

## **The Paradox of Institutional Conversion: The Evolution of Complementarity in the International Criminal Court**

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### **Abstract**

*The understanding and practice of ICC complementarity changed in the first six years following the signing of the Rome Statute in 1998. The author argues that the shift to positive complementarity was the result of the Prosecutor's efforts to ensure that the up-in-coming tribunal developed a favorable anti-impunity reputation in the context of existing challenges and opportunities. However, the shift represents a double-edge sword. The paradox of institutional conversion is that the positive turn of complementarity has produced adverse unintended consequences which can potentially undermine the Rome Statute system's long-term credibility and viability—the very concerns that motivated complementarity's redirection in the first place.*

**Key Words:** International Criminal Court, Complementarity, Institutional Change

### **1. Introduction**

Shortly after being appointed the first Prosecutor of the International Criminal Court in June 2003, Luis Moreno-Ocampo made the controversial decision to accept a voluntary referral by Uganda regarding the situation involving the Lord's Resistance Army in northern Uganda. A second voluntary referral to the Court followed in March 2004, this time involving the Democratic Republic of Congo concerning the situation in the Ituri region. Finally, the Central African Republic referred a situation on its territory in late December 2004. When the ICC was activated in July 2002, which was conditional upon the ratification of the Rome Statute by 60 states, no one expected that the first three situations before the ICC would be the result of voluntary referrals (Arsanjani and Reisman 2005; Schabas 2006).

The clearest sign of a departure from classical complementarity came during the Prosecutor's address before the Third Session of the Assembly of States Parties (ASP) in early September 2004. Moreno-Ocampo announced that the Court would pursue "a positive approach to cooperation and to the principle of complementarity" which would entail "encouraging genuine national proceedings where possible, relying on national and international networks, and participating in a system of international cooperation." The policy announcement followed the release of an Office of the Prosecutor (OTP) paper in 2003 in which the justification for voluntary referral was sketched out:

There may be cases when inaction by States is the appropriate course of action. For example, the Court and a territorial state incapacitated by mass crimes may agree that *a consensual division of labor is the most logical and effective approach*. Groups bitterly divided by conflict may oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial. There may also be cases where a third State has extra-territorial jurisdiction, but *all interested parties agree that the Court has developed superior evidence and expertise relating to that situation, making the Court the more effective forum* (ICC-OTP 2003a 5; emphasis added)

What the Prosecutor had in mind was that in the face of unique domestic circumstances, allowing a state to voluntarily relinquish jurisdiction to the ICC may be in the interest of the international community.

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Self-referrals, as envisaged by positive complementarity, presume a mutuality of interests between the Court and referral state that is conducive to the Prosecutor's willingness to initiate proceedings and to the referral state's cooperative disposition toward the Court. The understanding and practice of complementarity<sup>2</sup> underwent "a dynamic transformation" in the first six years following the signing of the Rome Statute in 1998 (Stahn 2010:311). This process of institutional change involved a gradual shift from the classical, competitive-based vision of complementarity—protecting the primacy of domestic jurisdiction and confining the Court to a backstopping role—to a positive, consent-based vision of complementarity—advocating consensual sharing of responsibilities and 'partnership' between the Court and domestic jurisdictions. Stahn (2010:311-12) depicts the change as one where "complementarity is no longer exclusively understood" to imply a competitive relationship between national justice and the Court, but "is increasingly recognized as" implying a relationship guided by mutual cooperation and responsibility sharing.

The shift to positive complementarity, I contend, was the result of the Prosecutor's utility-maximizing instinct to ensure that the up-in-coming tribunal developed a favorable anti-impunity reputation in the context of existing constraints and opportunities. In particular, this article argues that the shift from classical to positive complementarity reflected the Prosecutor's deliberate and purposeful efforts to address three institutional challenges. The first challenge stemmed from the inclusion of numerous fragile and weak states within the Assembly of States Parties (ASP). This diversification of members altered the balance of state interests in the ASP which, in turn, galvanized support for modifying the preexisting relationship between the Court and domestic jurisdictions to better serve the particular needs of new states parties. The utility of the Court varies between stronger and weaker states. From the viewpoint of stronger states, the Court has a normative significance—globalizing the norm of individual criminal accountability. From the perspective of weaker states, the Court advances their normative interest and, even more important, answers their material needs insofar as it helps ameliorate the cost-benefit balance related to providing domestic accountability. Thus, the Court faced growing pressure to accommodate a broader range of interests among states parties.

The other two challenges concerned the drawbacks related to the state referral mechanism and the use of the Prosecutor's proprio motu powers. Article 14 of the Rome Statute established an inter-state complaint mechanism in which a state can lodge a complaint against another state. However, because this mechanism has been inoperative in several UN human rights treaties, the common belief was that the jurisdiction of the ICC would be triggered by the two other mechanisms: proprio motu and UN Security Council referrals. Moreover, the Prosecutor's proprio motu power, whose role was particularly instrumental in combating impunity given the defunct inter-state mechanism, was limited by the Court's lack of enforcement capacity and of material resources, as well as the uncertainty of obtaining the full cooperation of states parties in its investigations.

Whereas classical complementarity afforded the Court few means to resolve these institutional challenges, positive complementarity did. The status quo-preserving effect of such an institution risked eroding the Court's legitimacy and efficacy as state interests and the Court's actions became increasingly misaligned and institutional shortcomings remained unaddressed. A crucial factor in overcoming these challenges was the cultivation of a cooperative relationship among key stakeholders in the international criminal law regime. Assistance provided by the Court could help fragile states strengthen their judicial systems and assert their sovereignty responsibility to deliver justice. Coordination of action based on the comparative advantage of different forums of justice could potentially minimize the risk of overburdening the Court while maximizing the effectiveness of investigations and prosecutions of international crimes.

The shift to positive complementarity, therefore, was a form of instrumental adaptation to ensure the credibility and reputation of the Court. This raises the question of how the prosecutor was able to redirect complementarity. Three institutional conditions created space for agency: ambiguousness of Statute rules, absence of preexisting benchmarks by which to measure the Court's performance, and lack of legal precedents by which to guide the Court. These conditions were conducive to institutional 'conversion'—that is, reworking complementarity (as an institutional component) in order to produce more favorable outcomes.

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<sup>2</sup> In this study, I treat complementarity as an institutional component of the Rome Statute system. Using Streeck and Thelen's (2005:9) definition of institutions, complementarity represents "*mutually related rights and obligations* for actors, distinguishing between appropriate and inappropriate, 'right' and 'wrong', 'possible' and 'impossible' actions and thereby organizing behavior into predictable and reliable patterns." Thus, an institution assumes a rule-like quality.

However, the shift to positive complementarity, I contend, represents a double-edged sword. On the one hand, institutional conversion was justified on the grounds that it was a way to enhance the Court's legitimacy and efficacy as well as facilitate capacity building in weaker states. On the other hand, the current institutional equilibrium is prone to moral hazard because the ICC's conversion encourages states to forego the exercise of national jurisdiction even though they have the capacity to do so. The offloading problem combined with the self-serving calculations that often underpin a government's referral decision heightens the Court's exposure to the risk of political manipulation. Another unintended effect is that the sovereignty costs of a voluntary referral by a state party can abruptly and unexpectedly outweigh the peacebuilding benefits that the referring state gains from such an action. While politically expedient domestic bargains may demand that a government repatriate a situation from the ICC, the Court is unlikely to be accommodating because it would incur sunk costs as well as reputation liabilities if its jurisdiction were self-deactivated. In sum, the paradox of institutional conversion is that the positive turn of complementarity has produced adverse unintended consequences which can potentially undermine the Rome Statute system's long-term credibility and viability—the very concerns that motivated complementarity's redirection in the first place.

The rest of the paper is divided into four parts. The first part elaborates on the classical and positive visions of complementarity by focusing on their conceptual and legal foundations. The second part explains why and how complementarity evolved. I argue that the theory of gradual institutional change articulated by Streeck and Thelen (2005) and Mahoney and Thelen (2010) provides valuable insight on the dynamics of changes within the ICC. Using the Ugandan self-referral case, I explore in the third part of this paper the paradoxical effects of positive complementarity.

## **2. Two Visions of Complementarity: Competitive and Cooperative**

Upon assuming office in 2003, the Prosecutor remarked that the ICC's performance “should not be measured by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of effective functioning of national systems, would be a major success” (ICC-OTP 2003a: 4). The statement was interpreted by some as reaffirming the classical, competitive vision of complementarity that prevailed at the Rome conference and by others as confirming the Prosecutor's desire to institute a positive, cooperative vision of complementarity. The main reason for this dual interpretation of complementarity is that the Rome Statute incorporates both dimensions. Rather than being mutually exclusive, Stahn (2008:113) observes that “both concepts form part of a common whole under the Rome Statute.” Because states and the Court have overlapping competencies over international crimes, some organizational framework is necessary to manage and mediate the relationship between these two forums of justice. As a key organizational principle in the architecture of the Rome Statute, complementarity apportions responsibility for international crimes, establishes the criteria by which to determine the proper forum of justice, and organizes the relationship between the Court and domestic jurisdictions. Classical and positive logics of complementarity address these three aspects differently.

### **2.1. Classical ‘Competitive’ Complementarity**

The classical logic of complementarity is based on the view that domestic and international jurisdictions are competing forums of justice. In the negotiations leading up to the signing of the Rome Statute, state delegates expressed concerns that an independent, *ex ante* tribunal would impose high sovereignty costs on states parties. The ICC Statute assuages these concerns by preserving the primacy of national jurisdiction, holding this forum of justice primarily responsible for combating impunity for perpetrators of mass atrocity crimes. “The ICC is not intended to replace national courts ... [and it] does not have primacy over national systems” the Prosecutor reaffirmed in a highly publicized document issued by the OTP in 2003 (ICC-OTP 2003a:7). The Court would provide a backstop or serve as a court of last resort in the event that domestic jurisdictions failed to take action. It would deter noncompliance by threatening judicial intervention, targeting its actions against “those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes” (ICC-OTP 2003a:7).

There are several provisions in the Rome Statute that reflect this logic of complementarity. The sixth preambular paragraph of the Statute states that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” Accordingly, states parties are expected to comply with their duty to conduct genuine investigations and prosecutions. Article 17 of the Statute contains benchmarks for determining whether a situation, seized of ICC jurisdiction, should be litigated before the Court. “The Court shall determine that a case is inadmissible where” a national government has genuinely carried out investigations or prosecutions.

Thus, the rule of complementarity contained in Article 17 bars the Court from intervening unless national proceedings are not genuine (See Schabas 2007:172; Robinson 2010:92).

Finally, the ICC's ability to issue credible threats in light of noncompliance stems from two provisions: the Prosecutor's proprio motu authority (Article 15) and the Court's ability to "determine the admissibility of a case in accordance with article 17" (Article 19). Thus, the Prosecutor, with the consent of two pre-trial judges, can initiate cases under his or her own initiative if it is determined that a state party has carried out sham proceedings. The rules and procedures that animate the classic logic of complementarity create a strategic context in which compliance is achieved "through a sophisticated system of carrots and sticks" (Stahn 2008:113). In sum, the ICC statute, according to advocates of classic complementarity, creates a competent Court but with limited opportunities to exercise it. Such catchwords as 'watchdog,' 'residual court,' and 'backdrop' imply that the Court is second to domestic jurisdictions and stays on the sidelines unless states fail to fulfill their complementarity duties. The Court is reactive, not proactive.

## 2.2. Positive Complementarity

Positive complementarity envisages a 'partnership' between the Court and national jurisdictions. One aspect of this partnership is that both forums of justice share the responsibility of combating impunity based on "considerations of efficiency and effectiveness" (ICC-OTP 2003a:4). Moreover, when necessary, the Court should encourage national governments to investigate and prosecute perpetrators of international crimes by enlisting the help of other states and of international and non-governmental organizations, and by providing direct assistance to enhance national judicial capacity. Positive complementarity radically departs from the classical view that the Court should be limited to a watchdog or residual role. What emerges is a Court which holds perpetrators of mass atrocities criminally accountable by coordinating with national jurisdictions, encourages national jurisdictions to fulfill their anti-impunity obligations, and enhances cooperation within the international criminal justice regime via multi-actor network-building efforts.

Proponents of positive complementarity invoke various provisions of the ICC Statute to support their view. The legal basis of burden sharing can be traced to the nature of the objectives contained in the preamble (Stahn 2008:91-92; Robinson 2010:96). Paragraph 4 of the preamble characterizes the crimes under ICC jurisdiction as "crimes of concern to the international community as a whole," implying that the responsibility to hold individuals criminally accountable is shared among stakeholders at the international and domestic levels.<sup>3</sup> Alongside this objective are other related goals. Paragraph 5 of the preamble refers to the endeavor "to put an end to impunity" and "to contribute to the prevention of such crimes." Paragraph 4 affirms that the prosecution of atrocity crimes calls for "measures at the national level" and "enhancing international cooperation." Lastly, the Court's complementary role to domestic criminal jurisdictions, as emphasized in paragraph 10, is connected to the goal "to guarantee lasting respect for and the enforcement of international justice," which is underscored in paragraph 11 of the preamble. The Statute also contains provisions that support self-referrals. Most advocates of positive complementarity agree that the Article 17 establishes a two-step test to determine admissibility: (1) Is a state investigating or prosecuting a case? (2) If national proceedings are taking place, are they being carried out genuinely? If a state abstains from carrying out national proceedings, then the case cannot be inadmissible.

If national governments are exercising their criminal jurisdiction, the Court cannot exercise its jurisdiction unless national proceedings (investigations or prosecutions) are vitiated by an unwillingness or inability to genuinely conduct proceedings. Self-referrals are facilitated by inactivity-based admissibility. A government may decide voluntarily to abstain from action, thus rendering the case admissible, while invoking Articles 13(a) and Article 14 to trigger ICC jurisdiction. The Court could then initiate an investigation provided the Prosecutor agrees to proceed under Article 53 of the Rome Statute. Other provisions in the Rome Statute create opportunities for the Court to encourage national proceedings. Article 15(2) enables the Prosecutor to "seek additional information from States" with regard to information received. Article 18(4) holds that if the Prosecutor decides to defer to a State's investigation, the Prosecutor "may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions."

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<sup>3</sup> Specifically, paragraph 6 of the preamble makes clear that domestic jurisdictions have the duty to investigate and prosecute. As for the Court, Article 53 states that the Prosecutor "shall ... initiate an investigation" if there is reasonable basis to proceed in light of the criteria listed in Article 53 (1)(a)-(c).

In the investigative phase of ICC proceedings, Article 53 enables the Prosecutor to continue evaluating admissibility—that is, assess whether the conditions that rendered a case admissible initially still exist. The probing and inquiring activities that these three provisions allow the Prosecutor to undertake can have the effect of converting states that hitherto were reluctant to carry out proceedings into states that are conducting genuine proceedings. Moreover, such prosecutorial activities can galvanize domestic support for broadening the scope of and improving the quality of ongoing national proceedings (Burke-White 2008:81). Cooperative interaction, an important aspect of positive complementarity, is promoted through various provisions. Among the Prosecutor's powers with respect to investigation, as indicated in Article 54, is the ability to "seek the cooperation of any State or international organization or arrangement in accordance with its respective competence and/or mandate" and to "enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate ... cooperation...." This provision affords the Prosecutor some latitude, which conceivably can be used to fashion arrangements that specifically encourage the exercise of domestic judicial sovereignty (Burke-White 2008: 82). The obligation of states parties to cooperate with the Court is established in Part 9 of the Statute. Article 86 obliges states parties to cooperate with the Court in its investigations and prosecutions. Article 88 holds that states parties set up procedures under national law that are conducive to cooperation. Article 89 states that states parties have the duty "to comply with requests for arrest and surrender." Finally under Article 93(10), "The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial" with regard to a crime within ICC jurisdiction or under jurisdiction of the requesting state.

### ***3. Explaining Change within the ICC***

The change in the understanding and enactment of complementarity was incremental rather than abrupt, and endogenously rather than exogenously generated. Moreover, such a change within the ICC produced unexpected outcomes, guiding the Court to situations that few observers would have expected in earlier years. Why and how did the principle of complementarity change? Neorealist and neoliberal theories, while helpful in explaining certain aspects of the ICC's institutional design and achievement of coordination in this issue-area, provide little leverage on these questions.

Neorealists emphasize that international institutions can help states attain their common objectives as long as their rules and decisionmaking procedures protect and advance the interests of member states, especially powerful ones. Absent the support of great powers, institutions lack the ability to enforce rules and to undertake necessary adjustments to remain viable. The neorealist view does explain certain ICC attributes. The exclusion of the United States has diminished the Court's ability to enforce its decisions—as illustrated by the high number of outstanding ICC arrest warrants—and has deprived it of other resources. Moreover, the ICC's affirmation of the primacy of national jurisdiction, the granting of referral and deferral powers to the Security Council (Article 13(b) and Article 16, respectively), and the legal and resource constraints facing the tribunal, illustrate that the Court's original design was fashioned with the intent to subject it to considerations of state power and interest and to moderate its legalistic authority.

The neorealist approach is less helpful in two areas. Although power asymmetry explains certain aspects of the ICC Statute, distribution of needs seems to better account for the way the Court has behaved since coming into force. The Court has been especially responsive to the interests of weaker states parties because they need the Court's assistance more than powerful states do. The ICC's usefulness is more likely to be exhibited through its interactions with weaker members than with powerful states. While the Court serves the normative interest of its powerful members, it serves the normative and, importantly, material interests of its less powerful members as I illustrate below.

Further, the Prosecutor was the catalyst of the shift to positive complementarity, not states parties as neorealists would claim. In describing the circumstances surrounding Uganda's self-referral, Schabas (2006:31) observes:

The self-referral cannot have been a spontaneous and unexpected development that emerged as a result of creative thinking by international lawyers within the Ugandan Foreign Ministry. Philosophically, it flowed from the ruminations within the Office of the Prosecutor in late 2003. The idea came from The Hague, not Kampala.

This form of supranational entrepreneurship stems from the Court's self-preservation instinct. Recognizing that the Court's reputation was at risk if classical complementarity were continued, the Court proactively pursued positive complementarity to the point of soliciting referrals, which the delegates of powerful states attending the Rome conference never anticipated.

The neoliberal approach posits that states create international institutions to mitigate dilemmas of common interest and lower transaction costs. The rules, principles, and procedures established under the Rome Statute create a set of positive and negative inducements to end impunity. The ICC encourages national investigations and prosecutions, monitors compliance behavior, and takes action when domestic jurisdictions fail. Moreover, as the only permanent, *ex ante* international criminal tribunal, the ICC casts a long shadow into the future, inviting states to broaden their efforts at combating impunity. The recent incorporation of crimes of aggression corroborates this neoliberal point. The neoliberal perspective, however, suffers from two drawbacks with regard to the issue of ICC complementarity. The theory offers little insight into why the interpretation or enactment of institutional rules change over time. Gruber (2000:63) observes that this neglect stems from the neoliberal assumption that “institutional choice is ultimately guided by efficiency considerations.” The efficiency rationale assumes that institutional contracts are complete and Pareto-efficient. In reality, international institutions, including the ICC, are the products of incomplete contracts, and such contractual ambiguities and flaws create space for shifts in the rules’ interpretation and enactment, as I describe below. Moreover, neoliberalism’s emphasis on positive-sum results of international agreements leaves the issue of distributional effects of institutional change unaddressed. The conversion to positive complementarity advanced the collective goal of ending impunity, but weaker states parties stood to gain more than stronger states from such a shift.

### 3.1. Why Complementarity Changed

There were three endogenous drivers of institutional change. First, the number of fragile or weak states (FWS)<sup>4</sup> that have ratified the Rome Statute has increased since the ICC was activated. By 2002 there were seventy-six states parties of which fifteen (20%) were characterized as FWS. Their numbers grew to twenty-three out of one-hundred-one states parties (23%) by late December 2005 and to thirty-three out of one-hundred-fourteen (29%) by November 2010. There are other trends that are noteworthy. The number of states parties labelled critical states<sup>5</sup> on the failed state index rose from three in 2002 to nine in 2010. Further, the average *Freedom House* (FH) score among FWS in the ICC deteriorated<sup>6</sup> and those identified as not free grew from two in 2002 to nine in 2010. Lastly, the average political terror scale (PTS) score—which measures the extent of physical integrity rights violations—dropped slightly but remained comparatively high.<sup>7</sup>

These trends show that an increasing share of states parties face social, political, and economic conditions that make it difficult for them to fulfill their responsibilities under the ICC Rome Statute—especially to conform to the complementarity principle. In particular, the domestic judicial systems found in FWS vary in institutional capacity. Several have yet to undertake reforms to ensure separation of powers, independence of the judiciary, due process, and defence rights. Many have poorly managed court systems and lack competent and trained judges, prosecutors, and lawyers. Evidence of corruption and patronage in the courts inspire little public confidence about the credibility of their justice systems. Inadequacy in witness protection mechanisms, prison security, provision of aid to victims, and training of law enforcement authorities is common in many of these states. Some are emerging from while others are currently gripped by domestic strife in which civilians are the victims of mass atrocities perpetrated not solely by state actors, but often by powerful non-state actors. Moreover, because of the fragility of peace in many of these countries, there has been a tendency for retributive justice to proceed slowly and inconsistently or for milder methods of accountability to be used so as to avert resumption of conflict among affected parties.

Whether strong or fragile, ICC states parties aspire to combat impunity for perpetrators of mass atrocities. However, the classical and positive visions of complementarity yield distinct distributions of benefits and costs between strong and weaker states parties. The classical vision of complementarity favors stronger members disproportionately because their strong enforcement and judicial capacity coupled with domestic political stability enable them to fulfill their complementarity duties with relative ease and, consequently, need not fear the threat of ICC intervention. Fragile members—especially those besieged by powerful insurgencies or possessing deficient enforcement and judicial systems—have struggled to comply, making them more vulnerable to ICC intervention.

<sup>4</sup> A fragile or weak state has a combined score of 80 and above out of a total of 120 on the *Fund for Peace* failed state index.

<sup>5</sup> Critical states rank among the top 20 on the *Fund for Peace* index.

<sup>6</sup> The average FH score was 3.87 in 2002, 3.89 in 2005, and 4.55 in 2010. The FH ranking is based on a scale from 1 (most free) to 7 (least free).

<sup>7</sup> The PTS score among FWS in the ICC was 3.36 in 2002, 3.27 in 2005, and 3 in 2009. The PTS ranking is based on a scale from 1 (life integrity violence is rare) to 5 (violence is serious and widespread).

By restricting the Court to a residual role, the ASP eliminated the possibility of the Court playing a leading role in actively encouraging cooperative arrangements that provided assistance to less capable members. The result was that they were left to their own devices and there was a risk that cross-national variance in anti-impunity capacity could widen within the international criminal justice regime. It was believed that the dynamics in positive complementarity would facilitate anti-impunity cooperation among stakeholders, and allow for more focused and sustained efforts to assist in capacity-building and encourage the exercise of domestic jurisdiction. For those FWS imperiled by powerful insurgencies or struggling to build an effective state apparatus, positive complementarity offered the kind of relief that could contribute to the creation of viable judicial systems, lower political costs of pursuing justice domestically, and restore states' domestic sovereignty.

### 3.1.1. The limits of the Prosecutor's *proprio motu* authority

The Prosecutor is empowered under Articles 13(c) and 15 to "initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court." The annex to the 2003 Policy Paper of the Prosecutor elaborates this role:

The Prosecutor's *proprio motu* power to initiate an investigation with authorisation from a Pre-Trial Chamber is a very important mechanism under the Statute. This procedure provides the legal basis to carry out investigations even where states have failed to refer an objectively serious situation. The Prosecutor will use this power with responsibility and firmness, ensuring strict compliance with the Statute (ICC-OTP 2004: 4).

However, the Court's mandate of providing international accountability is limited by several factors. First, the Prosecutor's threat to employ *proprio motu* authority against a state party in hopes of spurring prosecutorial actions domestically may be ineffective if the financial and political costs of providing accountability for mass atrocity crimes are too high. For some transitional states, there is an opportunity cost to pursuing accountability. Boettke and Coyne (2007: 55) observe that "investing resources in the administration of justice means that those resources are diverted away from other transition activities that can also yield a future stream of benefits." With too few resources at their disposal to promote peace and prosperity, transitional democracies are tempted to hold off pursuing perpetrators of past atrocities immediately. In the short run, governments are more inclined to channel scarce resource to build societal and state institutions—incorporating a mixture of accountability mechanisms—that with the passage of time can bring closure with the past and hope for the future.

Second, the Prosecutor's control over the execution of arrest warrants is weak (Burke-White 2008: 64-65). In contexts in which state authorities have lost the ability to impose law and order, there is ongoing armed conflict, and/or state officials are complicit in the violence, the Court's hopes for immediate arrests and surrender of suspects are especially dim. As of 2010, eight individuals against whom arrest warrants have been issued by the Court remain at large. Deprived of coercive instruments, "the Prosecutor will not be able to exercise his powers without the intervention of the international community," the OTP has admitted (ICC-OTP 2003a: 6). Such legal limitation is clearly an impediment to the Court's independent execution of its mandate.

Third, the Prosecutor's intervention could provoke a target state and its allies to adopt stonewalling tactics—particularly with regard to its requirement to cooperate with the Court—and to allege prosecutorial partiality. Given the absence of cases triggered by the Prosecutor's *proprio motu* powers to date, this assertion is speculative. However, if one looks at states' conduct toward the ICC in recent years, there is evidence corroborating this assertion. For example, to date, less than half of states parties have implemented legislation authorizing governments to cooperate with the Court, and the level of cooperation varies among complying members. What is more, during a meeting of the Assembly of the African Union's session in late July 2010, members renewed their commitment to "not cooperate with the ICC in the arrest and surrender" of Sudanese President al-Bashir, signaling a hardening of AU's stance vis-à-vis the Court (African Union 2010: para. 5). This came in the wake of the Security Council's rejection of the AU's request to defer proceedings.

Moreover, accusations of prosecutorial partiality and misconduct have surfaced. The AU (2010: para. 9) recently criticized the Prosecutor for "making egregiously unacceptable, rude and condescending statements" concerning the case against Sudan's president and other situations in Africa. The negative perception of the Court by some states has been fueled by the prosecutor's misstatements, but also by politically-motivated rhetoric asserting that the Court is applying a tougher standard of justice to Africa than to other regions. That all of the Court's criminal proceedings involve African countries, according to critics, evidences that the Court's application of justice belies the principles of impartiality and universality.

Finally, even if the Prosecutor endeavored to pursue every situation in which it was determined that there was a reasonable basis to proceed under the Statute, budget limitations force the Prosecutor to be selective in his selection of situations. The Court's budget allows it to carry out about three investigations and two trials annually (Burke-White 2008: 67). Aware of the mismatch between its mandate and capacity, the Prosecutor declared back in 2003 that the Court will "take action only where there is a clear case of failure to take national action" and "will initiate prosecutions of the leaders who bear most responsibility for the crimes" (ICC-OTP 2003: 3 and 5).

Recognizing the Court's legal and material constraints, the Prosecutor championed positive complementarity as a way to ensure that the Court's middling resources and legal powers did not diminish its ability to combat impunity. The Prosecutor remarked early in his tenure that "to make the most efficient use possible of its limited resources, the Office will make extensive use of existing external resources. This means that much of the Prosecutor's work will be carried out in co-operation with national investigators and prosecutors, individually or as part of international networks with which the Office interacts." Under positive complementarity, the focus shifts from threats of and actual unilateral Court intervention and from exclusiveness of domestic criminal jurisdiction to multilateral capacity-building assistance to states in need of it and to shared efforts to institutionalize individual criminal accountability. To be sure, the Court's embrace of positive complementarity was not a panacea for the problems related to ICC intervention. As recent events (described above) have shown, the promotion of such ideas as 'partnership,' mutual responsibility, and burden-sharing has neither made it less likely that the Court will be the target of politically-motivated rhetoric nor made it any easier to elicit the cooperation of states parties.

### 3.1.2. Inoperability of Article 14's state referral mechanism

Under Article 14(1), "a State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed...." The legal community has understood this article to establish an inter-state complaint mechanism. "The drafting history of article 14 of the Rome Statute," Schabas (2008b: 14) observes, "leaves little doubt that what was considered was a 'complaint' by a State party against another State." Similarly, Arsanjani and Reisman (2005: 386-87) point out that "There is no indication that the drafters ever contemplated the Statute would include *voluntary* state referrals to the Court of difficult cases arising in their own territory." The inter-state mechanism is also found in several UN human rights treaties. For example, Article 41(1) of the Covenant of Civil and Political Rights holds that its Committee has the authority "to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant."

Most observers are of the view that states parties are reluctant to activate the Court using this triggering device. To the extent that "states cannot be counted on to act as guardians of human rights, let alone on an impartial basis," Akhavan (2010: 105 and 117) points out, "the view that Article 14 should be restricted to inter-State complaints would most likely render this triggering mechanism redundant." To date, the inter-state complaint mechanism has never been used in the most important UN human rights treaties. With regard to other human rights treaties—for example, the European Convention of Human Rights and the Genocide Convention—states have rarely lodged complaints against other states. When states have employed the mechanism, it has tended to involve situations where the complainant state has been the victim of a human rights violation or seeks to defend the rights of the complainant state's nationals residing in other territories (Akhavan 2010: 117-19). Thus, aware of the inter-state mechanism's dismal track record, many observers believed that Security Council referrals and the Prosecutor's *proprio motu* actions would be the two primary triggers by which situations would land in the Court's docket.

The practice of voluntary referral, a core component of positive complementarity, was defended on grounds that such a method was not explicitly prohibited in the Statute and that it would enhance cooperation between the Court and stakeholders (Robinson 2010: 96). In his 2006 report reviewing the Court's activities over the last three years, the Prosecutor noted that "While *proprio motu* power is a critical aspect of the Office's independence, the Prosecutor adopted a policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court. The method of initiating investigations by voluntary referrals has increased the likelihood of important cooperation and on-the-ground support" (ICC-OTP 2006: 7). A state party that voluntarily relinquished domestic jurisdiction to the Court with regard to a specific situation by implication consented to assisting the ICC—that is, consensually dividing tasks in a way that ensured effective investigation and prosecution by the Court.



### **3.2. How Complementarity Changed**

In this section I consider how this institutional component of the Rome Statute system changed. In order to gain leverage over this empirical question it is necessary to have a set of analytical tools with which to explore gradual, endogenously-driven change. Streeck and Thelen (2005) and James Mahoney and Kathleen Thelen (2010) break new ground in the analysis of gradual change dynamics. They conceptualize and operationalize different modes of incremental change that are commonplace in society and in the political realm. Studying such dynamics draws our attention to “the way actors cultivate change [... by] working around elements they cannot change while attempting to harness and utilize others in novel ways” (Streeck and Thelen 2005: 19) ‘Conversion’ is the type of gradual change that best approximates developments on complementarity.<sup>8</sup> As Mahoney and Thelen (2010: 17) put it, “Conversion occurs when rules remain formally the same but are interpreted and enacted in new ways. This gap between the rules and their instantiation ... is produced by actors who actively exploit the inherent ambiguities of the institutions.” Institutional conversion is usually “set in motion by a shift in the environment that confronts actors with new problems that they address by using existing institutions in new ways or in the service of new goals” (Thelen 2002: 228).

Institutional ambiguities, undefined performance benchmarks, and the novelty of the ICC provided some space to the Prosecutor to determine how to fulfill the Court’s mission and what outcomes he envisioned for the tribunal. The ambiguity linked to complementarity stems from its dual foundation. Whether it was intentional or not, the drafters of the Rome Statute established rules and principles that served as underpinnings for the classical and positive visions of complementarity. This institutional arrangement afforded the Prosecutor some discretion over how complementarity was to be interpreted and deployed. In addition, the general language found in the Article 14—specifically, the absence of specific language restricting the state referral mechanism only to state-to-state complaints—created some interpretative space for the Prosecutor.

As the first Prosecutor, Moreno-Ocampo has had to bear the difficult task of building a favorable reputation for the new Court. Moreover, the Prosecutor has had to take the helm with little practical guidance to go on. As Arsanjani and Reisman (2005: 385) observe, now that the Court is activated, “the predecessors and prototypes that were so helpful in the drafting stages [are] of less and less assistance.” Not only does the ICC “operate in a substantially different context than the earlier efforts,” but the challenges it faces are “different from and may prove more formidable than those facing its prototypes.” Although the absence of preexisting performance benchmarks and of legal precedents can cause any organization to dither, both conditions also can be exploited to pursue innovative change. In his first years as Prosecutor, Moreno-Ocampo recognized the unique opportunity to define the direction of the Court for decades to come with the situations he chose, something his successors will probably not enjoy.

To assert that the Prosecutor acted in a utility maximizing fashion is to argue that he purposely sought to overcome the limitations of proprio motu power and the inoperability of the state referral mechanism, and to accommodate the interests of the ASP using whatever means were at his disposal. Mahoney and Thelen observe that conversion tends to occur when agents of change face low veto possibilities and are afforded a high degree of discretion in interpreting and enacting institutional rules. In the case of the ICC Prosecutor, the context and means of institutional change were conducive to ‘bounded innovation’ insofar as Moreno-Ocampo’s freedom of action was hemmed in by several institutional veto points. On the one hand, the Prosecutor’s discretion arose from the imprecision of several provisions in the Rome Statute and the absence of legal precedents and preexisting expectations. On the other hand, Moreno-Ocampo’s discretion was bounded by admissibility requirements, resource and enforcement limitations, judicial oversight by the pre-trial chambers, challenges to the jurisdiction of the Court, and the interests of the ASP.

Temporal and political factors mediated the interplay of these enabling and constraining conditions. The passage below hints at how the confluence of these counterbalancing and intervening forces played out with respect to the Prosecutor’s decision to accept the voluntary referral by Democratic Republic of Congo (DRC):

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<sup>8</sup> In addition to ‘conversion,’ Mahoney and Thelen elaborate three other modes of gradual change. ‘Displacement’ involves replacing existing rules with new ones; ‘layering’ is present when new rules are attached to existing ones; and ‘drift’ occurs when existing rules stay the same but their effects on outcomes change as external conditions change.

The Prosecutor's strategy of self-referral ... was a partnership with states, rather than a value judgment about the abilities or intentions of their justice systems. There was only one problem: it is not in the ICC Statute. Yet, the judicial activism of the Pre-Trial Chamber on this point went unchallenged. There was no appeal. After all, who had any interest in contesting such a reading of the ICC Statute? The Prosecutor was content, because the arrest warrant [of Lubanga] was issued, and he could now provide tangible evidence that he was doing his job. The judges were delighted to have a real trial, after years of relative inactivity. [The DRC] was satisfied to have disposed of a troublesome rebel leader who would be judged in distant Europe. It was a 'win-win' situation for all concerned (Schabas 2008a: 757).

As this case illustrates, certain factors helped neutralize or overcome veto possibilities. First, the Prosecutor effectively leveraged the power of creative arguments of certain Statute provisions to fill the current void in ICC jurisprudence. Second, the mobilization of broad consensus among members of the ASP and within the Court around the idea of positive complementarity enabled the Prosecutor to undertake concrete policy actions such as the one involving the DRC situation. Finally, the fact that the ICC was in its infancy generated a sense of eagerness to prove its competence, which in turn inclined potential veto players to be less adversarial temporarily. What is clear from these observations is that temporal circumstances figured prominently in the Prosecutor's ability to use his discretion in innovative ways. It is reasonable to argue that as the Court matures the weight of past choices and of established expectations will further curtail future Prosecutors' range of maneuver.

#### ***4. The Paradoxical Effects of Self-Referrals: The Case of Uganda***

In late January 2004, Ugandan President Museveni and the ICC Prosecutor held a press conference in London to inform the public of Uganda's referral of the "situation concerning the Lord's Resistance Army" in northern Uganda. Soon after the announcement the Prosecutor put to rest insinuations that the referral appeared to exempt the government and local militias from ICC scrutiny by affirming that he "would interpret the scope of the referral as concerning all crimes committed within the situation of Northern Uganda—irrespective of who committed them" (Moreno-Ocampo 2004).

Because Uganda's ratification of the Rome Statute on 14 June, 2002 came into effect on 1 September, the Ugandan government lodged a "Declaration on Temporal Jurisdiction" with the ICC Registrar in late February 2004, extending the Court's jurisdiction over the situation back to 1 July 2002, when the Statute entered into force. In late May 2004, Uganda's Solicitor-General submitted a "Letter on Jurisdiction" to the Prosecutor stating that the government had no plans to conduct national proceedings against individuals most responsible for the crimes within the Northern Uganda situation. The Museveni government judged that the ICC was "the most appropriate and effective forum for the investigation and prosecution" (Pre-Trial Chamber 2005: 11). The threat of ICC arrest warrants, it was believed, would force the rebels to negotiate a peace settlement.

In late July 2004, acting under Article 53 of the Statute, the Prosecutor determined there was a reasonable basis to initiate an investigation into the situation in Northern Uganda. An "Agreement on Cooperation and Assistance" was signed by the OTP and the Ugandan government in August 2004, which enabled the Prosecutor to conduct more than 50 evidence-gathering missions to Uganda in the proceeding months (Schabas 2006: 30). In May 2005, ten months after opening the investigation, the Prosecutor pursuant to Article 58 of the Statute submitted requests of arrest warrants against five LRA rebels—Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen.

The Prosecutor's decision to pursue the LRA but not the Ugandan forces hinged on the criterion that LRA's crimes "were much more numerous and of much higher gravity" (Moreno-Ocampo 2005: 3). The Prosecutor alleged that the LRA-led insurgency had instigated a cycle of violence and "established a pattern of 'brutalization of civilians'" involving murder, abduction, sexual enslavement, mutilation, looting of camp settlements, and destruction of homes. Another allegation included in the Prosecutor's arrest warrant application was that the abducted, both adults and children, were forced to serve as fighters, porters, and sex slaves for the LRA (Pre-Trial Chamber 2005: 2-3).

In early July, the Pre-Trial Chamber II issued the arrest warrants under seal against these five individuals for the perpetration of crimes against humanity and war crimes. In deciding to issue the warrants, the Chamber noted that the crimes that the Prosecutor accused the LRA of committing had also been reported by Ugandan state authorities, foreign governments, world media, the UN, and NGOs.

The Chamber also took note that the Ugandan government back in May 2004 had indicated that it had not conducted nor planned to conduct criminal proceedings with respect to this situation. In October 2005, the Chamber unsealed the arrest warrants and requested Uganda, the Democratic Republic of Congo, and Sudan to search for, arrest, and surrender to the Court the five LRA rebel leaders. To date, four of them remain at large and the proceedings against Raska Lukwiya were terminated in July 2007 following his death. The Ugandan case draws attention to three paradoxical effects associated with positive complementarity. One of the adverse effects is that the option of self-referral can create a moral hazard—that is, invite national governments to offload cases to the ICC even though the optimal path of resolution is at the domestic or regional level or both. Accordingly, the Ugandan referral has been criticized for two main reasons. First, critics note that such a move was unwarranted because Uganda's justice system has been among the most competent in sub-Saharan Africa. As Burke-White (2006: 20) observes, "If the Ugandan government chose to, it could probably arrest and prosecute the LRA leadership through military, police, and domestic judicial means. Certainly, with some attention and domestic institutional reform, national prosecution would be possible."

Not only could national proceedings have been conducted genuinely if there had been the political will to do so, but the domestic administration of justice using various accountability mechanisms could have facilitated securing the support of LRA rebels on a peace agreement, which the international route has failed to do. The other downside of the Uganda referral is that it has distracted attention from the geopolitical dimension of the Northern Ugandan situation. Between the early 1990s and mid-2000s, the cycle of violence that engulfed the region was directly connected to the conflict in southern Sudan. The animosity between the governments of Museveni and Sudanese President al-Bashir was manifested by their efforts to undermine one another's rule through the sponsorship of proxy militias. Sudanese President al-Bashir provided funds and weapons to the LRA in retaliation for Kampala's support of the Sudan People's Liberation Army (SPLA), against whom the Sudanese government fought during the decades-long civil war (Izama 2009: 54). The LRA was forced out of Sudan when Khartoum signed an agreement with the ICC in October 2005 to enforce the arrest warrants issued against the indicted LRA rebels. Since, the LRA has taken refuge in the Garamba National Park in the Democratic Republic of Congo. Just in the past two and half years, the LRA killed more than 2000 people in Southern Sudan, DRC, and the Central African Republic and committed more atrocities in Uganda.

LRA's ability to evade arrest, relocate to other countries, and expand its spree of atrocities to neighboring countries has been facilitated by the insecurity and interstate rivalry that pervades the Great Lakes region. These societies are trapped in a perverse-equilibrium—a situation in which individuals are unwilling to stop abusive practices unless everyone credibly commits to ending them (Katzenstein and Snyder 2009: 59 and 63). Unfortunately, the ICC has treated the criminal cases associated with the northern Uganda situation as if they had occurred in a geopolitical vacuum. Observers have argued that the deterrence effect of ICC indictments is weakened because of the perverse-equilibrium trap which induces rather than restrains rebels and militaries to commit atrocities. Thus, the more optimal immediate course of action to lower the incidence of human rights abuses would be to achieve regional peace through political negotiations rather than pursue justice selectively and divorced from the political realities. The moral hazard manifested here is that ICC's intervention has taken the onus off the Museveni government and other regional governments to secure a regional peace and perpetuated the false belief that the region's problems can be solved by the tribunal's provision of justice.

Another drawback is that positive complementarity inclines beleaguered governments to exploit the self-referral mechanism to achieve political gains against their adversaries. The Museveni government requested the help of the ICC in holding LRA criminally accountable for the atrocities it committed. Even though the Prosecutor in early 2004 indicated that ICC's investigation of the situation would not be limited to LRA rebels, the political reality was such that the Prosecutor had no choice but to pursue anti-government rebels. Subjecting pro-government forces to an ICC investigation undoubtedly would have caused Museveni's government to be less forthcoming in cooperating with the Court. Interestingly, when the President raised the issue of government complicity in the atrocities perpetrated in the past, he averred that "if such cases are brought to our attention, we will try them ourselves" (Quoted in Arsanjani and Reisman 2005: 394). In sum, few, if any, governments would be interested in using the self-referral strategy if they believed that the prosecutor would investigate evenhandedly the actions of both rebels and the government (Schabas 2008b: 19). What attracts governments to this legal mechanism is that it can be exploited against their enemies.

The third drawback is that when a national government refers a situation to the ICC, it loses exclusive control over how domestic justice is administered. In peace settlement negotiations, stakeholders often have to compromise on the provisions of the accountability formula that is to be applied to alleged perpetrators of atrocities. Central to this political decision is that the pursuit of justice must be amenable to peacebuilding. The use of amnesty and other justice mechanisms (such as truth commissions, traditional justice, and trials) are typically used in this endeavor (Vinjamuri and Boesenecker 2007). However, when the ICC becomes involved in such a situation, domestic stakeholders no longer decide on their own to whom and how justice will be applied. The ICC Prosecutor may open a criminal proceeding against an individual with whom peace negotiators might want to deal using another justice mechanism. In fact, the Court's involvement might become counterproductive in the peacebuilding process if it is unwilling to withdraw outstanding arrest warrants or defer a case when requested by domestic stakeholders. The Prosecutor and domestic stakeholders may find themselves at odds with one another over what is the appropriate approach to secure peace through justice.

The Museveni government witnessed firsthand during the Juba Peace talks between August 2006 and November 2008 how its room of maneuver had been constrained by ICC's involvement. Early in the peace negotiations, the LRA demanded the repeal of the arrest warrants against its leaders, a demand that Museveni asked the Prosecutor to agree to if the LRA signed a peace agreement. The OTP—who during the investigation of the situation in 2005 had alluded to the possibility of suspending its investigation “if it is in the interest of justice to proceed with a peace agreement”—refused to withdraw the arrest warrants (Sorokobi 2005). Article 53(2)(c) grants the Prosecutor the discretion to not carry on with a prosecution when it “is not in the interests of justice.” Richard Goldstone, the former chief prosecutor of ICTY and ICTR, shed light on Moreno-Ocampo's decision:

If you have a system of international justice you've got to follow through on it. If in some cases that's going to make peace negotiations difficult that may be the price that has to be paid. The international community must keep a firm line and say are we going to have a better world because of the international court or not (Quoted in McGreal 2007).

In response to the Prosecutor's rejection, the Ugandan government and the LRA agreed that the best course of action was to give the national judiciary the necessary legal mechanisms to deal with the criminal allegations involving the rebel group. The motive behind this effort was to enable Museveni to “challenge the admissibility of the ICC case against LRA leaders in the future, thereby seeking to exert control over the fate of the LRA” (Otim and Wierda 2010: 3). The parties signed in June 2007 the Agreement on Accountability and Reconciliation which called for trials, truth-seeking, compensation, traditional justice, and other special measures for victims. As part of the reform plan, the War Crimes Division of the High Court of Uganda was set up in July 2008 to try individuals who allegedly carried out mass atrocity crimes. In March 2010, the Ugandan Parliament passed the International Criminal Court Act which granted the High Court jurisdiction over Rome Statute crimes.

The Museveni government underestimated the political liability that would emerge by involving the Court in the ongoing civil war. To be sure, ICC's firmness on the indictment issue dispelled any misconceptions that the Museveni government may have had about the willingness of the Court to allow political expedience to trump justice in order to save peacebuilding efforts. Moreover, the ICC indictments had three unintended consequences for the government which, in hindsight, it most likely would rather have avoided. First, ICC's actions against the LRA compelled the rebel group to hold hostage the peace talks until a domestic solution was found. Second, that solution required the Ugandan state to struggle to regain sovereign authority over the domestic legal system by nationalizing accountability and justice procedures. Finally, the fear of being captured, compounded by the belief that the Museveni government would capitulate to the ICC, compelled indicted LRA leaders to go into hiding, abandon the peace process indefinitely (it did not sign the final peace agreement in 2008), and resume fighting. In sum, the sovereignty cost of ICC's involvement increased beyond what the Ugandan government had anticipated; the loss of control over the administration of domestic justice is a strategic asset it now regrets having relinquished.

## **5. Conclusion**

The aim of this article was to explain why and how complementarity, as an institutional component of the Rome Statute system, evolved since the early 2000s and to assess the political consequences of this institutional change. The article underscores two basic points. The first one concerns the dynamic of institutional change.

As this article has shown, the Prosecutor was the primary agent of change in response to the expansion of ICC's membership and the organizational drawbacks related to Article 14 and the Prosecutor's proprio motu powers. The combination of temporal and institutional conditions created some space for agency, which was leveraged to redirect complementarity in a way that has helped the Court deal with the three challenges. Two important aspects stand out from this analysis. First, the distributional effects of institutional conversion are such that weaker states parties stand to gain more materially and politically from positive complementarity than stronger members. Second, as the ICC becomes more institutionalized—that is, expectations, legal precedents, and procedural patterns emerge—the opportunities for agency are likely to be more circumscribed.

The second concluding remark is that the double-edge nature of institutional conversion illustrates how the forces of global legalism interplay and often clash with realities of international politics. On the one hand, the principal motive for converting the practice of complementarity in a positive direction was to ensure that international criminal law and the ICC—through which this body of laws is actualized—are capable of influencing state behavior. Moreover, the Court has endeavored to shield itself from political influences, a goal it deems necessary to achieve for the sake of building its credibility. At the 2010 Kampala Review Conference, the Prosecutor (2010: 5) reiterated this objective: “The Prosecutor and Judges cannot and will not take political considerations into account. This is a conscious decision, to force political actors to adjust to the new legal limits.”

On the other hand, the ICC is a product of and operates in a state-centric international system. The autonomy the Court enjoys by virtue of its supranational features is offset by the dependency condition under which it operates as a result of its intergovernmental characteristics. Further, political instrumentality and sovereignty concerns shape to varying degrees how states associate with the Court: whether to request its assistance, to cooperate with it, to take a dim view of its actions, or disregard it. What is more, the feasibility of promoting peace through justice is contingent on the strategic political context which may perpetuate or curb cycles of violence. In effect, despite the evolving nature of ICC's legalist design, the tribunal remains as susceptible as ever to the influences of political realities.

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