policy document. However, early OTP statements and documents mentioned several actions that could contribute to doing so, for instance: the OTP providing states with information received from

¹⁵ See Alexander S. Muller (who led the Advance Team), ‘Foreword by Alexander Muller’, in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5* (Torkel Opsahl Academic EPublisher, Brussels, 2017) p. vi (<https://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song>).

¹⁶ The entire report is reproduced as ‘Annex 1: Expert Report on The Principle of Complementarity in Practice’ in Morten Bergsmo and SONG Tianying, ‘The Principle of Complementarity in Practice’, in *ibid.*, pp. 739-798 (quotation on p. 748).

¹⁷ OTP, Luis Moreno Ocampo Statement to the Diplomatic Corps, 12 February 2004, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM_20040212_En.pdf (last accessed 6 June 2022). This policy had already been announced in the OTP’s first prosecutorial policy document, the 2003 Paper on some Policy Issues before the Office of the Prosecutor, but without the label ‘positive complementarity’.

¹⁸ OTP, Report on Prosecutorial Strategy, 14 September 2006, 5, https://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf (last accessed 6 June 2022).

¹⁹ *Ibid.*, 4. For a period, members of the Registry, too, expressed interest in assisting in domestic proceedings, preferring the term ‘proactive’ complementarity. See S. Arbia and G. Bassi, ‘Proactive Complementarity: A Registrar’s Perspective and Plans’, in C. Stahn and M. M. El Zeidy (eds.), *The International Criminal Court and Complementarity from Theory to Practice* (Vol. I, CUP, Cambridge, 2011) 52. For the foundations of the concept ‘proactive complementarity’, see William W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice’ (2008) 49 *Harvard International Law Journal* 53.

public sources,²⁰ with evidence (gathered by the Court),²¹ with advice regarding national proceedings²² and with training and technical support,²³ acting as an intermediary between states, brokering assistance and facilitating situations where states may assist one another in carrying out national proceedings;²⁴ promoting national proceedings, traditional mechanisms or other tools;²⁵ and developing legal tools to facilitate cooperation and empower domestic criminal jurisdictions.²⁶

Whilst it is difficult to identify explicit legal bases in the Statute for all the activities that have been cited as potentially falling within the policy of positive complementarity, one can for some aspects. The most directly relevant provision in the Statute is article 93(10), which focuses, under the heading ‘Other forms of cooperation’, on the ICC helping the State with evidence gathering:

- (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*:
 - 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.
- (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.

The article allows – not obliges – the ICC to share some of its evidence with states and provides some conditions and limitations. First, the words ‘upon request’ suggest that the initiative has to come from states, rather than the Court. Secondly, ‘conducting an investigation into or trial’ indicates that 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

²⁰ L. Moreno Ocampo, Statement to the Assembly of States Parties to the Rome Statute of the International Criminal Court, 16 June 2003, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf (last accessed 6 June 2022).

²¹ OTP, Annex to the Three Year Report and the Report on the Prosecutorial Strategy, 12 September 2006, https://www.icc-cpi.int/NR/rdonlyres/9960BBE1-C1E2-4986-BA8C-F6E20742641A/0/OTP_ProsecutorialStrategyAnnex_En.pdf (last accessed 6 June 2022).

²² The expert report ‘The Principle of Complementarity in Practice’ (n 16). Cf. L. Moreno Ocampo, ‘A Positive Approach to Complementarity’, in C. Stahn and M. M. El Zeidy (eds), *The International Criminal Court and Complementarity from Theory to Practice* (Vol. I, Cambridge University Press, 2011).

²³ L. Moreno Ocampo (n 17).

²⁴ The expert report ‘The Principle of Complementarity in Practice’ (n 16).

²⁵ OTP, Report on Prosecutorial Strategy, 14 September 2006, https://www.icc-cpi.int/RelatedRecords/CR2009_02250.PDF (last accessed 6 June 2022).

²⁶ OTP, Report on the Activities Performed during the First Three Years (June 2003-June 2006), 12 September 2006, https://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf (last accessed 6 June 2022).

committed in the entire situation. That said, the cooperation envisaged in this article is not limited to crimes over which the ICC itself could exercise jurisdiction. The reference in article 93(10)(a) to ‘within the jurisdiction of the Court’ is best read as ‘within the scope of Article 5’, rather than ‘within the territorial/personal, temporal as well as subject-matter jurisdiction of the Court’. This interpretation of ‘jurisdiction’ is suggested by the fact that the ICC may provide such assistance in case the conduct ‘constitutes a crime within the jurisdiction of the Court or *which constitutes a serious crime under the national law of the requesting State.*’ The second scenario also refers only to the subject-matter of the jurisdiction. This means that the Court can also supply evidence related to crimes that it itself could not have prosecuted.²⁷ Finally, article 93(10)(b) refers only explicitly to ‘evidence obtained *in the course of an investigation or a trial* conducted by the Court’; there is no reference to material obtained during a preliminary examination. However, it could be argued that the OTP is *a fortiori* allowed to share information that has been obtained without using its investigatory powers.

Many of the actions suggested by the OTP under the policy of positive complementarity listed above (advising on national proceedings, providing training and technical support, acting as an intermediary between states, promoting national proceedings, traditional mechanisms or other tools, and developing legal tools to facilitate cooperation and empower domestic criminal jurisdictions) do not fall squarely within the confines of article 93(10). Some of these activities, however, could still fall within the OTP’s inherent powers, as long as they do not jeopardise the OTP’s ability independently and impartially to assess admissibility, including complementarity.²⁸ For instance, in order to be able to assess complementarity during the preliminary examinations phase, it is natural for the OTP, specifically the Jurisdiction, Complementarity and Cooperation Division, to communicate with the relevant domestic authorities. During such communications, the OTP can assist in the promotion of domestic proceedings by pointing to the existence of the ICC Legal Tools Database and the availability of scholars who provide free training in their use. When made aware of specific needs, the OTP can also facilitate contact with actors who are engaged in such capacity-building. However, in order to be able to assess admissibility independently and impartially, the OTP has to be careful not take steps that risk identifying the Office with the outcome of specific in-country capacity strengthening. Such projects are frequently long-term and their outcome depends on several factors beyond the control of those who conduct, oversee, fund or initiate the projects.

In its 2009-2012 Prosecutorial Strategy, issued in 2010 before the Review Conference in Kampala, the OTP specified that positive complementarity included:

²⁷ See also ICC, Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf, para 7: ‘The Office will also seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment.’

²⁸ See, for instance, Kai Ambos, *Treatise on International Criminal Law, Volume III, International Criminal Procedure* (Oxford: Oxford University Press, 2016) 332.

- a) providing information collected by the Office to national judiciaries upon their request pursuant Article 93 (10), subject to the existence of a credible local system of protection for judges or witnesses and other security-related caveats; sharing databases of non-confidential materials or crime patterns;
- b) calling upon officials, experts and lawyers from situation countries to participate in OTP investigative and prosecutorial activities, taking into account the need for their protection; inviting them to participate in the Office's network of law enforcement agencies (LEN); sharing with them expertise and trainings on investigative techniques or questioning of vulnerable witnesses;
- c) providing information about the judicial work of the Office to those involved in political mediation such as UN and other special envoys, thus allowing them to support national/regional activities which complement the Office's work; and
- d) acting as a catalyst with development organizations and donors' conferences to promote support for relevant accountability efforts.²⁹

Possibly in response to criticism from states that the ICC should not become a development agency, the OTP also explicitly stated that it would not get directly involved in 'capacity building or financial or technical assistance.'³⁰

The OTP's usage of the notion of 'positive complementarity' in its first decade is both useful and potentially confusing. It is useful in that the addition of 'positive' indicates that the OTP approaches complementarity as reflective of an ideal (namely that international crimes are ideally investigated and prosecuted at the domestic level) that it wishes to pursue actively, beyond considering cases inadmissible if genuinely investigated or prosecuted domestically.³¹ However, the term is potentially confusing because in the Rome Statute, complementarity is an admissibility rule, while the policy of positive complementarity as described here amounts to a policy of cooperation.³² Whereas most of the Statute's provisions on cooperation focus on the cooperation of states with the Court in order to facilitate the Court's proceedings, the policy of positive complementarity focuses on the Court cooperating with states to enable their proceedings. The confusing aspect of the term 'positive complementarity' is that the policy of cooperation is not necessarily linked to the admissibility rule. Indeed, courts with primary jurisdiction have also had

²⁹ Ibid, para 17.

³⁰ Idem. See also OTP, Strategic Plan 2016-2018, 16 November 2015, https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf (last accessed 6 June 2022), where the OTP refers only once to '[t]he notion of positive complementarity', emphasising that 'it will not act as a development agency towards situations under preliminary examination or under investigation but that it can contribute to complementarity through the normal execution of its mandate, including through (1) the sharing of its expertise in international criminal law, investigations or witness protection upon request, (2) the inclusion, where appropriate, of national investigators or prosecutors into its teams for the duration of an investigation, or (3) the participation in the coordination of national and ICC investigations.'

³¹ The term 'active complementarity' is used in Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer* (Torkel Opsahl Academic EPublisher, Oslo, 2011) (<https://www.toaep.org/ps-pdf/8-bergsmo>).

³² The OTP explicitly acknowledged the different characters of these two forms of complementarity in its 2009-2012 Prosecutorial Strategy: 'complementarity has two dimensions: (i) the admissibility test, i.e. how to assess the existence of national proceedings and their genuineness, which is a judicial issue; and (ii) the positive complementarity concept, i.e. a proactive policy of cooperation aimed at promoting national proceedings.' OTP, Prosecutorial Strategy 2009-2012, 1 February 2010, para 16, <https://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> (last accessed 6 June 2022, emphasis added).

policies to foster domestic proceedings.³³ Moreover, implementation of a policy of positive complementarity is not legally linked to the admissibility assessment. That is to say, whilst actions to support a domestic jurisdiction may of course influence the facts that form the basis of the admissibility assessment, it is not the case that purely because there is ICC-state cooperation, cases are inadmissible before the Court. Indeed, both the OTP and the chambers must at all times remain able impartially to assess whether a state's domestic proceedings are or have been genuine.

Positive complementarity in the sense as it developed in the Court's first decade is better known from OTP speeches and other forms of written interventions than from OTP practice.³⁴ little is known about how the OTP has given it effect.

2. The Assembly of States Parties embraces and changes the focus of positive complementarity

At the Kampala Review Conference in 2010, the ASP adopted the idea of positive complementarity, but stressed that states (together with international organizations and civil society), rather than the ICC itself, should take initiatives to promote accountability efforts at the domestic level. It defined positive complementarity, at least for the purposes of its report, as a policy to be implemented by States, rather than the ICC:

While positive complementarity could take many forms, for the purposes of this paper, 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.³⁵

The ASP report emphasised 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'.³⁶ One of the key concerns among states parties was that of the allocation of the budget: they did not want the Court to use its resources for encouraging, let alone enabling, others to investigate and prosecute, rather than using those resources to do so itself. The report therefore shifted positive complementarity away from the Court to the action radius of states and their development

³³ 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 described at one stage the ICTY's cooperation with national jurisdictions as 'complementarity' (RC/11 Annex V(c) (2010), para 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').

³⁴ L. Moreno Ocampo, 'A Positive Approach to Complementarity', in C. Stahn and M. M. El Zeidy (eds), *The International Criminal Court and Complementarity from Theory to Practice* (Vol. I, Cambridge University Press, 2011) 21.

³⁵ Resolution ICC-ASP/8/Res.9, adopted at the 10th plenary meeting, on 25 March 2010, by consensus, Annex 4 'Stocktaking of International Criminal Justice: Complementarity', Appendix: 'Report of the Bureau on Stocktaking: Complementarity: Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap', https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf (last accessed 6 June 2022).

³⁶ Ibid, Annex 4, para 4. Reiterated again in para 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 para 52 ('The aim is not to create new roles for the Court.').

agencies, international organisations and ‘civil society’.³⁷ The ASP’s concluding resolution in Kampala did not use the term ‘positive complementarity’, but 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’,³⁸ 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’.³⁹ 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 accordance with internationally recognized fair trial standards, pursuant to the principle of complementarity’.⁴⁰

3. *The OTP’s policy of positive complementarity after Kampala: a ‘positive approach to complementarity’ but with a different meaning*

Cautioned in Kampala, the OTP began to make fewer references to ‘positive complementarity’, shifting instead back to the initial ‘positive approach to complementarity’. However, it imbued that notion with a slightly different meaning than what was initially covered by ‘positive complementarity’. Rather than focusing on how the Office can help domestic proceedings, the emphasis shifted to looking ‘positively’ at the principle of complementarity as incorporated in the Rome Statute.⁴¹ At first sight, this seems like stating the obvious: the OTP must look ‘positively’ to all its obligations under the Rome Statute, including the principle of complementarity.⁴²

However, a positive approach to complementarity becomes more relevant if one is of the view that the OTP has considerable discretion at various stages of its work. On that reading, a positive approach to complementarity becomes a policy factor to be considered when using that discretion. Simply put, a positive approach to complementarity could come down to the OTP, or the ICC more generally, assuming that states that are investigating and prosecuting act in good faith and giving them a chance to render cases inadmissible before the Court, when assessing whether a state is

³⁷ Ibid, paras 17 and 42.

³⁸ Resolution RC/Res.1, 8 June 2010, by consensus, para 5, https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/RC-Res.1-ENG.pdf (last accessed 6 June 2022).

³⁹ Ibid, para 8.

⁴⁰ ASP, Kampala Declaration (RC-4-ENG-04062010), 4 June 2010, https://asp.icc-cpi.int/sites/asp/files/asp_docs/RC2010/RC-4-ENG.pdf last accessed 6 June 2022).

⁴¹ See, for instance, E. Rogier, ‘The Ethos of Positive Complementarity’, *EJIL:Talk!*, 11 December 2018, <https://www.ejiltalk.org/the-ethos-of-positive-complementarity/> (last accessed 6 June 2022): ‘Since its early days, the Office has looked “positively” at the principle of complementarity – a cornerstone of the Rome Statute – and has sought to make the best out of it’.

⁴² So much so that one can raise the question whether the word ‘positive’ could not be added to any act in accordance with the Statute: a positive approach to investigations, a positive approach to requesting arrest warrants, a positive approach to the duty to disclose potentially exculpatory evidence.

genuinely investigating or prosecuting cases within the Court's jurisdiction.⁴³ In 'positive complementarity' as a 'positive approach to complementarity', positive complementarity is thus not a separate programme of ICC-state cooperation, but indeed a policy consideration in the admissibility assessment.

Whether there actually is scope for such a policy consideration is contested because of diverging views on the extent of the discretion of the ICC Prosecutor. On the one hand, article 15 of the Statute, on the Prosecutor's power to initiate investigations *proprio motu*, suggests that the Prosecutor has discretion: 'The Prosecutor *may* initiate...'. That said, according to article 15(3), the Prosecutor 'shall' submit a request for authorisation if he or she concludes that there is a reasonable basis to proceed. When taking that decision, the Prosecutor must, according to rule 48 of the Rules of Procedure and Evidence, consider the criteria of article 53, which provides that the Prosecutor 'shall, having evaluated the information made available to him or her, initiate an investigation', unless certain exhaustively listed conditions are not fulfilled. However, the OTP has from the outset emphasized that it has substantial discretion, if only because of the reality of its limited resources.⁴⁴ Moreover, a decision taken by the Prosecutor for reasons other than the ones listed in article 53(1) of the Statute is likely to stand on account of the limited nature of the judicial review. Finally, 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. For these reasons there thus is scope for a 'positive approach to complementarity' as a policy consideration.

At the stage of deciding whether or not to prosecute, complementarity features again.⁴⁵ And even during an ICC trial, the case can be rendered inadmissible on the ground of complementarity.⁴⁶ That the drafters have envisaged such a dynamic assessment of complementarity reflects the principle's 'cornerstone status'. The legal criteria for a successful challenge become stricter and stricter, which is unsurprising given the increasing amount of resources that the ICC will have put into the case. Positive complementarity also becomes relevant again in the phase that the OTP completes its involvement in a situation.

When 'positive complementarity' is understood as 'a positive approach to complementarity' the line between complementarity and positive complementarity becomes harder to draw. For

⁴³ Such a positive approach to complementarity must then also be reflected in key performance indicators. In the early years, 'an indicator of achievement' of the Jurisdiction Complementarity and Cooperation Division was 'a minimal number of challenges to OTP determinations on jurisdiction and admissibility, and upholding of OTP decisions by the Court'. ('Draft Programme Budget for 2005 Prepared by the Registrar', ICC-ASP/3/25 (2004), p. 75). However, a positive approach to complementarity, and even more so a policy of positive complementarity, could involve envisaging and indeed celebrating that cases that once were admissible before the Court are no longer so.

⁴⁴ OTP, Annex to the Policy Paper: Referrals and Communications, 1 September 2003, https://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf (last accessed 6 June 2022).

⁴⁵ See RS, art 53(2).

⁴⁶ According to article 19(4) an admissibility challenge shall take place 'prior to or at the commencement of the trial'. However, the same article provides that '[i]n exceptional circumstances, the Court may grant leave for a challenge to be brought ... a time later than the commencement of the trial.' A concluded domestic trial – even if conducted in absentia – could constitute such an exceptional circumstance.

instance, in the OTP's Strategic-Plan 2019-2021, 'the mere fact of engaging with national authorities' is suggested to be an activity of positive complementarity.⁴⁷ But such engagement may also be an integral aspect of complementarity as part of the admissibility assessment. Vice versa, the ICC's annual report to the United Nations of 2021 notes that '[t]he Registry and the Office of the Prosecutor continued ... to assist with national proceedings, where appropriate, *in accordance with the principle of complementarity*'⁴⁸ as if the admissibility rule itself requires such 'assistance'. Similarly, the concept of a 'positive approach to complementarity' also makes it difficult to differentiate between consequences of complementarity and consequences of positive complementarity: actions taken at the domestic level that were inspired by the idea of states having the primary right to investigate or prosecute may result from complementarity per se, rather than any positive action.

4. *The ASP's policy of positive complementarity after Kampala: communicating 'complementarity' activities*

Immediately after Kampala, there was activity in the ASP to follow up on the idea that positive complementarity should be a policy of states parties rather than the OTP. There were high-level 'Greentree' meetings in New York among representatives of states parties, UN agencies and organisations such as the International Centre for Transitional Justice, focusing on integrating positive complementarity with broader rule of law and development agendas.⁴⁹ The ASP appointed states as 'focal points' on the topic, developed resources on its website and considered 'complementarity' in its annual reports. The meaning of 'positive complementarity', or 'complementarity activities', has in this context mostly become that of 'rule of law development programmes aimed at enabling domestic jurisdictions to address war crimes, crimes against humanity and genocide'.⁵⁰

The role of the Secretariat of the ASP in fostering positive complementarity has developed mainly into that of a matchmaker between states that indicate a need for assistance and organisations and states that offer such support.⁵¹ It has generated specific forms and indeed a 'Complementarity Platform' in which states parties can indicate their needs for technical assistance.⁵² The ASP's Bureau on Complementarity then puts the requesting states in touch with the four categories of 'complementarity actors' that it lists on its website: academic; non-governmental organisations; international or regional organisations; and states.⁵³ The Court itself is not mentioned. In 2019, the Bureau reported to have received in that year such requests from four states parties, 'relating to a broad range of areas, including victims and witnesses (protection, training, advice, including

⁴⁷ OTP, Strategic Plan 2019-2021, 17 July 2019, para 50, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20190726-strategic-plan-eng.pdf> (last accessed 6 June 2022).

⁴⁸ ICC, 2020/2021 Annual report of the International Criminal Court to the United Nations, 15 June 2021, para 83, <https://www.icc-cpi.int/Pages/item.aspx?name=20210824-icc-report-UN> (last accessed 6 June 2022).

⁴⁹ See, for instance, ICTJ, 'Greentree Meeting Advances Complementarity from Policy to Practice', 16 December 2011, <https://www.ictj.org/news/greentree-meeting-advances-complementarity-policy-practice> (last accessed 6 June 2022).

⁵⁰ ICC, ASP, Report of the Bureau on Complementarity, 29 November 2018, para 5, https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP17/ICC-ASP-17-34-ENG.pdf (last accessed 6 June 2022).

⁵¹ Ibid.

⁵² Ibid, pp 19-20.

⁵³ See ICC, ASP, 'List of Actors Working in the Field of Complementarity', 7 March 2019, <https://asp.icc-cpi.int/complementarity/List-of-Actors> (last accessed 6 June 2022).

psychological support and the establishment of a specialized body/unit); security support; strengthening legal representation; implementing legislation; technical capacity for prosecutors and staff; judicial infrastructure; gathering and documenting of evidence; and administrative justice modernization.⁵⁴ In 2021, no such requests were received.⁵⁵ The Platform is not generally well known and does not appear to be fully integrated in all the networks involved in promoting accountability at the domestic level.

Confusingly, the ASP, like the OTP, seems to have distanced itself from the term ‘positive complementarity’. Instead, it usually speaks of ‘complementarity’,⁵⁶ thus further obscuring the difference between complementarity the admissibility rule and positive complementarity the policy of co-operation, even when it clearly focuses on the latter.

5. *Positive complementarity according to the Independent Expert Review (2020)*

Positive complementarity also received attention in the prominent 2020 Report of the Independent Expert Review (IER). The IER had been mandated by the ASP in 2019 to ‘identify ways to strengthen the ICC and the Rome Statute system in order to promote universal recognition of their central role in the global fight against impunity and enhance their overall functioning’ and to make ‘concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole’.⁵⁷

The IER report does not define positive complementarity but seems to understand it as separate from the admissibility assessment. For instance, in its discussion of preliminary examinations (PEs), it observes that ‘[c]omplementarity questions arise in relation to two aspects of the OTP’s approach to PEs: the legal and factual analysis of complementarity for the assessment of jurisdiction; and the engagement by the OTP in positive complementarity activities.’⁵⁸ In contrast to the OTP’s ‘positive approach to complementarity’, the IER thus keeps the admissibility assessment and positive complementarity separate. This is also illustrated by the fact that the IER refers to ‘positive complementarity *activities*’, which suggests that positive complementarity involves more than merely considering a factor in a decision-making process, as in the OTP’s ‘positive approach to complementarity’.

Without calling it as such, the experts criticised the OTP’s positive approach to complementarity as part of the admissibility test. The IER reported that:

⁵⁴ ICC, ASP, Report of the Bureau on Complementarity 2019, ICC-ASP/18/25, 29 November 2019, para 25, https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/ICC-ASP-18-25-ENG.pdf (last accessed 6 June 2022).

⁵⁵ ICC, ASP, Report of the Bureau on Complementarity, ICC-ASP/20/22, 6 December 2021, Annex I, para 6, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/ICC-ASP-20-22-ENG.pdf (last accessed 6 June 2022).

⁵⁶ See, for instance, the ASP website, where one of the tabs is ‘complementarity’.

⁵⁷ Resolution ICC-ASP/18/Res.7, 6 December 2019, Annex 1, ‘Terms of Reference for the Independent Expert Review of the International Criminal Court’, https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/ICC-ASP-18-Res7-ENG.pdf (last accessed 6 June 2022).

⁵⁸ Independent Expert Review, Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, para 720, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (last accessed 6 June 2022).

There is a widespread concern among many external stakeholders that by applying the admissibility test prospectively, the OTP is exceeding its mandate. It is accused of conducting what amounts to ‘human rights monitoring’, or playing a ‘watchdog role’. For instance it appears that in the cases of Afghanistan and Nigeria, where crimes continue to be committed after the opening of a PE, the OTP has undertaken continuing assessments of the domestic proceedings thereby extending the duration of the PE for a number of years. In others, e.g. Guinea or Colombia, the OTP has been monitoring the national proceedings for many years, without being able to come to a conclusion on their genuineness or sufficiency.⁵⁹

The criticism reported here could have come from both those who consider that the ICC is involved for too long because it should not be involved at all, as well as those who think the preliminary examination stage lasts too long because the ICC should already have opened investigations. The IER took the latter line, focusing on shortening the length of preliminary examinations and recommending specifically that:

The OTP should not have regard to prospective national proceedings and focus solely on whether national proceedings are or were ongoing (Article 17). This would further align the admissibility criteria on complementarity with Article 17 of the Rome Statute (‘is’, ‘has been’ conducted), and the requirements set out by the Appeals Chambers (‘tangible’ steps).⁶⁰

The IER was also critical of the OTP’s ‘positive complementarity activities’ at the preliminary examinations stage: ‘There is a prevailing view that during PEs, the OTP engages in activities that are beyond the Prosecutor’s mandate, and that this is inconsistent with the purpose of PEs.’⁶¹ Referring to the OTP Policy Paper on Preliminary Examinations, the IER identifies as such activities ‘types of engagements’ ‘in order to promote domestic proceedings’. The IER does not seem to be critical of positive complementarity per se, but mostly of its delaying consequences on the preliminary examinations phase. It suggests that positive complementarity is more appropriate in the investigation stage,⁶² adding that:

a division of labour between the OTP and the ASP appears to be of potential importance. While the OTP is clearly responsible for determining the scope of its investigations and prosecutions, as well as determining which parties may be supported by sharing

⁵⁹ Ibid, para 724.

⁶⁰ Ibid, recommendation 262, pp 236-237. Footnote omitted.

⁶¹ Ibid, para 729.

⁶² See e.g. *ibid*, paras 734 and 735 on page 236: ‘The OTP appears to consider that positive complementarity is exclusive to the PE stage (based on the Strategic Plan and Policy). However, nothing precludes the OTP from engaging states in the same manner during the investigation stage [footnote omitted]. Once an investigation is opened, the OTP conducts a case selection and prioritisation exercise in relation to the situation. At this time, closer dialogue with situation and/or neighbouring states would be beneficial in developing a strategy with clear prosecutorial goals. The setting of prosecutorial priorities would benefit from collaboration with the relevant states and other competent authorities. Furthermore, once the OTP reaches an advanced stage of investigation, and begins preparing for prosecutions, the OTP could and should find ways to engage with other jurisdictions, including, if possible and appropriate, the situation country. Sharing information and evidence could be used to catalyse additional prosecutions, beyond the limited scope of the OTP. In fact, such activities have been undertaken in terms of evidence sharing with several jurisdictions during investigations, on an *ad hoc* basis’.

information or evidence, the ASP could play an important role in facilitating partnerships between the OTP and the States Parties, non-States Parties, and other organisations.⁶³

Its ultimate recommendations on positive complementarity then were:

R264. Positive complementarity activities should not delay the opening of an investigation or closure of a PE. The OTP should consider positive complementarity in the context of the strategy for the situations at all stages of proceedings, and not restricted to PEs. The OTP should consider whether positive complementarity activities would be more appropriate after an investigation is authorised.

R265. Positive complementarity should be considered in the design of completion strategies.

6. *Positive complementarity after the IER report and the new Prosecutor*

In the Court's 'overall response' to the IER, the OTP promised a paper 'on its understanding and practice of complementarity, including with respect to positive complementarity, which may help chart a way forward to arriving at a consensus on the proper role and function of complementarity at the PE stage.'⁶⁴ The OTP pushes back, however, against the idea that preliminary examinations have been unnecessarily lengthy due to factoring in complementarity. In its view, the recommendation to shorten preliminary examinations does not resolve the OTP resources issues:

The recommendations make sense, if the goal is to shorten PEs and reduce the risk of evidence degradation and loss prior to an investigation, by achieving faster movement into investigations. However, their implementation would not resolve the OTP's current operational capacity/overload issue, other than by potentially creating either (i) many opened, but de-prioritised or "hibernated" investigations, which would incidentally obviate the advantage of the ability to exercise full investigative powers, or (ii) many closed PE situations that have to be re-opened, in a revolving-door fashion.⁶⁵

In response to the Experts' suggestion to use positive complementarity at later stages of the proceedings, namely during investigations and especially as part of completion strategies, the Court pointed out that the former has already occurred - stating that the OTP has, for instance, answered cooperation requests from the Special Criminal Court in the Central African Republic; the Government of Libya; Uganda's International Crimes Division, ad hoc requests from the DRC – and that it will draft a policy on implementing positive complementarity during completion strategies.⁶⁶

⁶³ Ibid, para 736.

⁶⁴ ICC, Overall Response of the International Criminal Court to the 'Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report': Preliminary Analysis of the Recommendations and information on relevant activities undertaken by the Court, 14 April 2021, para 499, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/Overall%20Response%20of%20the%20ICC%20to%20the%20IER%20Final%20Report%20-%20ENG%20-%2014April21.pdf (last accessed 6 June 2022).

⁶⁵ Ibid, para 502.

⁶⁶ Ibid, para 503.

Since taking up office in June 2021, Prosecutor Khan has emphasised the importance of complementarity. In line with his comments during previous interviews,⁶⁷ he stated during his swearing-in ceremony: ‘The priority for me, and I believe that is the principle of the Rome Statute, is not to focus so much on where trials take place but to ensure that the quest for accountability and inroads on impunity are made.’⁶⁸ On the controversial issue of the role of complementarity during the preliminary examinations phase, he diplomatically observed a few months after his inauguration in a speech to the ASP: ‘the basic function of preliminary examinations must mean that they do not take any longer than they are required’.⁶⁹ He took immediate practical steps to that effect. In October 2021, Khan concluded the preliminary examinations phase in two specific situations, Colombia and Venezuela. However, rather than blaming the role that the complementarity assessment had played in the length of these preliminary examinations (the one in Colombia had lasted 17 years), he concluded the examinations *with reference to* complementarity.

He ended the preliminary examination into Colombia after having reached an agreement with Colombia that commits Colombia to domestic accountability processes and the provision of information to the Court.⁷⁰ The OTP, for its part, commits to ‘continue supporting Colombia’s accountability efforts within its mandate and means’. Whilst the agreement refers only to the importance of complementarity *per se*,⁷¹ the accompanying press release announces that the end of the preliminary examination ‘marks the beginning of a new chapter of support and engagement – an example of *positive* complementarity in action’.⁷²

⁶⁷ See, for instance, Prosecutor Khan’s comments in ‘Delivering the ICC Vision Through Deeds not Words: An Interview with Karim Khan QC’, *Opinio Juris*, 21 May 2021, <http://opiniojuris.org/2021/05/21/selling-the-icc-vision-through-deeds-not-words-an-interview-with-karim-khan-qc/> (last accessed 6 June 2022) and ‘Episode 45 – Karim Khan and UNITAD’, *Asymmetrical Haircuts Podcast*, 13 June 2021, <https://www.asymmetricalhaircuts.com/episodes/episode-45-karim-khan-and-unitad/> (last accessed 6 June 2022).

⁶⁸ Swearing-in ceremony: Speech of new ICC Prosecutor Karim Asad Ahmad Khan QC, 16 June 2021, https://www.youtube.com/watch?v=tDldr2ma1S0&ab_channel=IntlCriminalCourt, at minute 3:00 (last accessed 6 June 2022). See also Prosecutor Karim Khan, Opening Plenary Remarks at the Twentieth Session of the Assembly of States Parties, 6 December 2021, para 14, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/ASP20-STMT-PROS-ENG.pdf (last accessed 6 June 2022): ‘Before I was elected and in the first six months of this current mandate, I have repeated and emphasised, and forgive me for underscoring it again, that complementarity is a key aspect, a key bedrock foundation, of the Rome Statute system’.

⁶⁹ Prosecutor Karim Khan, Opening Plenary Remarks at the Twentieth Session of the Assembly of States Parties, 6 December 2021, para 26, https://asp.icc-cpi.int/sites/default/files/iccdocs/asp_docs/ASP20/ASP20-STMT-PROS-ENG.pdf https://asp.icc-cpi.int/sites/default/files/iccdocs/asp_docs/ASP20/ASP20-STMT-PROS-ENG.pdf (last accessed 6 June 2022).

⁷⁰ Cooperation Agreement between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia, 28 October 2021, <https://www.icc-cpi.int/itemsDocuments/20211028-OTP-COL-Cooperation-Agreement-ENG.pdf> (last accessed 6 June 2022).

⁷¹ See *e.g.* *ibid*, third preambular paragraph: ‘Inspired by the principle of complementarity, which constitutes the cornerstone for the exercise of the jurisdiction of the International Criminal Court’. See also article 6.

⁷² OTP, Press Release: ICC Prosecutor, Mr Karim A. A. Khan QC, Concludes the Preliminary Examination of the Situation in Colombia with a Cooperation Agreement with the Government Charting the Next Stage in Support of Domestic Efforts to Advance Transitional Justice, 28 October 2021, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1623> (last accessed 6 June 2022) (emphasis added). See also Kai Ambos, ‘The Return of “Positive Complementarity”’, *EJIL:Talk!*, 3 November 2021, <https://www.ejiltalk.org/the-return-of-positive-complementarity/> (last accessed 6 June 2022): ‘This [more cooperative relationship] breathes new life into the concept known as “positive complementarity”, and the Prosecutor rightly highlights the uniqueness of the Colombia Agreement, which may well have a trailblazing effect.’ (hyperlink omitted).

In Venezuela, however, the Prosecutor closed the preliminary examination with a view to proceeding to the next stage: opening an investigation. There, too, the Prosecutor concluded an agreement with the government with a view to enhancing cooperation. The quid pro quo undergirding the agreement is that Venezuela promises to cooperate with the OTP's investigations, whilst the OTP agrees to help Venezuela with its proceedings, albeit in a less committed manner: the Parties have agreed

To strive towards agreeing on means and mechanisms that will effectively contribute to the efforts of ... Venezuela to carry out genuine national proceedings in accordance with article 17.

*To work to ensure that the principle of complementarity has adequate and meaningful effect.*⁷³

Like the agreement with Colombia, the agreement with Venezuela refers only to complementarity, not positive complementarity, but substantively, the agreement is primarily about cooperation, and thus about 'positive complementarity', insofar it provides for ICC support for Venezuela.⁷⁴ In speeches, the references were more explicitly to 'positive complementarity'. The Venezuelan President referred to an agreement that guaranteed 'positive complementarity' and both the Venezuelan Attorney General and the ICC Prosecutor even referred to the 'the *principle* of positive complementarity'.⁷⁵

Whilst concerning very diverse circumstances, the Colombia and Venezuela decisions both suggest that positive complementarity is still referred to, albeit more in speeches than in official agreements, and that the line between complementarity and positive complementarity is not clear.

7. The definition of positive complementarity

In its follow up on the IER, the ASP Bureau on Complementarity pointed to the very definition of positive complementarity as a source of tensions, observing that '[t]here [i]s no universally agreed definition of what "positive complementarity" exactly means', and 'the States Parties'

⁷³ Memorandum of Understanding between the Bolivarian Republic of Venezuela and the Office of the Prosecutor of the International Criminal Court, 3 November 2021, operative clauses 3 and 4, <https://www.icc-cpi.int/itemsDocuments/otp/acuerdo/acuerdo-eng.pdf> (last accessed 6 June 2022) (emphases added).

⁷⁴ See also Prosecutor Karim Khan, Opening Plenary Remarks at the Twentieth Session of the Assembly of States Parties (n 69), para 24: 'What was important in Venezuela, and is a first in fact, was that at the same moment I opened an investigation, I signed with the President of the Bolivarian Republic of Venezuela an agreement, which shows that in parallel with my Office's investigations, we can have *cooperation based on complementarity*, and I look forward to constructive and sustained dialogue with Venezuela to address impunity also through national proceedings.'

⁷⁵ See Prosecutor Khan's remarks at the press conference following the signing of the MOU 'Firma del Memorandum de entendimiento entre la República Bolivariana de Venezuela y la CPI', 4 November 2021, https://www.youtube.com/watch?v=hDjUUwzBu2o&ab_channel=Nicol%C3%A1sMaduro at minute 12:25 [in English] (last accessed 6 June 2022): 'As we move into this new phase... I am really pleased, that by way of the letters we have just signed, we are committed to working collaboratively, independently, but with full regard to the principle of positive complementarity'. See also, 'ICC prosecutor says he will open investigation into Venezuela', *Reuters*, 4 Nov 2021, <https://www.reuters.com/world/americas/icc-prosecutor-says-he-will-open-investigation-into-venezuela-2021-11-03/> and:

'Special Interview with Tarek William Saab, Attorney General of the Republic of Venezuela', *Telesur*, 7 Nov 2021, https://www.youtube.com/watch?v=P3gTmRZG0_Q&ab_channel=TeleSUREnglish (last accessed 6 June 2022).

understanding of the term is slightly different from the way the Office of the Prosecutor has been using it'.⁷⁶ It explained that “‘positive complementarity’ for the ASP was oriented more towards strengthening national capacities through international cooperation, while the OTP implemented “‘positive complementarity’ by not rushing to judge a State’s unwillingness or inability, preferring to ‘practically encourage relevant and genuine national proceedings’.”⁷⁷ Parties agreed that ‘further discussions were needed to resolve *tensions* between the OTP and States Parties in respect of *defining* “positive complementarity”’.⁷⁸ In its report to the ASP then, the ASP Bureau on Complementarity reported that ‘[p]reliminary discussions on “positive complementarity” – and associated IER recommendations – have revealed that more could be done to build a shared understanding of this term and any differences adopted by the ASP and the Court.’ More work was planned for early 2022 – the time that the Committee finalized this ILA report.

This report’s short ‘conceptual history’ of positive complementarity suggests, however, that a significant part of the lack of clarity arises from the fact that the term ‘positive complementarity’ has been used to refer both to the admissibility assessment in the Statute and to a policy of cooperation in which the ICC or other actors support states in their domestic proceedings. Given that these concepts of positive complementarity are different in nature and have separate legal frameworks in the Rome Statute, the Committee recommends that they be more clearly distinguished, also by using different terms for the separate processes. The Committee returns to this at the end of this report.

For the purposes of this report the Committee requires a definition that best fits the aim of addressing the obstacles to domestic accountability, irrespective of the actor who does so (ICC, ASP, civil society, etc).⁷⁹ The Committee therefore adopts a definition of positive complementarity that:

- (a) keeps a distinct meaning for positive complementarity, i.e. does not merge respect for complementarity as an admissibility rule with any policy of promoting proceedings at the domestic level (irrespective of the head of jurisdiction those proceedings are based on);
- (b) does not predetermine which actor (OTP, Chambers, Registry, ASP, civil society) is responsible for the policy of positive complementarity, since it is part of the Committee’s mandate to answer that question;
- (c) focuses both on capacity issues and on willingness issues, since both are part of the barriers to accountability identified in the Sydney report.

On this basis, the Committee adopts the following definition:

⁷⁶ ASP Bureau on Complementarity, Informal Information Session: ‘Complementarity, including the concept of Positive Complementarity (R262 – R265) and the Gravity Threshold (R227)’, 1 October 2021, 3, https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/Compl.%204%20summary.pdf (last accessed 6 June 2022).

⁷⁷ Ibid, 6.

⁷⁸ ASP, Report of the Bureau on Complementarity, 6 December 2021, para 43, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/ICC-ASP-20-22-ENG.pdf (last accessed 6 June 2022) (emphasis added).

⁷⁹ That said, as will be elaborated below, this broad understanding of positive complementarity also allows the Committee to envisage roles for the ICC, both the ASP and the OTP, in implementing positive complementarity. In the final section of this report, the Committee will also make recommendations about definitions with a view to enhancing clarity and a shared vocabulary among actors working in and on the ICC.

*Positive complementarity is any cooperation with a criminal jurisdiction aimed at enhancing the capacity and willingness of that jurisdiction to investigate and prosecute crimes within the ICC's subject-matter jurisdiction.*⁸⁰

III. Causes of accountability gaps: barriers to accountability

The Sydney report listed several distinct reasons why events potentially within the jurisdiction of the ICC have gone unaddressed at the domestic level (whether the domestic jurisdiction could have jurisdiction on the basis of the principles of territoriality, personality or universality). To date, much of the discourse around positive complementarity has assumed certain factors to be decisive obstacles to accountability, for instance, the lack or inadequacy of domestic legislation incorporating core crimes into domestic law or the absence of special courts, without having an eye for other, possibly more decisive, obstacles. The overview of factors provided in the Sydney report and reproduced here allows actors to assess obstacles to accountability in a particular situation with a keen eye for the fact that key obstacles in that situation may be different from the ones they had assumed, and that therefore any policy of positive complementarity needs to be developed accordingly. This report does not weigh or rank these barriers to accountability. Nor does it suggest that in cases of accountability gaps, all barriers are important or are equally important. In each specific instance, it will have to be assessed whether the barrier to accountability exists and, if so, how relevant it is. Finally, some of the obstacles to accountability that have been identified are normatively defensible or indeed desirable, and therefore *should not* be overcome by policies of positive complementarity. That normative assessment is also part of the discussion below.

Accountability gaps emerge as a result of the inaction or lack of sufficient action of a number of states: the state where the conduct took place, the state of which alleged offenders are nationals, the state of which a victim is a national, states whose essential governance interests at stake, and states with no link to the conduct but which still have a right to investigate and prosecute on the ground of universal jurisdiction (and in some instances even have obligations to that effect as a result of suppression treaties). The Committee has considered obstacles both to the exercise of territorial jurisdiction and the use of heads of extraterritorial jurisdiction. Section U below is dedicated to obstacles specific to the use of extraterritorial heads of jurisdiction. This report focuses on explanations for the absence of criminal proceedings, recognising, however, that some of these factors can also obstruct other accountability mechanisms.

The Sydney report identified the following barriers to accountability.⁸¹ This report adds, for each of them, potential actions under a policy of positive complementarity, including potential actors.

- A. No incorporation of Rome Statute crimes in domestic criminal law
- B. A principle in domestic law prohibiting retrospective application of criminal law
- C. Statutes of limitations
- D. Amnesties

⁸⁰ The ICC's subject-matter jurisdiction here refers to the crimes listed in article 5 of the Rome Statute; it excludes offences against the administration of justice over which the ICC also has jurisdiction.

⁸¹ The only barrier that is new in this report is 'International criminal tribunals or courts competing for cases with domestic jurisdictions'.

- E. Limited jurisdiction
- F. Narrow mandates
- G. Immunities
- H. Lack of evidence
- I. Custody issues
- J. Justifications that pre-empt investigations
- K. Government sees proceedings as against its interests
- L. Lack of independent investigations
- M. Lack of prosecutorial independence
- N. Lack of judicial independence
- O. Corruption
- P. Internal instability or lack of control by government authorities
- Q. Lack of capacity
- R. Accessibility of courts
- S. Patronage
- T. Priorities of the domestic justice system
- U. Difficulties specific to the exercise of extraterritorial jurisdiction
- V. International criminal tribunals or courts competing for cases with domestic jurisdictions.

A. No or inadequate incorporation of the core crimes in domestic legislation

A commonly reported obstacle is the absence of the core crimes in domestic law.⁸² In most domestic legal systems, the Rome Statute is not self-executing:⁸³ it creates the ICC and gives it jurisdiction but does not create crimes under domestic law. As such this need not result in an accountability gap: accountability can also be pursued by investigating and prosecuting offenders under ‘ordinary crimes’ classifications, that is, common crimes under domestic law that do not have the special characteristics of the core crimes as defined in the Statute, for instance, prosecuting someone for 500 counts of murder, rather than as an ICC crime *eo nomine* such as genocide by killing. For the purposes of admissibility, the Rome Statute does not require conduct to be prosecuted as the core crimes either. Prosecution as ordinary crimes can suffice, as long as those ordinary crimes cover the ‘same conduct’.⁸⁴

The question is thus what conduct in the Rome Statute could not be prosecuted under existing domestic law. The answer will vary from state to state. By way of example, the revised Italian report provides a whole range of Rome Statute crimes the conduct of which is not covered by Italian law:

- As regards the *actus rei* of crimes against humanity: extermination; persecution; deportation or forcible transfer of population; apartheid; forced pregnancy and enforced sterilization;

⁸² See, for instance, Country Report on Argentina, Brazil and Peru 27 (with respect to Brazil); Country Report on China 10; Country Report on the United States 23; Country Report on Zimbabwe 3; Country Report on Italy 4; Country Report on Malawi 2; Country Report on Palestine 3-4; Regional Report on the Caribbean 1-2, reporting no Caribbean countries except for Trinidad and Tobago have incorporated all the Rome Statute crimes into domestic law (some have adopted legislation on genocide).

⁸³ However, in some states, for instance the Democratic Republic of the Congo, the Rome Statute has been directly applied.

⁸⁴ See more elaborately, Nouwen (n 8) 49-51 and Ambos (n 28) 281-2.

- With respect to war crimes: willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court; committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence; conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities; intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission;
- With respect to the *actus rei* of genocide: causing serious mental harm to members of the protected group is not expressly included among the criminalised acts.
- The crime of aggression.

Moreover, the prosecution of core crimes as ordinary crimes can run into other obstacles to accountability, including, as discussed in this report, statutory limitations (C), immunities (G) and unavailability of universal jurisdiction (U).

Policy of positive complementarity:

As part of their policy of positive complementarity, states can help each other in drafting and adopting legislation that enables them to prosecute Rome Statute crimes. States Parties that have already imported the Rome Statute crimes into domestic criminal law may be well placed to do so. Organisations such as the Commonwealth Secretariat and civil society actors have also fulfilled such roles, often without calling it ‘positive complementarity’.⁸⁵ The Complementarity Platform of the ASP Bureau on Complementarity already provides a venue for requesting such assistance. Several international criminal lawyers have developed relevant expertise that may be consulted, and there are useful online knowledge-bases such as the National Implementing Legislation Database (NILD), which is part of the ICC Legal Tools Project.⁸⁶ The Special Adviser on Knowledge Transfer, appointed by the Prosecutor in September 2021, could play a role in accelerating the usage of the online legal tools.

B. A principle in domestic law prohibiting retrospective application of criminal law

Even when the crimes within the ICC’s jurisdiction have been incorporated into domestic law, a strong domestic principle against retroactive application of criminal law may prohibit its use for events prior to the entry into force of that domestic law.⁸⁷ If the acts were already criminal under international law at the time of commission, the impediment is not international human rights law, for that body of law explicitly states that the legality principle does not stand in the way in case of proceedings involving acts or omissions that were crimes under international law at the time they

⁸⁵ For instance, when drafting its International Criminal Court Bill, Uganda received advice from the Commonwealth Secretariat. The drafters considered the Canadian, South African and New Zealand ICC legislation. See Nouwen (n 8) 196.

⁸⁶ See: <https://demo.hrlc.net/en/> (last accessed 6 June 2022). See also Case Matrix Network, Implementing the Rome Statute of the International Criminal Court, <https://www.legal-tools.org/doc/e05157/pdf> (last accessed 6 June 2022).

⁸⁷ On *nullum crimen* as an obstacle, see Country Report on China 6.

were committed.⁸⁸ However, many domestic legal systems contain a protection that does not consider international law a sufficient basis for meeting the legality principle.⁸⁹

The impossibility domestically to investigate and prosecute core crimes as a result of *nullum crimen* is an obstacle to accountability if, as discussed in the previous section, the same conduct is not covered by ordinary crimes, or, as will be discussed in the next section, if those ordinary crimes are subject to statutes of limitations.

Positive complementarity

As part of a policy of positive complementarity, the Legal Tools Project could enhance search functionality (in the ICC Legal Tools Database (LTD), the National Implementing Legislation Database (NILD), or the Cooperation and Judicial Assistance Database (CJAD)) so that the databases easily show how states have dealt with this difficult normative conundrum.⁹⁰ Given that both accountability for international crimes and respect for the legality principle are important for the rule of law, there is no easy normative answer. However, several domestic courts have dealt with this issue with different results. Easy access to the relevant parts of such case law will enrich the argumentation and consideration of the normative questions.

C. Statutes of limitations⁹¹

Some country reports have identified statutes of limitations as a barrier to criminal proceedings. The obstacle is often linked to that identified above under A - the absence of the core crimes as specifically international crimes in domestic law – because only ordinary crimes can be charged in such cases and ordinary crimes *are* often subject to statutes of limitations. For instance, the country report on Brazil identifies as a barrier to accountability the fact that the crime against humanity of enforced disappearances has not been incorporated into Brazilian law and that the ordinary crime that covers the same conduct, namely kidnapping, is still subject to statutes of limitations—the argument that kidnapping is a continuing crime not having been accepted.⁹²

As with the protection against non-retroactivity (obstacle B), this barrier to accountability is created by domestic law, rather than international law. There are no international statutes of limitations and indeed, statutes of international criminal courts and tribunals usually provide that domestic statutes of limitations do not apply to the international crimes within their jurisdiction.⁹³ That, however, is not enough to establish a customary-international-law *prohibition* on statutes of

⁸⁸ See International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, art. 15. See also, for instance, European Convention on Human Rights, 4 November 1950, ETS 5, art. 7(2) and relevant case-law. See more elaborately, Claus Kress, ‘Nulla poena nullum crimen since lege’, *Max Planck Encyclopaedia of Public International Law*, 2010.

⁸⁹ See, for instance, for the Dutch legal system: Bouterse (Desiré), Re, Judgment on Appeal, Decision No LJN: AB1471, Case No HR 00749/01 CW 2323, NJ 2002, 559, ILDC 80 (NL 2001), 18th September 2001, Netherlands; Supreme Court [HR] Date: 18 September 2001, Oxford Public International Law Database, annotated by H. van der Wilt, <https://opil.ouplaw.com/view/10.1093/law/ildc/80nl01.case.1/law-ildc-80nl01> (last accessed 6 June 2022). For an example from Uganda, see Nouwen (n 8), 202-204.

⁹⁰ On the legal tools project, see <https://www.casematrixnetwork.org/icc-legal-tools-database/>. See also: <https://demo.hrlc.net/en/> and <https://cjad.nottingham.ac.uk/en/>. (All sites last accessed 6 June 2022).

⁹¹ Thanks to Karolina Wierczyńska for her contributions to this section.

⁹² Country Report on Argentina, Brazil and Peru 17-18.

⁹³ See, for instance, RS, art. 29.

limitations for core crimes.⁹⁴ As a matter of domestic law, and contrary to provisions in the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, statutes of limitations continue to present obstacles to prosecuting the core crimes at the domestic level, either because no exception has been made to existing statutes of limitations for the core crimes as such, or because the core crimes are prosecuted as ordinary crimes and ordinary crimes, or at least most of them,⁹⁵ continue to be subject to statutes of limitations.

Whilst statutes of limitations do not originate in international law, some international legal instruments do, in fact, recognise and give effect to statutes of limitations, for instance, international agreements concerning extradition. Statutes of limitations may thus also be an obstacle to states' ability to extradite people to another state.⁹⁶

Policy of positive complementarity

As part of their policy of positive complementarity, states can help each other in drafting and adopting legislation that removes statutes of limitations for core crimes, even when prosecuted as ordinary crimes. Moreover, the Legal Tools Project could enhance search functionality on how domestic courts have dealt with statutes of limitations when they came up in domestic proceedings. States parties to extradition agreements that recognise statutes of limitations could make exceptions for core crimes, even if charged as ordinary crimes.

D. Amnesties

Amnesties are intentional barriers to criminal accountability. Amnesties vary in scope and form. They have been defined as 'extraordinary legal measure[s] whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offences in a court of law.'⁹⁷ This broad definition also includes pardons of those who have already been prosecuted. A narrower definition of amnesties focuses only on bars to criminal proceedings in the first place.

Amnesties are barriers to criminal proceedings in the state that adopted them;⁹⁸ they do not bind international or foreign courts. However, as with statutes of limitations, they could also be a

⁹⁴ There is, however, extensive human rights case law, especially by the Inter-American Court of Human Rights (IACtHR), rejecting statutes of limitations for serious human rights violations. See *Barrios Altos v. Peru*, Judgment (Merits), para. 41 (14 March 2001) followed by subsequent case law, cited in Kai Ambos, *Treatise on International Criminal Law I* (2nd ed, OUP, 2021) 552-555, with case law references at 553 with fn. 1309.

⁹⁵ Some states make exceptions to the applicability of statutes of application for certain categories of serious crimes, for instance, those subject to the death penalty.

⁹⁶ For instance, article 4(4) of the Framework Decision on the European Arrest Warrant provides statutes of limitations as one of the grounds on which executing judicial authorities may refuse to execute European arrest warrants. See Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA), Official Journal of the European Communities L 190/1, 18 July 2002 (last accessed 6 June 2022).

⁹⁷ M. Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press, 2009) 6.

⁹⁸ Country report on Argentina, Brazil and Peru 5, 10-11; Country Report on Bangladesh 1; Country report Sudan 14-15.

domestic legal obstacle to extradition or surrender.⁹⁹ Several international courts have found amnesties for core crimes incompatible with international (human rights) law.¹⁰⁰ Some international courts have suggested that there may be exceptions in case of negotiated settlements and if alternative accountability measures are in place.¹⁰¹ Where amnesties have been successfully challenged before constitutional and regional human rights courts,¹⁰² such domestic supreme courts have not always accepted such decisions, thus leaving them intact as obstacles to domestic proceedings.¹⁰³

While amnesties are by definition an obstacle to accountability in the sense of criminal sanctions, they need not be an absolute bar to all forms of accountability, through criminal law or otherwise. Pardons remove only the consequences of criminal liability and not the prospect of it: they still allow criminal proceedings in which an accused is held to account. Moreover, not all amnesties bar accountability measures other than criminal proceedings, for instance civil proceedings. Indeed, if made conditional upon, for instance, truth-telling or collaboration in the investigations, they may promote the work of accountability mechanisms such as truth commissions or commissions of inquiry.¹⁰⁴

Positive complementarity

Amnesties pose challenging normative questions. From a rule of law perspective, both accountability for core crimes and respect for legal guarantees are important. The normative evaluation of an amnesty will depend on how it was issued and by whom, to whom and whether it was accompanied by forms of accountability other than criminal punishment. As part of a policy

⁹⁹ Article 3(1) of the Framework Decision on the European Arrest Warrant provides amnesties as a ground for mandatory non-execution of the European Arrest Warrant. See Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA) (n 96).

¹⁰⁰ See, for instance, *Barrios Altos v. Peru*, IACtHR. (Mar. 14, 2001), paras 41-44; *Prosecutor v. Kallon, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, Special Court for Sierra Leone, Case No. SCSL-2004-14-AR72(E) (SCSL App. Ch., Mar. 13, 2014); *Decision on Ieng Sary's Rule 89 Preliminary Objections (Ne Bis in Idem and Amnesty and Pardon)*, Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, 3 November 2011.

¹⁰¹ *Marguš v. Croatia*, European Court of Human Rights, Appl. No. 4455/10, Judgment, 27 May 2014, para. 139 and IACtHR, *The Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment, 25 October 2012, Concurring Opinion of Judge D. García-Sayán, at para. 37.

¹⁰² E.g. IACtHR, *Gomes Lund et al v Brazil*, Judgment (Preliminary Objections, Merits, Reparations, and Costs) (24 November 2010); Country Report on Argentina, Brazil and Peru 8.

¹⁰³ See Country report on Argentina, Brazil and Peru 10-11.

¹⁰⁴ The best-known example of such a comprehensive truth-for-justice design is probably the transitional-justice model that South Africa adopted after the end of apartheid. See Promotion of National Unity and Reconciliation Act, Act 34 of 1995. See, among plurima alia, Desmond Tutu, *No Future Without Forgiveness* (Rider, 1999); Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, 2004); Mia Swart and Karin van Marle (eds), *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years On* (Brill Nijhoff, 2017). On the relevance of the South African experience for the future development of international criminal law, see S.M.H. Nouwen, 'Is There Something Missing in the Proposed Convention on Crimes against Humanity? A Political Question for States and a Doctrinal One for the International Law Commission' (2018) 16(4) *Journal of International Criminal Justice* 877. For a discussion of another amnesty that was accompanied by other accountability measures, see Kai Ambos and Gustavo Emilio Cote Barco (eds), *Ley de Amnistía, Comentario completo y sistemático (Ley 1820 de 2016)*, available at https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/epapers/Ambos_Kai_ed_con_Gustavo_Emilio_Cote_Barco_Ley_de_Amnista_Comentario_completo_y_sistemtico_Ley_1820_de_2016_Bogot_Editorial_Temis_S_A_2019.pdf (last accessed 6 June 2022).

of positive complementarity, the Legal Tools Project could enhance search functionality on how states have dealt with this difficult normative conundrum.

E. Limited jurisdiction

Even though international law allows states to establish widespread jurisdiction over the crimes within the Rome Statute (including not only territorial jurisdiction, but also jurisdiction on the grounds of nationality (sometimes extended to residency), the protection principle, passive personality and, at least for some of the crimes, universal jurisdiction) states often have not established the widest possible jurisdiction under domestic law. In the United States, there is a general presumption *against* extraterritoriality in the application of US federal criminal law.¹⁰⁵

In more exceptional circumstances, even the territorial jurisdiction is limited. The Palestinian report notes that Article 1 of the Protocol Concerning Legal Matters of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 divides the criminal jurisdiction between Israel and the Palestinian Authority and prevents Palestinian courts from prosecuting Israeli citizens.¹⁰⁶

Positive complementarity

As part of their policy of positive complementarity, states can help each other in drafting and adopting legislation to establish the jurisdiction that the state is allowed to use by international law. Legal systems differ in how they establish such jurisdiction: for some, this is done through general provisions; others specify it for each and every offence. The Complementarity Platform of the ASP Bureau on Complementarity already provides a venue for requesting legislative assistance but seems to suffer from a lack of resources and a lack of awareness of its existence and potential role.

The issue of limited usage of extraterritorial jurisdiction is probably at least as political as it is technical: states must first be persuaded to make use of all the heads of jurisdiction that international law provides them with. One way to commit to establishing (and using) jurisdiction allowed under international law to prosecute core crimes is to sign up to suppression treaties that oblige states to do so. For instance, once transformed into a treaty, the Articles on Prevention and Punishment of Crimes against Humanity, drafted by the International Law Commission (ILC), would be an instrument for committing to establishing and using jurisdiction to investigate and prosecute crimes against humanity.¹⁰⁷ NGOs are well placed to persuade states to push this initiative forward.

F. Narrow mandates

Even if a state has established broad grounds for jurisdiction, specific bodies established to investigate (and prosecute) international crimes may have been given narrow mandates, *ratione temporis*, *loci*, *materiae* or *personae*. As a result, they may bring accountability for some events

¹⁰⁵ Country Report on the USA 24-25.

¹⁰⁶ Country Report on Palestine 5.

¹⁰⁷ See 'Chapter IV: Crimes against humanity', *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, p. 10 et seq. See also UN Doc. A/RES/74/187 (2019).

and people, while at the same time pushing accountability for other events and people further into the background, precisely because they are seen as *the* mechanism for accountability and they have not touched upon these events and people.

The Canadian report gives the poignant example of the Military Police Complaints Commission (MPCC) that investigated complaints made by Amnesty International Canada and the British Columbia Civil Liberties Association regarding Afghan detainee abuse. The MPCC had explained that its mandate was limited to the question whether eight individual members of the Military Police had failed to investigate transfers of detainees to Afghan forces despite reports that previous detainees held by Canadian forces were tortured by Afghan authorities. The MPCC explicitly stated that it was not within its mandate to examine the overall appropriateness of Canada's detainee transfer policies. The Canadian country report concludes: 'The report highlights the narrow mandate of the MPCC accountability mechanism, and the lack of authority to undertake a wider investigation into the Canadian Forces and its policies. The use of such mechanisms may therefore in effect shield perpetrators from justice, enabling the government to claim that allegations have been investigated while in fact the events at issue are excluded from examination.'¹⁰⁸

Positive complementarity

All actors interested in justice, whether states, international courts, NGOs or academics, should always recognise that human institutions never meet the expectations of justice that inspired their creation, among others due to narrow mandates. This does not mean that these institutions should be criticised for their inherent limitations – just like the ICC should not be criticised for states parties having decided to limit its territorial, substantive and temporal jurisdiction. It does, however, require never to focus all attention and resources on that one body. Just like the ICC can only do some criminal justice – as opposed to realising 'global justice' – domestic war crimes courts or investigative bodies will always shine light on some forms of injustice and not others. Positive complementarity could involve an ethos that requires always being interested in other forms of injustice, and never allowing the justice discourse to get monopolized by a single institution.¹⁰⁹

G. Immunities¹¹⁰

Immunities can bar the exercise of national criminal jurisdiction over foreign officials. As a matter of international law, incumbent Heads of States, Heads of Government and Foreign Ministers enjoy personal immunity from foreign criminal jurisdiction.¹¹¹ As to functional immunity, it has been argued that such immunity is contrary to the very idea of international criminalisation of

¹⁰⁸ Short Report on Canada, May 2017 8-9 (internal footnotes omitted).

¹⁰⁹ See also M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) 122, chapters 5 and 7; A. Branch, 'What the ICC Review Conference Can't Fix', 11 March 2010, <https://africanarguments.org/2010/03/what-the-icc-review-conference-cant-fix/> (last accessed 6 June 2022) and S. Nouwen and W. Werner, 'Monopolizing Global Justice' (2015) 13(1) *Journal of International Criminal Justice* 157-176.

¹¹⁰ Thanks to Nataliya Maroz for her contributions to this section.

¹¹¹ ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment [2002] ICJ Reports 3, 20-21 (para. 51) <https://www.icj-cij.org/public/files/case-related/121/13743.pdf> (last accessed 6 June 2022);

certain conduct.¹¹² Since the Paris peace conference of 1919 a significant body of State practice has confirmed either verbally or through actual prosecutions or other forms of accountability that functional immunity does not apply in national proceedings for genocide, crimes against humanity and war crimes.¹¹³ Functional immunity is still an obstacle to domestic proceedings, however, when *domestic law* grants it despite international law not doing so.

A specific problem concerns immunity of members of national military/police contingents that are involved in peacekeeping abroad. Military and sometimes civil personnel of such missions usually enjoy immunity from criminal jurisdiction abroad pursuant to status-of-forces agreements.¹¹⁴ This creates challenges, as whilst they enjoy no such immunity in the sending state, troop contributing countries are sometimes reluctant to hold their own peacekeepers accountable.¹¹⁵

In addition to immunities for foreign officials and immunities based on status-of-forces agreements, some countries have immunity acts that provide obstacles for prosecuting their own nationals for crimes within the ICC's jurisdiction. Whilst these immunity laws, like amnesty laws, do not apply outside the domestic legal order,¹¹⁶ they are an obstacle to domestic proceedings in the state that has adopted these laws.

Positive complementarity

The enjoyment of functional immunity by foreign officials in national criminal proceedings would constitute a key obstacle to an effective national pillar of the prosecution of core crimes. Draft Article 7 on Immunity from foreign criminal jurisdiction as adopted by the ILC states that functional immunity does not apply to genocide, crimes against humanity and war crimes.¹¹⁷ While this proposal has generated some controversy,¹¹⁸ states and NGOs could make it part of their policy of positive complementarity to support Draft Article 7 not only as a matter of law, but also as a

¹¹² For a famous judicial pronouncement to that effect, see Jerusalem District Court, AG of Israel v. Adolf Eichmann, (1968) I.L.R. 277, 308-309.

¹¹³ For an account of the relevant practice, see Claus Kreß, 'Art. 98', in: Kai Ambos (ed.) *The Rome Statute of the International Criminal Court* (4th edn, Beck, Hart, Nomos, 2022). 2617-2620 (marginal numbers (mn.) 54-65), 2623 (mn. 74). See also a recent decision by the German Federal Court of Justice citing state practice, Article 7 of the Nuremberg Tribunal's Charter, and the writing of scholars: Bundesgerichtshof, Judgment of 28 January 2021 - 3 StR 564/1, Neue Juristische Wochenschrift 2021, 1326 ff. (an English translation is forthcoming in International Law Reports). For the detailed prosecution brief in the case, see Claus Kreß, Peter Frank and Christoph Barthe, 'Immunity of Foreign State Officials Before National Courts. A Stress Test for Modern International Criminal Law?' (2021) 19(3) *Journal of International Criminal Justice* 697 and for a discussion see Aziz Epik, 'No Functional Immunity for Crimes under International Law before Foreign Domestic Courts' (2021) 19(5) *Journal of International Criminal Justice* 1263. See also Leila Sadat, 'New Developments in State Practice on Immunity of State Official for International Crimes' 2021 25(18) *American Society of International Law Insights* <https://www.asil.org/insights/volume/25/issue/18> (last accessed 26 February 2022).

¹¹⁴ See, for instance, Council Decision 2010/686/CFSP of 13 September 2010 concerning the signing and conclusion of the Agreement between the European Union and the Islamic Republic of Afghanistan on the Status of the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN) OJ L 294, 12 November 2010, art. 6(4) and UN Model Memorandum of Understanding for Military Contingents (A/75/121), 31 August 2020, art. 7 (quinquies).

¹¹⁵ C. McKenzie, 'Proposing a Model of Immunity for Peacekeepers: The Sovereignty/Justice Balance – What sort of immunity should peacekeepers have if justice is to be achieved for victims of war crimes?' (2019) 26 *Australian International Law Journal* 151.

¹¹⁶ See, e.g., L. Sadat, 'Exile, Amnesty and International Law' (2006) 81 *Notre Dame Law Review* 955.

¹¹⁷ A/CN.4/L.893, 10 July 2017.

¹¹⁸ For documentation, see Claus Kreß, Art. 98, in: Kai Ambos (ed.) *The Rome Statute of the International Criminal Court* (Munich: Beck, Hart, Nomos, 4th edition 2022), pp. 2602 (mn. 25), 2621 (mn. 68), 2623-2624 (mn. 77).

matter legal policy, for instance by assisting in reviewing legislation to see that states do not offer more immunity than is strictly required by international law.

The OTP could make it part of a policy of positive complementarity to notify troop-contributing-countries if it has information that crimes have been committed by the state's troops and the ICC does not intend to investigate or prosecute.

H. Lack of sufficient evidence according to domestic law¹¹⁹

Lack of evidence is among the most prominently cited causes of accountability gaps.¹²⁰ Unlike the legislative issues discussed so far, it is a problem that international courts face, too. One therefore has to explore the causes of the lack of evidence, some of which are listed here as independent causes of accountability gaps. Among the causes of a lack of evidence are: a lack of interest and therefore a lack of investigations;¹²¹ lack of investigations due to the supposed investigators being implicated in the crimes;¹²² lack of government control over territory and/or people;¹²³ the events having taken place a long time ago;¹²⁴ reluctance of victims and witnesses to testify due to fear for repercussions or mistrust of the state, or having accepted compensation;¹²⁵ high standards of proof (or at least, standards of proof applicable to ordinary crimes, the argument being made that they should be lower/different for international crimes);¹²⁶ requirements of medical certificates that are difficult to obtain; lack of resources to obtain evidence; lack of investigatory powers of those who are doing the investigations and lack of cooperation with the police that has such powers;¹²⁷ and the government's invocation of national security interests as a ground on which to refuse handing over evidence to investigatory bodies.¹²⁸

The use of extraterritorial jurisdiction can create specific evidentiary issues since much of the evidence is often in another jurisdiction.¹²⁹ Conducting investigations abroad is expensive, challenging as it requires navigating foreign territory and requires cooperation with foreign authorities.¹³⁰ Following investigations, there are numerous acquittals due to lack of evidence.¹³¹ The numbers can be explained by the fact that many national trials take place long after the crimes were committed, which creates additional challenges with respect to obtaining sufficient and

¹¹⁹ Thanks to Alexander Heinze for contributing to this section.

¹²⁰ See, for instance, Country Report on Bangladesh 4, Country Report on Indonesia 6, Country Report on Sudan 13; Country report on Canada 2-3 (discussion of the case of *R v Mungwarere*).

¹²¹ See, for instance, Country Report on Bangladesh with respect to the violence committed during the Liberation War by nationalist Bengali fighters (Country Report on Bangladesh 4); Country Report on Indonesia 5; Country Report on Kenya 3.

¹²² Country Report on Kenya 5.

¹²³ Country Report on Sudan 13; Country Report on Palestine 5.

¹²⁴ Country Report on Canada 2.

¹²⁵ Country Report on Indonesia 5, Country Report on Sudan 13.

¹²⁶ Country Report on Indonesia 6, 9.

¹²⁷ *Ibid*, 6.

¹²⁸ The updated Canadian country report provides a telling example: 9.

¹²⁹ The country report on Austria mentions a case in which preliminary investigations against the accused began in 2011, but the accused was indicted only in 2015; the indictment became possible only after the conviction of four co-perpetrators by a court in Bosnia and Herzegovina. (Country Report on Austria 1).

¹³⁰ Short Report on Canada, May 2017 3, Country report on Germany 6.

¹³¹ See Sydney report, fn. 81.

reliable evidence. Related to the lack of evidence are rules of procedure and evidence that pose a rather high threshold for investigations into or the prosecution of core crimes. For instance, in the Netherlands, a Dutch court partially acquitted Mpambara due to the Dutch rule that one witness is not enough (Art. 342(2) of the Dutch Code of Criminal Procedure). In Germany, when the Higher Regional Court in Stuttgart rendered its judgment in the FDLR case, the presiding Judge remarked: ‘This is not going to work. Such a giant trial cannot be managed with the tools our criminal procedure code provides.’¹³² Several charges of war crimes and crimes against humanity, including the recruitment of child soldiers, were dropped in the course of the trial for lack of evidence.¹³³ This raised questions about the thoroughness of the investigations undertaken by the German authorities.¹³⁴ Some rules under German procedural law also seemed ill-suited for this type of trial. For example, the requirement that the names of victims participating as civil parties be made public¹³⁵ effectively prevented the participation of Congolese victims due to security concerns.¹³⁶ Nevertheless, numerous successful prosecutions show that meeting the threshold required for evidential sufficiency is certainly possible.¹³⁷ Evidentiary obstacles and institutional shortcomings (such as understaffed investigation authorities and a lack of structural reform) go hand in hand and cannot be sharply separated. In Germany, between 2002 and 2008, no prosecutions were pursued under the Code of International Criminal Law (VStGB), ‘partly due to structural deficiencies and partly because the focus of the authorities’ efforts lay in other fields, such as the prosecution of crimes related to terrorism.’¹³⁸ This has changed through the German *Strukturverfahren*:¹³⁹ broad preliminary investigations that attempt to catalogue crimes that have occurred in a particular country, collect evidence about them and identify victims and witnesses present in Germany for future criminal cases. Nevertheless, the recent judgments in the German trial against Anwar R.¹⁴⁰ and Eyad A.¹⁴¹ were criticised, inter alia,¹⁴² for the failure to include the

¹³² D. B. Von Rechtsanwältin, ‘So geht es nicht. Ein solches Mammutverfahren ist mit den Mitteln der Strafprozessordnung nicht in den Griff zu kriegen.’, *beck online*, 10 December 2016, translation by the author; also cited in Bentele, ‘Völkerstraßprozesse in Deutschland voranbringen – Eine rechtspolitische Betrachtung’ (2016) 11 *Zeitschrift für Internationale Strafrechtsdogmatik* 803, https://www.zis-online.com/dat/artikel/2016_12_1069.pdf (last accessed 6 June 2022).

¹³³ Higher Regional Court Stuttgart, Judgment of 28 September 2015, 5-3 StE 6/10, mn. 1916 *et seq.*

¹³⁴ Human Rights Watch, Press Release: ‘DR Congo: German Court Convicts 2 Rwandan Rebel Leaders – Justice for Victims of Grave FDLR Crimes’, 28 September 2015, <https://reliefweb.int/report/democratic-republic-congo/dr-congo-german-court-convicts-2-rwandan-rebel-leaders-justice> (last accessed 6 June 2022).

¹³⁵ § 200(1) German Code of Criminal Procedure.

¹³⁶ Human Rights Watch (n 134).

¹³⁷ R. Manton, ‘Prosecutorial Discretion and the Prosecution of International Crimes in New Zealand’ (2009) 9 *New Zealand Armed Forces Law Review* 96, 114-115.

¹³⁸ W. Kaleck, *Double Standards: International Criminal Law and the West* (TOAEP, 2015) 81.

¹³⁹ See in detail T. Beck and C. Ritscher, ‘Do Criminal Complaints Make Sense in (German) International Criminal Law? A Prosecutor’s Perspective’ (2015) 13 *Journal of International Criminal Justice* 229, 232 ff.

¹⁴⁰ Higher Regional Court of Koblenz, Judgment of 13 January 2022, Case No. 1 StE 9/19, Press Release of 13 January 2022, <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/lebenslange-haft-ua-wegen-verbrechens-gegen-die-menschlichkeit-und-wegen-mordes-urteil-gegen-ein-1/> (last accessed 6 June 2022).

¹⁴¹ Higher Regional Court of Koblenz, Judgment of 24 February 2021, Case No. 1 StE 3/21, Press Release 24 February 2021, <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/urteil-gegen-einen-mutmasslichen-mitarbeiter-des-syrischen-geheimdienstes-wegen-beihilfe-zu-einem-ver/> (last accessed 6 June 2022).

¹⁴² For an overview see A. Heinze, ‘Attacked, Applauded, Threatened, Universalized. Or: A Wednesday at the International Criminal Court’, in A. Heinze and V. E. Dittrich (eds), *The Past, Present and Future of the International Criminal Court* (Torkel Opsahl Academic EPublisher 2021), pp. 87 ff.

alleged conduct of sexual violence (as crimes against humanity) in either the arrest warrant or the indictment,¹⁴³ and for the lack of witness protection.¹⁴⁴

Positive complementarity

It is in this area that the Rome Statute provides an explicit legal basis for a policy of complementarity by the ICC: the above-cited article 93(10).¹⁴⁵ According to that article, the ICC may cooperate with and provide assistance to a state (party or non-party) that is ‘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 requested State’.¹⁴⁶ The article provides as examples of forms of assistance: ‘[t]he transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court’ and ‘[t]he questioning of any person detained by order of the Court’.¹⁴⁷ The IER has explicitly recommended the OTP engage in this type of positive complementarity.¹⁴⁸

States can address the evidence obstacle to accountability by enhancing mutual cooperation, both legally and practically.¹⁴⁹ To enhance the legal basis for such cooperation, they can join the initiative for the Mutual Legal Assistance Convention¹⁵⁰ and, more specifically with respect to crimes against humanity, transform the ILC’s articles on crimes against humanity into a treaty.¹⁵¹

I. Custody issues

Custody issues arise in the state where the crimes were committed if the alleged perpetrator leaves the country;¹⁵² or if a state wishes to exercise extraterritorial jurisdiction and the accused is not on

¹⁴³ ECCHR, ‘Executive Summary, Sexual and gender-based violence in detention facilities of the Air Force Intelligence in Syria: Criminal complaint to the German Federal Public Prosecutor’, https://www.ecchr.eu/fileadmin/Hintergrundberichte/Executive_summary_SGBV_Syria.pdf (last accessed 6 June 2022); S. Aboueldahab, ‘Sexualisierte Kriegsgewalt vor deutschen Gerichten’, *Legal Tribunal Online*, 19 June 2020, <https://www.lto.de/recht/justiz/j/gba-bundesanwaltschaft-syrien-haftbefehl-geheimdienst-sexualisierte-kriegsgewalt-voelkerstrafrecht/> (last accessed 6 June 2022).

¹⁴⁴ H. El-Hitami, ‘Syrian Torture Trial In Germany: Insiders Without Protection’, *JusticeInfo.net*, 27 July 2020, <https://www.justiceinfo.net/en/44982-syrian-torture-trial-in-germany-insiders-without-protection.html> (last accessed 6 June 2022).

¹⁴⁵ See section II.B.1. On that article, see also C. Kress and K. Prost, in K. Ambos (ed.), *Rome Statute of the International Criminal Court* (4th edn, Beck, Nomos, Hart, 2022), Art. 93, pp. 2529-2564.

¹⁴⁶ RS, art. 93(10)(a).

¹⁴⁷ RS, art. 93(10)(b).

¹⁴⁸ IER, (n 58), para 735.

¹⁴⁹ See, for instance, the European Network for investigation and prosecution of genocide, crimes against humanity and war crimes, which is a part of the European Union Agency for Criminal Justice Cooperation and enables close cooperation among national authorities in the investigation and prosecution of international crimes.

¹⁵⁰ See ASP, Joint Statement: ‘Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of Atrocity Crimes (crimes of genocide, crimes against humanity and war crimes)’, 20-28 November 2013, https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Netherlands-Joint-ENG.pdf (last accessed 6 June 2022). See also <https://www.gov.si/en/registries/projects/mla-initiative/> (last accessed 6 June 2022).

¹⁵¹ See above, III E. On both initiatives, see also D. Tladi, ‘Complementarity and Cooperation in International Criminal Justice: Assessing Initiatives to Fill the Impunity Gap’, *ISS Paper 277*, 24 November 2014, <https://issafrica.org/research/papers/complementarity-and-cooperation-in-international-criminal-justice> (last accessed 6 June 2022).

¹⁵² See, for instance, Country Report on Bangladesh 2; Country Report on Timor-Leste 6.

its territory. As with the challenges in evidence gathering, international courts, too, face custody issues.

Custody may legally not be required as a precondition for the opening of a case, but in practice often is, particularly when the head of jurisdiction exercised would be universal jurisdiction. The German report notes how a German court has found that ‘there must be a continuing presence of the suspect on German territory or concrete indicia for his expected presence; such indicia, to be assessed exclusively by the Prosecutor within his discretion, are lacking if the suspect has no professional, personal, or family connections in Germany’.¹⁵³

A lack of custody can be overcome through international cooperation, but some reports suggest that requests for such cooperation have not been implemented.¹⁵⁴ That may be due to distinct reasons: a lack of cooperation agreements (for instance, extradition treaties), a lack of double criminality,¹⁵⁵ exceptions to those agreements (for instance, no extradition of nationals or for ‘political’, ‘military’ or ‘fiscal offences’), inexperience with implementing such agreements, or protection by foreign states.

Positive complementarity

A policy of positive complementarity could focus on assisting states by concluding more cooperation agreements, including the above-mentioned initiative for a Mutual Legal Assistance Convention. As with other obstacles, some obstacles to custody exist for good normative reasons: refugees and others sought by foreign governments for political reasons continue to require protection.

The OTP could enhance domestic proceedings by recognising that if custody is the only obstacle to domestic proceedings, it could defer the case to national proceedings once it has obtained custody of the suspect or accused.

J. Justifications that pre-empt investigations

A barrier to accountability of a different character than the ones previously discussed is that of justifications for conduct that pre-empt consideration of the conduct as a potential international crime. This phenomenon is particularly pertinent with respect to conduct by the state itself. Few states think of publicly authorized acts of their officials as criminal. What others might call aggression or war crimes, they call legal self-defence or military necessity. These differences in perception as to whether incidents might qualify as (internationally) criminal is one of the reasons why some states have reservations about signing up to the Rome Statute despite having strong justice systems: they cannot rely on complementarity when they, unlike others in the international system, believe the conduct in question is not criminal in the first place.

¹⁵³ Country Report on Germany 6, referring to Higher Regional Court Stuttgart, Decision 13/09/2005, 5 Ws 109/05, paras 6-8. On the question of the presence requirement, see also the Country Report on South Africa.

¹⁵⁴ Country Report on Malawi 5; Country Report on Timor-Leste 4.

¹⁵⁵ On which, see Country Report on China 7.

The Palestinian report identifies this barrier to accountability with respect to Israel where it states: ‘[w]ith regard to certain war crimes, particularly the transfer of Israeli settlers into the occupied territory and related offences, the intention of perpetrators forms part of the official policy of the State of Israel and ... there will never be any investigation or prosecution by that State for its policies’.¹⁵⁶ It observes the same phenomenon with respect to Hamas. The report notes ‘allegations that Hamas has committed international crimes against Palestinians’, but that it is ‘doubtful that Hamas would accept the prosecution of its militants or politicians in Gaza courts or surrender them to The Hague, as Hamas considers the actions of these militants to be resistance against occupation’.¹⁵⁷ While such justifications may not hold as a matter of law, their application does constitute, in practice, a barrier to accountability in that those who believe in the applicability of the justifications, do not open or proceed with an investigation.

The Israel-Palestine situation also illustrates that the obstacle to accountability is particularly difficult to surmount when the legal qualification of conduct, and thus whether as criminal or not, goes to the heart of a broader dispute, for instance, whether an area should be considered ‘disputed territory’ or ‘occupied territory’.¹⁵⁸

The obstacle to accountability is biggest if nobody in the state concerned thinks of the conduct as possibly illegal. More opportunities arise if some actors do encourage an investigation and the investigatory bodies are sufficiently independent to pursue this. However, in many countries, police, prosecutors and judges try to stay away from issues that they consider intensely political, including crimes committed during armed conflict.¹⁵⁹ In case a government objects to the classification of certain conduct as potentially criminal, pressures on investigators, prosecutors, and potentially judges, will be significant (see below).

Positive complementarity

NGOs, academics and others can play an important role in arguing and demonstrating that certain conduct is not merely ‘political’ or ‘related to conflict’ but also criminal according to international law. In this, it is particularly important to counter double standards.

K. Government sees accountability efforts as against its interests¹⁶⁰

A related factor is when the executive branch obstructs accountability efforts because it sees such efforts as against its interests. An important example has been the difficulties holding individuals accountable in the United States for torture committed as part of the ‘global war on terror’, particularly during the period 2002-2004. Initiatives to hold the government itself accountable, or government officials, the army, the police or groups within society on whose loyalty it depends, are often seen as being against the government’s interests.¹⁶¹ However, even accountability of the

¹⁵⁶ Country Report on Palestine 5.

¹⁵⁷ Country Report on Palestine 5-6.

¹⁵⁸ On which, see OTP, Report on Preliminary Examination Activities, 4 December 2017, para 69, https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf (last accessed 6 June 2022).

¹⁵⁹ See for example, Country Report on Sudan 18; Country Report on Kenya 8.

¹⁶⁰ Thanks to Angela Mudukuti for contributing to this section.

¹⁶¹ See Country Report on Bangladesh with respect to both Pakistan and Bangladesh, 2-4; Country Report on Cambodia 5; Country Report on Indonesia 2-3 and 6; Country Report on India 4; Country Report on Palestine with respect to both Israel and Hamas 5-6; Country Report on the USA 25.

opposition may be considered against the government's own interests when it is feared that this will undermine the stability in the country (see below under P) or will ultimately also lead to calls for government accountability. For example, in South Africa, in a case brought by relatives of an anti-apartheid activist who had been tortured by the apartheid police and disappeared in 1983¹⁶²—an act for which no amnesty had been granted—the former National Director of Public Prosecutions, stated in a sworn affidavit that there was political interference that effectively ‘barred or delayed the investigation and possible prosecution’ of cases recommended for prosecution by the Truth and Reconciliation Commission and that there was a fear that prosecution of apartheid era crimes could ‘open the door to the prosecution of ANC members’.¹⁶³

A government may also see accountability efforts as against its interests when such efforts create international tensions. The country report on Bangladesh notes how the US and China, then allied with Pakistan, ‘withheld recognition from Bangladesh until it dropped its demand to put the key Pakistani suspected war criminals on trial’.¹⁶⁴ It also reports that Prime Minister Sheikh Hasina, ‘told [the Bangladesh] Parliament in 1992 that the amnesty was enacted as the quid pro quo of securing the repatriation of the 250,000 East Pakistanis who were being held in West Pakistan’.¹⁶⁵ The report on Timor-Leste observes that Timorese leaders ‘ha[d] a legitimate concern that their immediate and long-term relationship with Indonesia would be harmed if Timor-Leste is seen as taking the lead in bringing high-level Indonesian perpetrators to justice’.¹⁶⁶

Cases involving universal jurisdiction also provide examples where states see accountability as against their own interests. For example, in South Africa, the authorities refused to investigate a case pertaining to torture committed as a crime against humanity by Zimbabweans, against Zimbabweans in Zimbabwe, *inter alia*, out of fear for the ‘negative impact on diplomatic initiatives, the functioning of SARPPCO’¹⁶⁷ and ongoing and future cooperation from the Zimbabwean Police’.¹⁶⁸

Government objections to accountability efforts can translate into no official body initiating any action, lack of human and financial resources for such efforts, or political interference with any

¹⁶² Nkadameng and Others v National Director of Public Prosecutions and Others (32709/07) [2008] ZAGPHC 422 (12 December 2008), <https://www.derebus.org.za/wp-content/uploads/2021/06/Nkadameng-and-Others-v-National-Director-of-Public-Prosecutions-and-Others.pdf>; Southern Africa Litigation Centre, ‘South Africa: Challenging NPA inaction for TRC related prosecutions’, <https://www.southernafricalitigationcentre.org/2016/11/28/south-africa-challenging-npa-inaction-for-trc-related-prosecutions/> (last accessed 6 June 2022).

¹⁶³ Sworn affidavit of Vusi Pikoli in the case of Thembisile Nkadameng v the NDPP and others, 6 May 2015, para 33, <http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Vusi-Pikoli-Affidavit-Simelane.pdf> (last accessed 6 June 2022).

¹⁶⁴ Country Report on Bangladesh 2.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid, 5.

¹⁶⁷ Southern African Regional Police Chiefs Co-operation Organisation.

¹⁶⁸ National Director of Public Prosecution Heads of Arguments in the case of SALC v the NDPP and others, 8 February 2012, para 84, www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/First-Respondents-Heads-of-2012_Argument-Part-2.pdf (last accessed 26 February 2022). South African courts, including the Constitutional Court, ordered that the investigation should proceed: National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC) (30 October 2014).

efforts, whether through witness intimidation or pressure on investigators, prosecutors or judges (see subsequent headings).

Positive complementarity

It will be a challenge for any policy of positive complementarity to transform the perception of proceedings being against government interests into them being in their interests. That said, analysis into a government's attitude towards such proceedings is a crucial first step for any policy of positive complementarity to work.

Moreover, it is in this respect that positive complementarity as a policy of purely reminding states of the complementarity principle could be effective: if cases are not genuinely investigated domestically, they will be admissible before the ICC. In that way, the OTP, the ASP and civil society organisations could play a role in encouraging relevant states parties to investigate and prosecute crimes within the jurisdiction of the ICC.

Transnational professional networks may also allow prosecutors and judges to discuss how they have dealt with situations where there was resistance or obstruction from the government to domestic proceedings.

L. Lack of independent investigations¹⁶⁹

The independence of those investigating crimes varies from legal system to legal system. While most investigating bodies are, as a matter of law, not entirely independent, direct and intrusive political interference with their work can become a barrier to accountability. The more discretionary the power is to open an investigation, the more scope there is for undue influence on an investigating body not to open an investigation. Similarly, absence of duties to justify a decision not to open an investigation leaves more scope for improper influence. And lack of statutory and personal guarantees for the person or body responsible for opening an investigation may result in investigations not being opened due to fear for the consequences of doing so.

Investigations, in the sense of actions to ascertain whether '[an] individual is responsible for [specific criminal] conduct',¹⁷⁰ are difficult if those who are supposed to investigate are themselves the subject of allegations. The Kenya report notes that in the 2007 post-election violence, police were perpetrators who sided with the incumbent president. The Commission of Inquiry on the Post-Election Violence concluded that of the 1300 killed, the majority were shot by the police in regions of the country controlled by the opposition.¹⁷¹ The country report observes that Kenyan police conduct 'shoddy investigations often tampering with evidence'.¹⁷²

The country report on Zimbabwe, too, reports police to have obstructed investigations: 'a number of police officers appear to be biased': victims have 'reported being turned away by the police

¹⁶⁹ Thanks to Eleni Micha and Richard Goldstone for contributing to this section.

¹⁷⁰ Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute' (ICC-01/09-02/11-274), 30 August 2011, paras. 1, 40, <https://www.icc-cpi.int/pages/record.aspx?uri=1223134> (last accessed 6 June 2022).

¹⁷¹ Country Report on Kenya 4.

¹⁷² Country Report on Kenya 4.

when trying to lodge criminal complaints arising from political violence perpetrated by the ruling party’, and some ‘have also been arrested and detained by the police for trying to report incidents of political violence’.¹⁷³

A lack of a systematic approach to investigations into specific crimes can also result in investigations not being followed up. The Tree Workers case in the Czech Republic is characteristic: a number of 90 complaints for labour trafficking had been filed by the victims but they were all dismissed because they were assessed by distinct police departments and not seen in connection to each other.

When investigations have been tainted by a lack of independence, this may result in findings of a lack of respect for the fundamental rights of the accused and therefore an end to the proceedings, thus leaving an accountability gap.

Positive complementarity

It is difficult for any policy of positive complementarity to enhance independence: enhancing independence is not a matter of a few trainings to investigators, teaching them ‘thou shalt be independent’. Often, the investigators are much aware of the importance of being independent, but operate in a broader political culture that does not take that independence seriously.

Human rights organisations can play an important role in pointing out when independence is threatened. Transnational professional networks can allow investigators to learn from colleagues how they have resisted pressures that challenged their independence.

Still, in this context, a pure reminder of complementarity may act as a catalyst for domestic action: if there are no genuine domestic proceedings, the ICC can step in. The OTP has, in some circumstances, publicly stated that it was looking at the possible commission of crimes within the jurisdiction of the ICC.¹⁷⁴ Such statements can be calculated not only to discourage such unlawful conduct but also to encourage domestic investigation of possible core crimes. In some situations, civil society organisations are also able to play a role in the investigation and publicising conduct that might amount to the commission of crimes within the jurisdiction of the ICC. In South Africa, the Constitutional Court ordered the police authority to investigate acts of torture that were committed in Zimbabwe.¹⁷⁵ By the same token, the courts would have jurisdiction to order the investigation of crimes committed within South Africa.

¹⁷³ Country Report on Zimbabwe 4.

¹⁷⁴ See, for instance, Statement by the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the situation in Ituri, Democratic Republic of the Congo, 4 June 2020, <https://www.icc-cpi.int/Pages/item.aspx?name=200604-icc-prosecutor-statement-ituri-drc>; Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, on the escalating violence in the Situation in Afghanistan, 17 August 2021, <https://www.icc-cpi.int/Pages/item.aspx?name=210817-otp-statement>; Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have been closely following recent developments in and around Ukraine with increasing concern.”, 25 February 2022, <https://www.icc-cpi.int/Pages/item.aspx?name=20220225-prosecutor-statement-ukraine> (websites last accessed on 6 June 2022).

¹⁷⁵ National Commissioner of The South African Police Service v Southern Africa Human Rights Litigation Centre and Another, 2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC) (30 October 2014)

M. Lack of prosecutorial independence

While many assessments of independence immediately turn to the judiciary, the position of prosecutors can be even more important. Their position is crucial in that no matter how independent, judges cannot hold perpetrators to account if prosecutors do not bring any cases. The question of prosecutorial independence differs from legal system to legal system, and total independence is not guaranteed, *de jure* and even less so *de facto*. In some states, prosecution of international crimes requires approval of a political appointee, such as the Attorney-General.

In practice, prosecutors have often been under executive pressure not to prosecute,¹⁷⁶ especially when government officials, or those protected by them, are under scrutiny.¹⁷⁷ Worse, as one report observes, ‘victims are reported to have been maliciously prosecuted for reporting incidents of political violence to the police’.¹⁷⁸ Alternatively, sometimes prosecutors have been under pressure from the executive not to prosecute, or have self-policed to pre-empt such pressure, if such prosecutions could negatively affect the state’s diplomatic relations.¹⁷⁹

Whether external pressure influences prosecutors can be difficult to establish, because prosecutors can decide not to prosecute on the ground that the evidentiary requirements have not been fulfilled. Recourse to judicial review to overturn such decisions is not always available, or, when available, often not successful.¹⁸⁰

Positive complementarity

Independence is not something that can simply be lectured. Rather, it requires a culture in which there is respect for the need for independent investigations. Human rights organisations in particular can play an important role in pointing out when that boundary is crossed. Transnational professional networks can allow prosecutors to learn from colleagues how they have resisted pressures that challenged their independence.

N. Lack of judicial independence¹⁸¹

Many of the country reports identified a lack of judicial independence as an obstacle to accountability efforts.¹⁸² Judicial independence can be interfered with through executive control over judges and self-policing by judges in order not to issue judgments against the executive, and corruption. When the judiciary is perceived to lack independence, this negatively impacts on

¹⁷⁶ See for instance, the above-cited sworn affidavit by former South African prosecutor Vusi Pikoli in the case of *Thembisile Nkadameng v the NDPP and others* (n 163).

¹⁷⁷ Country Report on Zimbabwe 4 and Country Report on Sudan 18.

¹⁷⁸ Country Report on Zimbabwe 4.

¹⁷⁹ Country Report on Timor-Leste 7-8 and Country Report on Germany 7 where it quotes Wolfgang Kaleck to this effect.

¹⁸⁰ See, for instance, Country Report on Germany 3. However, see for a successful example, *South African Litigation Centre et al vs National Director of Public Prosecutions et al*, North Gauteng High Court, 8 May 2012, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/High-Court-Judgment.pdf> (last accessed 6 June 2022) and upheld on appeal in *SALC v NDPP* (Zimbabwean Torture Case), CCT 02/14, Constitutional Court South Africa, 30 October 2014, available online at <http://www.saflii.org/za/cases/ZACC/2014/30.pdf> (last accessed 6 June 2022).

¹⁸¹ Thanks to Richard Goldstone and Mia Swart for contributing to this section.

¹⁸² Country Report on Bangladesh 9; Country Report on Cambodia 7; Country Report on Sudan 17; Country Report on Zimbabwe 4; Country Report on Indonesia 7; and more in the abstract, Country Report on Palestine 13.

people's recourse to, and cooperation with, the formal justice system, thus rendering criminal proceedings more difficult.

Positive complementarity

Positive complementarity policies can include assisting states in reviewing the legal and operational framework in which judges work with a view to enhancing judicial independence. Human rights organisations can play an important role in pointing out when such independence is at risk. In such scenarios, sending senior trial observers might have a salutary effect. The International Bar Association's Human Rights Institute, for instance, has been active for many years in sending observers to trials in states whose judiciary is thought not to be independent and there have been many cases over the years where the presence of such observers has strengthened independence. Transnational professional networks can allow judges to learn from colleagues how they have resisted pressures that challenged their independence.

O. Corruption¹⁸³

Corruption can undermine investigations, prosecutions and trials.¹⁸⁴ According to the report on Indonesia, individuals who had 'leadership roles in breaches of international criminal law' are unlikely to be prosecuted, convicted, 'or touched' by the judiciary due to corruption.¹⁸⁵ The report on Cambodia similarly highlights 'endemic corruption' as a cause of its weak judicial and law enforcement system.¹⁸⁶ Corruption is enhanced by resource shortfalls, leading to insufficient salaries for the relevant officials.¹⁸⁷

Positive complementarity

Corruption affecting the repression of crimes under international law is best addressed within the framework of comprehensive anti-corruption strategies. As to international legal measures, states and NGOs could encourage and help the relevant state fully to implement the 2003 UN Convention against Corruption and the provisions concerning corruption of the 2000 UN Convention against Transnational Organized Crime in the domestic legal order. The UN Office on Drugs and Crime (UNODC) might provide advice and assistance in drafting or revising national anti-corruption policy and legislation. State and NGOs could also share best practices and facilitate training of police officers, members of the judiciary and the prosecution. However, like with the issue of independence, training is unlikely to be enough. Rather, often a general change in the political culture within which proceedings take place is required. States may learn from successful holistic anti-corruption efforts elsewhere. Part of such efforts can be developing protection programmes for witnesses who report acts of corruption aimed at preventing, delaying or otherwise influencing criminal proceedings relating to international crimes.

¹⁸³ Thanks to Olympia Bekou and Marina Mancini for contributing to this section.

¹⁸⁴ See for instance, Country Report on Cambodia 13; Country Report on Indonesia 8.

¹⁸⁵ Country Report on Indonesia 6.

¹⁸⁶ Country Report on Cambodia 13.

¹⁸⁷ On corruption, see Country Report on Cambodia 13.

P. Internal instability or lack of control of government authorities¹⁸⁸

Existing internal instability may be an obstacle to domestic prosecutions. Sometimes the government may lack control over areas in which alleged perpetrators reside or operate,¹⁸⁹ obstructing arrests and the collection of evidence, or making such endeavours dangerous enterprises. For instance, who will arrest members of Islamic State as long as they are in areas controlled by Islamic State? Similarly, the continued insecurity in northern Mali, has been reported to make it difficult for judges and forensic experts to conduct investigations.¹⁹⁰ The situation in Libya has illustrated the problem of the national authorities lacking control over detention facilities.¹⁹¹

Fear for instability may also present an obstacle to the pursuit of domestic accountability. A common reason for refraining from accountability efforts is that they are feared to exacerbate political instability, fostering coups and violence, particularly in situations where a democratic transition is still fragile, or obstruct peace processes.¹⁹² In Uganda, community leaders lobbied for an amnesty for the Lord's Resistance Army, concerned that criminal investigations would threaten the opportunities for a peace process.¹⁹³ It has been argued that the International Crimes Tribunal – Bangladesh that was set up to try crimes committed during the 1971 war of national liberation when Bangladesh seceded from Pakistan¹⁹⁴ illustrates how prosecutions targeting only one side of a dispute can intensify division.

Positive complementarity

Providing stability probably goes beyond any policy of positive complementarity. That said, policies of positive complementarity must take into account the impact of instability on the ability to hold people accountable.

Q. Lack of capacity¹⁹⁵

Capacity is understood here as the ability of national justice systems to conduct criminal investigations into and prosecutions of core crimes, whether they are prosecuted as ordinary crimes or as international crimes. Prosecution of core crimes as international crimes may raise specific capacity issues compared to prosecuting them as ordinary crimes. For instance, some reports cite

¹⁸⁸ Thanks to Parvathi Menon for contributing to this section.

¹⁸⁹ Country Report on Sudan 13; Country Report on Mali 1 and Country Report on Palestine 1, 5.

¹⁹⁰ See, Myriam Dessables, 'Point de Presse de la MINUSMA', 12 April 2018, <https://minusma.unmissions.org/point-de-presse-de-la-minusma-du-12-avril-2018> (last accessed 6 June 2022).

¹⁹¹ The Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi (ICC-01/11-01/11), Pre-Trial Chamber, 11 October 2013, para 263, <https://www.icc-cpi.int/libya/gaddafi> (last accessed 6 June 2022).

¹⁹² Country Report on Bangladesh 3; Country Report on Argentina, Brazil and Peru 51-52 with respect to Brazil.

¹⁹³ See Nouwen (n 8) Chapter 3.

¹⁹⁴ See 'A nation divided: A flawed tribunal opens old wounds and threatens Bangladesh's future', *Economist*, 9 March 2013, <https://www.economist.com/asia/2013/03/09/a-nation-divided> (last accessed 6 June 2022).

¹⁹⁵ Thanks to Olympia Bekou for contributing to this section. See, more elaborately, O. Bekou, 'The ICC and Capacity Building at the National Level' in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP Oxford 2015) 1245–58 and O. Bekou, 'Building National Capacity for the ICC: Prospects and Challenges' in T. Mariniello (ed), *The International Criminal Court in Search of Its Purpose and Identity* (Routledge New York 2016) 133–46.

lack of training or experience with respect to international crimes.¹⁹⁶ Certain elements of international crimes may be more complex in comparison to ordinary crimes, for instance, obtaining the evidence necessary for the level of proof required to meet contextual and circumstantial elements, and to prove modes of liability. These problems might not appear if charges are brought under ordinary criminal law (but prosecution of the core crimes as ordinary crimes may bring its own problems, see above under A and C).

Other capacity issues, however, appear irrespective of whether the charges are of international or of ordinary crimes. First, whether charged as ordinary crimes or as international crimes, the conduct that is investigated and prosecuted has often taken place as part of mass crime. Domestic law enforcement and judicial authorities sometimes lack the technical expertise necessary for such complex and large-scale criminal investigations.¹⁹⁷ Similarly, they may be overwhelmed by the sheer size of the investigations and the numbers of victims and perpetrators involved.¹⁹⁸ National courts may also lack the capacity to manage the caseload where there is an influx of many complex cases with large quantities of data. Capacity may be lessened by inefficient processes, for example failure to organise data and maintain clarity within each case leading to failures due to evidence gaps, time-wasting, or increased administrative costs.¹⁹⁹

Secondly, authorities often face practical challenges such as insufficient human and financial resources,²⁰⁰ infrastructure, institutions and collaboration among institutions,²⁰¹ to respond to situations of mass atrocity. For instance, post-conflict states often lack the courtrooms, detention centres, prisons, judges, and other personnel required to conduct investigations and prosecutions.²⁰² A lack of such resources may limit the number of proceedings and also affect the quality of proceedings, for instance, when a lack of resources leads to a lack of evidence (see above under H).

A lack of resources can be a purely technical matter, but it can also be political, as the report on Indonesia highlights. Alongside a lack of human capacity, Indonesia also faces a lack of physical capacity, specifically lacking ‘computers, technical expertise, up-to-date software, and general computer literacy’ within the prosecution service.²⁰³ However, it is acknowledged that the Attorney General’s Office does possess many resources allowing it to address these difficulties,

¹⁹⁶ Country Report on Malawi 6; Country Report on Palestine 2, 11; Country Report on Kenya 7.

¹⁹⁷ S. Straus, ‘How Many Perpetrators Were There in the Rwandan Genocide? An Estimate’ (2004) 6 *Journal of Genocide Research* 85. See also M. Bergsmo et al., *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina* (TAOEP 2009), <https://www.toaep.org/ps-pdf/3-bergsmo-helvig-utmelidze-zagovec-second> (last accessed 6 June 2022).

¹⁹⁸ S. Straus, *ibid.*, 85. See also M. Bergsmo, *ibid.*

¹⁹⁹ M. Bergsmo et al, ‘Preserving the Overview of Law and Facts: the Case Matrix’ in A. Smeulers (ed.), *Collective Violence and International Criminal Justice* (Intersentia 2010) 413–35. See e.g. E. Baylis, ‘Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks’ (2009) 50 *Boston College Law Review* 1, 29.

²⁰⁰ See, for instance, Country Report on Kenya 5 and Country Report on Germany 8 on the immediate years after the entry into force of the *Völkerstrafgesetzbuch*.

²⁰¹ On a lack of cooperation between police and prosecutors, see Country Report on Indonesia 6.

²⁰² Baylis (n 199) 49.

²⁰³ Country Report on Indonesia 10.

‘but it seems like the lack of political will to prosecute these cases is the cause of the lack of a specialized capacity to deal with human rights cases’.²⁰⁴

Positive complementarity

Positive complementarity as capacity building comes closest to the ASP’s understanding of positive complementarity. In that understanding, positive complementarity focuses on technical, legislative and financial assistance provided to states for capacity building activities enabling them to oversee investigations and prosecutions of the core crimes.²⁰⁵ As discussed above, the ASP explicitly removed positive complementarity as capacity building from the remit of the ICC to itself, the states parties. States parties can help build capacity through voluntary and bilateral assistance.²⁰⁶

Assistance may include provision of training to law enforcement personnel, judicial officials, investigators, and development of victim-and-witness-protection measures. Judges or prosecutors may be deployed to assist national courts, hybrid tribunals, or other justice mechanisms. Further, positive complementarity may also include assistance with construction, or reconstruction, of physical infrastructure necessary to establish operational criminal justice.²⁰⁷

Giving free access to knowledge and information about international criminal law is a fundamental step to improving the quality of national proceedings. Access to relevant legal sources is a prerequisite for lawyers in domestic criminal jurisdictions to be able to fully utilize their existing resources. The ICC Legal Tools Database provides such access to more than 165,000 international criminal law sources.²⁰⁸ But it is also important that those trying to initiate domestic proceedings have free access to digests of case law, commentaries, academic publications and other online knowledge resources. Academic publishers can have their own positive complementarity policy by providing free access to academic material.²⁰⁹ Free online learning platforms like Lexsitus are also important.²¹⁰ By allowing domestic criminal justice actors to acquire and absorb information and knowledge when required and with minimal work disruption, digital knowledge transfer supplements in-country capacity building.²¹¹ The newly appointed Special Advisor to the ICC Prosecutor in knowledge transfer could facilitate development of new digital services for domestic criminal justice actors.

²⁰⁴ Ibid.

²⁰⁵ Report of the Bureau on Stocktaking: Complementarity (n 35), para 17.

²⁰⁶ See E. Hunter, ‘Establishing the Legal Basis for Capacity Building by the ICC’ in M Bergsmo (ed.), *Active Complementarity: Legal Information Transfer* (Oslo: Torkel Opsahl Academic EPublisher 2011) 67–93.

²⁰⁷ Ibid.

²⁰⁸ See <https://www.legal-tools.org/>. See O. Bekou, M. Bergsmo and A. Jones, ‘Complementarity after Kampala: Capacity Building and the ICC’s Legal Tools’, in M. Bergsmo (ed.), *Active Complementarity: Legal Information Transfer* (Oslo: Torkel Opsahl Academic EPublisher 2011) 3–23.

²⁰⁹ The Torkel Opsahl Academic EPublisher, for example, has published more than 1,120 open access publications since it was founded in 2010 (see <https://toaep.org/>).

²¹⁰ The Lexsitus service can be accessed at <https://cilrap-lexsitus.org/>.

²¹¹ See M. Bergsmo, ‘Decomposition Works in Our Favour’ (2020) *TOAEP Policy Brief Series No. 114*, 2020 (<http://www.toaep.org/pbs-pdf/114-bergsmo/>); M. Bergsmo, ‘Complementarity and the Challenges of Equality and Empowerment’ (2011) *TOAEP Policy Brief Series No. 8* (<https://www.toaep.org/pbs-pdf/8-bergsmo>).

A key factor in capacity is funding.²¹² Justice for core crimes is expensive, especially for (post-) conflict states that also have enormous other demands on small budgets.²¹³ An essential and practical part of any policy of positive complementarity is therefore for wealthier states financially to support less wealthy states that are trying to conduct domestic proceedings.

R. Accessibility of courts

A lack of accessibility of courts is an obstacle to accountability particularly in states where accountability heavily relies on the initiative of the victim or his or her family, whether in civil or in criminal proceedings. As the report on Zimbabwe notes, '[d]ue to the long distance and costs incurred in travelling to the courts, a number of victims were unable to pursue their cases through the courts'.²¹⁴

Positive complementarity

The capacity-building aspect of the policy of positive complementarity outlined under Q could also include addressing the obstacle of a lack of access to courts.

S. Patronage

Patronage can also be an obstacle to accountability: in patronage systems, political loyalty can be rewarded with refraining from accountability measures. For instance, the Kenyan report notes that in Kenya, '[i]mpunity became the currency to be exchanged for stay in power.'²¹⁵ The Sudan report explains how impunity is primarily the consequence of political economy:

the government's rule is heavily dependent on the loyalty of powerful groups, both within the constitutional order such as the army, and outside it, for example an abundance of security forces and persons enjoying authority independent of the state. In exchange for loyalty, the patron (the ruling party or person who himself or herself is a client of the ruling patron) provides a share of the scarce resources to which the state has unique access: government positions, arms, money and security. Security includes impunity.

Thus, in Sudan, where Khartoum's control over Darfur has always been limited, successive Sudanese governments have kept Darfur continuously under emergency law and, unable to win wars of resistance on their own, offered militias money, weapons, titles to land, administrative positions and a *carte blanche* to fight the rebellion. ...The patronage bazaar also determines the chances for accountability: impunity is one of the currencies in which loyalty transactions are paid. Whether or not someone is prosecuted depends on the value of the suspect's loyalty to the patron and on the prospect of obtaining or maintaining such loyalty.²¹⁶

²¹² See also European Union, Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the Gap between International and National Justice, <https://data.consilium.europa.eu/doc/document/ST%206783%202013%20INIT/EN/pdf>, pp. 12-13.

²¹³ See also obstacle T below.

²¹⁴ Country Report on Zimbabwe 5.

²¹⁵ Country Report on Kenya 4, see also 7-8.

²¹⁶ Country Report on Sudan 16, based on Nouwen (n 8), chapter 4.

Positive complementarity

Like with the obstacle of a government seeing accountability against its own interest, patronage is an obstacle that is difficult to address by external actors. That said, understanding how patronage fosters impunity is key to designing and implementing any specific policy of positive complementarity. Moreover, external actors can in fact be part of patronage networks or the economic market that sustains patronage networks;²¹⁷ they can thus assess how their own work potentially (and inadvertently) supports patronage.

T. Priorities of domestic justice systems²¹⁸

Crimes within the ICC's jurisdiction compete with other crimes for the attention of domestic justice systems. The German report notes that between 2002 and 2008 'the focus of the authorities' efforts lay in other fields, such as the prosecution of crimes related to terrorism'.²¹⁹ The report on Indonesia notes that issues of drug trafficking, corruption and organized crime are 'given priority' over the prosecution of alleged international crimes.²²⁰ In the context of extradition, the report on China notes that 'China is more interested in cooperating ... in order to eliminate safe havens and to bring to justice high-level corrupt officials who have fled abroad with a significant sum of capital.'

If the question is whether priorities of domestic justice systems may serve as barriers or obstacles to domestic criminal prosecutions for international atrocity crimes, the answer is: sometimes, yes. One tension point is that prosecution of ordinary common crimes of yesterday may be prioritized over the prosecution of acts of atrocity of yesteryear(s). This prioritization may be an excuse or diversion to pretextually emaciate transitional justice and accountability. In other cases, however, this prioritization may be genuine and undertaken in good faith. For example, as Jane Stromseth notes, the fact remains that '[p]rosecutions for serious violations of international humanitarian law are complex, costly, and time consuming.'²²¹ Hence, there may simply be a higher return on investment for putting scarce resources into prosecuting ordinary common crimes or in prosecuting atrocity crimes as ordinary common crimes.²²²

Relatedly, there may be a push for accountability for transnational crimes (corruption, trafficking, corporate misconduct, terrorism) that may not fall within the remit of the Rome Statute and the core of international criminal law. Once again, this prioritization may be undertaken in good faith.

Another tension point is to inquire what, exactly, are the priorities of domestic justice systems. Certainly, 'law and order' is such a priority, as are related goals of retribution and deterrence. Rehabilitation, as well, though this objective has not received significant emphasis in recent decades. That said, in some instances the priorities of a domestic justice system may have more to

²¹⁷ See eg A. de Waal, 'Mission without End: Peacekeeping in the African Political Marketplace' (2009) 85(1) *International Affairs* 99.

²¹⁸ Thanks to Mark Drumbl for contributing to this section.

²¹⁹ Country report on Germany 6.

²²⁰ Country Report on Indonesia 8.

²²¹ J.E. Stromseth, 'Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?' (2007) 38 *Georgetown Journal of International Law* 251, 266.

²²² On this latter note, see K.J. Heller, 'Radical Complementarity' (2016) 14(3) *Journal of International Criminal Justice* 637.

do with social justice than penalization. For example, in a survey assessing the views of Americans of the top priority for the US criminal justice system, 43% of respondents indicated this should be to reduce bias against minorities through reform of court and police practices and 49% indicated it should be to strengthen law and order through greater enforcement of law.²²³ So, too, in post-conflict spaces: A priority may not be the operation of a criminal justice system but the reform of that criminal justice system. As Stromseth notes, ‘in many post-conflict societies, citizens view existing legal institutions skeptically because of corruption, systematic bias, association with abusive past regimes, failure to effectively address past grievances, or severe shortfalls in human or other resources.’²²⁴ Hence, activists may prioritize rebuilding the system rather than operationalizing a flawed system.

International development actors (UNDP, bilateral donors) may choose to prioritize support of rule of law initiatives over pushing for international accountability. Or they may step back from pursuing international accountability on realizing that it is not feasible, and that insisting thereupon may be counterproductive. Regrettably, this reflects what Stromseth identifies as a ‘siloization’ of ‘transitional justice’, on the one hand, and ‘rule of law reform’ on the other hand. This separation has ‘impeded efforts to explore systematically how accountability processes might, concretely, contribute to forward-looking rule of law reforms’.²²⁵ Dancy and Montal for their part have identified how domestication of the Rome Statute might catalyse domestic criminal proceedings for more ‘ordinary’ human rights violations, which is a phenomenon they label as ‘unintended positive complementarity’.²²⁶

Looking beyond the criminal law, another priority for rule of law may be to bolster administrative agencies, public governance, and economic management.²²⁷ On this note, whereas atrocity prosecutions may prioritize penal enforcement of massive violations of civil and political rights, domestic systems may wish to accent redress for violations of economic, environmental, property, civil, and cultural rights.²²⁸ Domestic anti-corruption policies, put in proactively, may also be a significant priority.²²⁹

²²³ See Justin McCarthy, ‘Americans Divided on Priorities for Criminal Justice System’, *Gallup News*, 14 October 2016, <https://news.gallup.com/poll/196394/americans-divided-priorities-criminal-justice-system.aspx> (last accessed 6 June 2022).

²²⁴ Stromseth (n 221) 252.

²²⁵ *Ibid.*, 256.

²²⁶ G. Dancy and F. Montal, ‘Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions’ (2016), online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736519 (last accessed 6 June 2022).

²²⁷ See R. Sannerholm, ‘Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template’ (2007) 12(1) *Journal of Conflict and Security Law* 65 (discussing Liberia among other places as case-studies).

²²⁸ For discussion of this tension, see M.A. Drumbl, ‘Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development’, *International Center for Transitional Justice*, November 2009, <https://www.ictj.org/sites/default/files/ICTJ-Development-PropertyCrimes-FullPaper-2009-English.pdf> (last accessed 6 June 2022).

²²⁹ Sannerholm (n 227).

In this regard, then, indeed, a priority of a domestic justice system may be to support the living, rather than seek justice for the dead.²³⁰ Although supporting the living may be congruent with seeking justice for the dead, this is not always the case in practice. Whether this is seen as an obstacle to accountability, or vexatious, or an understandable choice amid limited resources depends on the individual circumstances.

Positive complementarity

If the rationale for the prioritization of other activities is purely financial or a lack of other capacity, a policy of positive complementarity could help address this by providing funding and capacity as discussed under Q. However, if the prioritization is normative, there can be circumstances under which choices deserve respect. If not genuinely investigated or prosecuted, cases will remain admissible before the ICC.

In the determination and assessment of priorities, the voices of victims are easily - and often unintentionally - appropriated.²³¹ The voices of actual victims must be truly listened to. Justice sector actors should consider their roles as complementary to those voices.

U. Difficulties specific to the exercise of extraterritorial jurisdiction and especially universal jurisdiction

Some of the above-mentioned challenges are especially pertinent in case of the use of extraterritorial jurisdiction, most specifically universal jurisdiction. For instance, domestic justice systems often prioritise the investigation and prosecution of crimes directly affecting the state over crimes over which they can exercise jurisdiction only on the basis of universal jurisdiction. The German report observes ‘a lack of understanding on parts of the population why to prosecute crimes that were committed thousands of kilometres away, more than a decade ago, and without the involvement of a German perpetrator or victim’.²³²

A specific challenge with universal jurisdiction is that many national laws impose preconditions on its use, for instance the presence of the accused on the territory.²³³ Such presence may come as a surprise and be only very temporary.²³⁴

Positive complementarity

²³⁰ Cf: ‘You have failed the living over the dead’, *Kapo Abraham to Sonderkommando Saul*, SON OF SAUL (2015, dir. László Nemes).

²³¹ See Chenai G. Matshaka, *Civil Society Narratives of Violence and Shaping the Transitional Justice Agenda in Zimbabwe*, Lexington Books, an imprint of Rowman & Littlefield, forthcoming in 2022. See also S. Kendall and S. Nouwen, ‘Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood’, 76 *Law & Contemporary Problems* (2013) 235.

²³² Country report on Germany 10.

²³³ Some countries, have, however, removed this obstacle. See the South African report on South African case-law that provides that ‘adopting a strict presence requirement (in respect of investigations) defeats the wider manner in which our legislation is framed and does violence to the fight against impunity’. Country Report on South Africa 1.

²³⁴ See, for instance, Country Report on Germany 7 with respect to a former Uzbek interior minister who faced allegations of crimes against humanity and torture.

The policy of positive complementarity has often been understood to focus on encouraging domestic proceedings in the country where the crimes were committed. A policy to encourage the usage of extraterritorial and in particular universal jurisdiction would be very different in character. Although aspects of this report touch upon some of the issues presented, a full treatment of this question is therefore left for a separate report.

V. International criminal tribunals or courts competing for cases with domestic jurisdictions²³⁵

Paradoxically, the creation of a permanent International Criminal Court may have the opposite of an encouraging effect on domestic jurisdictions: it is also a jurisdiction to which situations can be ‘outsourced’. The roots of this ‘normative paradox of complementarity’ are in the Rome Statute,²³⁶ the preamble of which ‘recall[s] the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’, but which does not, as already noted above, actually contain an obligation for states parties to investigate or prosecute. It does allow states to refer situations on their own territory to the Court.²³⁷ The Japanese representative to the Rome Statute negotiations may have observed that the Court ‘should not be used as a “garbage can” into which national court systems could dump criminals that they should be punishing at the national level’,²³⁸ but nothing in the Statute prohibits so-called ‘self-referrals’. And indeed, many of the first situations before the Court were such ‘self-referrals’. The ICC is thus not only, on account of complementarity, a court of last resort, but also, on account of allowing self-referrals, a court of convenience.²³⁹ Worse, from the perspective of encouraging domestic proceedings, some of these ‘self-referrals’ were in fact, so Phil Clark has argued,²⁴⁰ strongly encouraged by the OTP. From the Court’s perspective this can be understood: it depends on state cooperation and states that ‘self-refer’ are more likely to provide such cooperation. But this practice of chasing situations has been the opposite of a policy of positive complementarity.²⁴¹

Secondly, the encouragement of domestic proceedings has in some instances been further undermined by what has been called ‘a pro-ICC ideology’:²⁴² a belief, often on the part of some NGOs, that proceedings at the international level are by definition better than at the domestic level.

Thirdly, the understanding that complementarity is about international courts and domestic courts ‘complementing’ each other by dividing the labour in a specific situation²⁴³ – the ICC the big

²³⁵ Thanks to Richard Goldstone for contributing to this section.

²³⁶ See Nouwen, (n 8), 345.

²³⁷ See also C. Kress, “Self-Referrals” and “Waivers of Complementarity”--Some Considerations in Law and Policy’ 2(4) *Journal of International Criminal Justice* (2004) 944.

²³⁸ UN, Press Release (L/2771): ‘Preparatory Committee on International Criminal Court Continues Considering Complementarity between National, International Jurisdictions’, 2 April 1996, <https://www.un.org/press/en/1996/19960401.L2771.html> (last accessed 6 June 2022).

²³⁹ See Nouwen, (n 8), 346.

²⁴⁰ See P. Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics*, Cambridge University Press, (2018).

²⁴¹ See Nouwen (n 8) 238.

²⁴² Ibid, 352.

²⁴³ See eg H. Takemura, ‘Positive Complementarity’, *Max Planck Encyclopedia of International Procedural Law* (2018), section C.1.

cases, the domestic courts the smaller ones – weakens the normative expectation that states investigate and prosecute domestically. As has been written elsewhere:

Probably because both are based on an idea of ‘positive’ and ‘cooperative’ – in fact what is meant is ‘uncompetitive’ – relations between the ICC and domestic jurisdictions, it is mostly in the context of the policy of positive complementarity that the term complementarity has been used to describe a division of labour between the ICC and domestic jurisdictions. Indeed, some authors claim that such a division of labour is a ‘tactic’ of positive complementarity. However, this argument, and the use of complementarity in its literal sense more generally, is misleading because it ignores the fact that the admissibility rules giving effect to the principle of complementarity apply to all cases before the ICC, including those pertaining to persons bearing the greatest responsibility. Thus, if a state genuinely investigates or prosecutes a case involving those bearing the greatest responsibility for conduct within the Court’s jurisdiction, complementarity grants that state primacy over the ICC, even if this does not reflect or result in ‘positive’ relations with the ICC. Any policy of positive complementarity aimed at establishing cooperative relations cannot overrule the law of complementarity which grants states the primary right to investigate and prosecute crimes within the Court’s jurisdiction.²⁴⁴

A division of labour is not inherent in the principle of complementarity: courts with primacy have also had such policies, often as part of their completion strategies. Indeed, complementarity means that domestic courts in principle have primacy, in all cases.

Finally, the way that complementarity as an admissibility rule has developed – requiring the same person, substantially the same conduct and to a large extent the same incidents – has also made it harder for states to succeed in admissibility challenges.²⁴⁵

All of these developments seem to do the opposite of encouraging domestic proceedings – the aim of positive complementarity.

Positive complementarity

It is particularly with respect to this obstacle that the OTP’s policy of a ‘positive approach’ to ‘complementarity’,²⁴⁶ in other words, giving complementarity a chance, is important. Whilst not a policy of positive complementarity as defined for the purposes of this report – there is little ‘cooperation’ in purely giving complementarity a chance – it is essential for complementarity truly to be a cornerstone of the Statute.

This applies to all stages of the ICC process. First, it means not chasing self-referrals of situations in states parties that may be encouraged to do them domestically. This is especially so if the ICC

²⁴⁴ Nouwen (n 8), 341 (internal footnotes omitted).

²⁴⁵ See also C. Stahn, ‘Revitalizing Complementarity a Decade after the Stocktaking Exercise’ (2020) *TOAEP Policy Brief Series No. 115*, 4, <https://www.toaep.org/pbs-pdf/115-stahn/> (last accessed 6 June 2022): ‘serious consideration should be given to a more contextual reading of Articles 17 and 19 and the possibility of qualified deference, in particular in situations of transition’. On qualified deference and complementarity, see Drumbl (n 109).

²⁴⁶ See above section II.B.3.

does not have a comparative advantage in the area where the state faces an obstacle to domestic proceedings, for instance, obtaining custody.

Secondly, the IER has rightly advised that a policy of positive complementarity should not stand in the way of opening or closing a preliminary examination. But that does not mean that complementarity cannot be considered at all during the preliminary examinations phase. As discussed above, the Prosecutor must consider complementarity when deciding whether or not to proceed to an investigation. The issue is that, due to separate drafting committees, article 53 refers to ‘cases’, whereas at the preliminary examination stage the OTP does not think in terms of cases yet. 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 and that at the preliminary examinations phase ‘the admissibility assessment ... actually refers to the admissibility of one or more potential cases within the context of a situation.’²⁴⁷ 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’.²⁴⁸

The real issue then is not so much whether or not complementarity has to be considered at the preliminary examinations phase, but whether the Prosecutor has discretion not to open an investigation (yet) even though cases are (still) admissible. As discussed above,²⁴⁹ the OTP has some discretion. The OTP could thus wait with opening an investigation depending on how domestic proceedings develop. Also from a policy perspective, there are arguments for doing so: if complementarity becomes an obstacle to ICC proceedings at a later stage, more ICC resources will already have been invested in the ICC proceedings. This efficiency argument may also explain why the legal criteria for a successful challenge become stricter and stricter the further developed

²⁴⁷ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, International Criminal Court (ICC), 31 March 2010, para 48, <https://www.refworld.org/cases,ICC,4bc2fe372.html> (last accessed 6 June 2022); see also para 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 Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’, ICC-02/11-14-Corr, Pre-Trial Chamber III, 15 November 2011, para 190, https://www.icc-cpi.int/courtrecords/cr2015_04777.pdf (last accessed 6 June 2022). For further case law see Schabas/El Zeidy, in K. Ambos (ed.), *Rome Statute of the International Criminal Court* (4th edn, Beck, Nomos, Hart, 2022), Art. 17 mn. 33 ff.

²⁴⁸ Decision Authorizing Kenya Investigation (ibid), para 52. In Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, ICC-01/09-02/11-274, Appeals Chamber, 30 August 2011, para 38, <https://www.icc-cpi.int/pages/record.aspx?uri=1223134> (last accessed 6 June 2022), 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’.

²⁴⁹ Section II.B.3.

the proceedings are. There are thus strong reasons to give complementarity a serious chance during the preliminary examinations phase. Positive complementarity becomes fully relevant again, as the IER has also argued, in the phase that the OTP completes its involvement in a situation.

One way to address the obstacle of international courts competing with domestic courts is to foster a change in attitude. Pro-ICC ideology—the idea that international courts are by definition better than domestic courts—goes against the fundamental position of complementarity in the Rome Statute. From this perspective, the new Prosecutor’s stance is promising. He has from the outset emphasised that for him what matters is that justice is done, rather than where.²⁵⁰

IV. Conclusions and Recommendations

1. Complementarity is a cornerstone principle of the Rome Statute. But, as given effect in the Statute by an admissibility rule, complementarity is not enough to promote domestic and regional accountability for crimes within the ICC’s subject-matter jurisdiction. It is therefore important to supplement the admissibility rule with policies and practices of ‘positive complementarity’: ‘any cooperation with national or regional criminal jurisdictions aimed at enhancing the capacity and willingness of those jurisdictions to investigate and prosecute crimes within the ICC’s subject-matter jurisdiction.’

2. Shared terminology is recommended to avoid confusion and friction. Thus far, states, ICC organs, NGOs and scholars have used ‘positive complementarity’ for different ideas or invoked ‘complementarity’, ‘positive complementarity’ and ‘a positive approach to complementarity’ interchangeably. It is recommended to differentiate among:

(a) ‘complementarity’: the admissibility rule, given effect through articles 17-20 and 53 of the Rome Statute;

(b) ‘positive complementarity’: a policy of cooperation with national or regional criminal jurisdictions aimed at enhancing the capacity and willingness of those jurisdictions to investigate and prosecute crimes within the ICC’s subject-matter jurisdiction;

(c) ‘a positive approach to complementarity’: a policy for the OTP to use when exercising its discretion not (yet) to open an investigation or prosecution which assumes that states that are investigating and prosecuting are doing so genuinely and gives them a chance to render cases inadmissible before the Court.

3. The obstacles to domestic investigations and prosecutions of crimes within the ICC’s subject-matter jurisdiction are wide-ranging. Different actors (for instance, states, international organisations, non-governmental organisations, ICC organs, academic institutions, publishers) have different strengths in addressing these obstacles. On the basis of their mandates and strengths, they can each assess what they can do to promote accountability for core crimes at the domestic

²⁵⁰ See above section II.B.6.

level. Whether they use the label or not, they can all have their own policies of positive complementarity, acting complementarily. The diversity of actors and approaches is an advantage.

4. The ICC's Office of the Prosecutor can encourage and support domestic proceedings in various ways.

(a) The Statute requires the Prosecutor to consider complementarity as given effect by the admissibility rule at various stages of the proceedings (articles 53 and 15, 17-20 in combination with Rule 48 of the Rules of Procedure and Evidence). The OTP can encourage domestic proceedings by reminding states that complementarity grants them the primary right to investigate and prosecute the crimes within the ICC's jurisdiction, and that the Court has jurisdiction over a case only if no state is genuinely investigating or prosecuting that case or has done so.

(b) The Statute also provides a legal basis for the OTP to transfer evidence to states that are investigating or prosecuting a crime within the Court's subject-matter jurisdiction or which constitutes a serious crime under the national law of the requesting State (article 93(10)).

(c) Some activities to promote domestic proceedings – whether called 'positive complementarity' or not – are within the implied powers of the OTP as long as they do not jeopardise its ability independently and impartially to assess admissibility. Among these are:

i. pointing to the existence of the ICC Legal Tools Database and the possibility of receiving free training in their use;

ii. facilitating contact with actors specialised in capacity building, or with the ASP's Complementarity Platform which also fulfils such a facilitating role.

iii. using the new mandate of a Special Adviser to the Prosecutor on Knowledge Transfer to promote the ICC Legal Tools Database and to facilitate new digital services for domestic criminal justice actors.

The OTP must endeavour not to tie the Office to the outcome of specific in-country capacity strengthening. Such projects are frequently long-term and their outcome depends on several factors beyond the control of those who conduct, oversee, fund or initiate the projects. This means that the facilitation by the Office may not be public and that this may not be an area that lends itself well for publicity about the work of the Office.

(d) The OTP has a certain degree of discretion in deciding whether or not and, if so, when to open an investigation or, with respect to specific cases, a prosecution. When exercising that discretion, a positive approach to complementarity can be a policy consideration. After the opening of an investigation and in the preparation of cases for prosecution, the OTP can share information and evidence pertaining to other cases with domestic and regional jurisdictions with a view to catalysing additional prosecutions. A policy of positive complementarity on the part of the OTP is also important in the phase it completes its involvement in a situation.

(e) Encouraging states to refer situations involving crimes over which these states could exercise jurisdiction to the ICC may sometimes work against the ideal of promoting domestic proceedings. This is especially the case if the ICC faces the same or similar obstacles as those that hamper domestic proceedings, for instance, obtaining custody. If custody is the only obstacle to domestic proceedings, the OTP could consider deferring a case to domestic proceedings once it has obtained custody of the suspect or accused.

5. It is recommended that the ICC Legal Tools project enhance its search functionality on questions pertaining to statutes of limitations, amnesties, and immunities.

6. States Parties can play important roles in promoting positive complementarity, both collectively, within the Assembly of States Parties, and individually. It is therefore recommended that they adopt policies of positive complementarity, within the ASP and individually.

It is recommended that the ASP:

- (a) support projects that enhance the capacity to adopt legislation incorporating the core crimes in domestic law, such as the National Implementing Legislation Database of the ICC Legal Tools Project;
- (b) promote more actively its Complementarity Platform and integrate it into existing networks so that it can provide quick and tailored follow up to requests. The ASP can also do more to promote the ICC Legal Tools Database *vis-à-vis* domestic criminal justice actors, including raising awareness of the possibility to receive free training in their use.

States Parties individually are recommended to:

- (a) assist other states in drafting, adopting and reviewing legislation with a view to having legislation that enables them to prosecute Rome Statute crimes; that does not have statutes of limitations for core crimes, even when prosecuted as ordinary crimes; that establishes the jurisdiction that is allowed by international law; that does not offer more immunity than is strictly required by international law and that facilitates cooperation;
- (b) assist other states in reviewing the legal and operational framework in which prosecutors and judges work with a view to enhancing independence and exchange lessons learnt from anti-corruption programmes;
- (c) assist other states that are investigating Rome Statute crimes in evidence gathering;
- (d) provide other in-kind and financial support for domestic accountability efforts, for instance through international cooperation programmes;
- (e) develop new international legal instruments that fill gaps in the existing accountability framework for domestic prosecutions including adopting the International Law Commission's 2019 Draft Articles on Prevention and Punishment of Crimes against Humanity as a global treaty, and the proposed Mutual Legal Assistance Convention;

- (f) review their other engagements with the state concerned to assess whether they are consistent with the aim of promoting domestic accountability efforts;
- (g) recognise that domestic justice systems may have other priorities and that in some circumstances such alternative priorities can be normatively defensible assuming they are consistent with international law and the interests of justice under the Rome Statute. In the determination and assessment of priorities, the voices of victims must be truly listened to. Justice sector actors should consider their roles as complementary to those voices.

7. International organisations and civil society actors can also play valuable roles by adopting policies of positive complementarity (whether or not they use that label). It is recommended that they:

- (a) identify obstacles to domestic accountability;
- (b) show that certain conduct is not merely ‘political’ or ‘related to conflict’ but also criminal according to international law;
- (c) reveal and problematise double standards;
- (d) follow and attend proceedings;
- (e) remind states that complementarity gives them the primary right to investigate and prosecute core crimes and that if they don’t, cases may be admissible before the ICC;
- (f) assist states in drafting, adopting and reviewing legislation with a view to having legislation that enables them to prosecute Rome Statute crimes; that does not have statutes of limitations for core crimes, even when prosecuted as ordinary crimes; that establishes the jurisdiction that is allowed by international law; that does not offer more immunity than is strictly required by international law and that facilitates cooperation;
- (g) review the legal and operational framework in which prosecutors and judges work with a view to enhancing independence;
- (h) persuade states to develop new international legal instruments that fill gaps in the existing accountability framework for domestic prosecutions including adopting the International Law Commission’s 2019 Draft Articles on Prevention and Punishment of Crimes against Humanity as a global treaty, and the proposed Mutual Legal Assistance Convention;
- (i) assist states in fully implementing the 2003 UN Convention against Corruption and the provisions concerning corruption of the 2000 UN Convention against Transnational Organized Crime; share best practices and facilitate training of police officers, members of the judiciary and the prosecution in countering corruption;
- (j) recognise that domestic justice systems may have other priorities and that in some circumstances, such alternative priorities can be normatively defensible assuming they

are consistent with international law and the interests of justice under the Rome Statute. In the determination and assessment of priorities, the voices of victims must be truly listened to. Justice sector actors should consider their roles as complementary to those voices.

8. Transnational professional networks of investigators, prosecutors and judges can facilitate discussions among members on how they have overcome obstacles to accountability in their jurisdictions. They can also send senior trial observers.
9. Scholars can play a valuable role in promoting accountability at the domestic level by making relevant scholarship freely available online, assisting in developing the ICC Legal Tools Project and related training activities, and highlighting the legal dimensions of conflicts that governments treat as 'purely political'. Academic publishers can make relevant material freely available to actors promoting or involved in domestic accountability efforts.
10. Recognising the diversity in human aspirations for justice, all actors interested in justice should ensure that calls for individual criminal accountability should not crowd out other modalities or conceptions of justice. Additionally, the strengthening of criminal justice, for instance, through enhanced cooperation, should not be abused to violate the human rights of potential defendants or to target refugees, who are entitled to specific protections under international law.