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Military Self-Interest in Accountability for Core International Crimes

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If You're Not at the Table, You're on the Menu: Complementarity and Self-Interest in Domestic Processes for Core International Crimes

Christopher Mahony*

11.1. Introduction

The research project of which this anthology is part of seeks to identify "which forms of justice speak most effectively"[1] to military self-interest in bringing perpetrators to justice for core international crimes. This chapter focuses on the extent to which the Statute of the International Criminal Court ('ICC') accepts politicised trials under its principle of complementarity. Does the complementarity principle, which provides primacy to States unless they are "unable or unwilling",[2] tolerate politicised domestic processes? This chapter considers the military self-interest in prosecuting core international crimes cases in order to exclude ICC jurisdiction. By examining a number of situations under ICC examination or investigation, I argue that the complementarity threshold tolerates politicised processes. I argue that it is in the long-term self-interest of armed forces to bring

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1 Morten Bergsmo, Arne Willy Dahl and Richard Sousa, "Military Self-Interest in Accountability for Core International Crimes", in *FICHL Policy Brief Series*, 2013, no. 14, Torkel Opsahl Academic EPublisher, Stanford (http://www.legal-tools.org/doc/396da7/).

2 ICC Statute of the International Criminal Court, Rome, 17 July 1998, Article 17(1) ('ICC Statute').

perpetrators of core international crimes to justice via domestic processes that are politically controlled but still meet the complementarity threshold.

To refrain from prosecuting those of political expediency leaves those not of political expediency exposed to ICC investigation. If armed forces refrain from sitting at the prosecuting table they remain potential prey on the ICC menu. I argue, therefore, that the primary interest of armed forces in prosecuting core international crimes cases is realist self-interest in controlling who is prosecuted and who is not. In making this argument, I consider the cases of Colombia, Libya, Kenya, Uganda and Guinea. Where these States demonstrated the requisite due diligence and intent to pursue politically controlled and expedient processes, they have disabled sensitive ICC investigations. Where more belligerent opposition to the ICC was adopted – where States refuse to sit at the table – the ICC has pursued sensitive cases.

11.2. Complementarity and Political Control of Domestic Case Selection

To consider political interaction with the complementarity principle, we must assess the extent to which realist jurisdictional and functional constraints of complementarity are affected by normative pressure to independently investigate and prosecute core international crimes. Critical to considering the interest of armed forces in prosecuting international crimes is the degree of primacy complementarity affords domestic proceedings, the independence complementarity demands of domestic proceedings, and how those variables interact with other pressures upon the ICC.

ICC Statute deference to domestic jurisdictions constitutes, along with United Nations Security Council controls over jurisdiction, the most compromising element for the ICC Office of the Prosecutor's ('OTP') independence in case selection. Complementarity provides sophisticated State actors the amnesty card instrument of manipulated investigations while enjoying the credible commitment benefits of ICC Statute participation. To understand the regulatory capture and compromise of independence afforded by complementarity, its technical elements must be considered. Article 17(1)(a)−(c) of the ICC Statute renders a case inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction over the crimes in question. However, inadmissibility is voided if the

investigating or prosecuting State is unwilling or unable genuinely to carry out the investigation or prosecution.[3]

11.3. Colombia: Complementarity's Low Pre-Investigation Threshold

A determination of "unable or unwilling genuinely" was never fully explored in the ICC's first investigation in Uganda. Colombia, where formal OTP investigations have not yet opened at the time of writing, has experienced close scrutiny of domestic proceedings. The Colombian government has exploited the fact that complementarity is not definitely and finally determined at one point in time, allowing for gaming and re-gaming of the complementarity threshold. Even if an investigation is opened, complementarity may be revisited several times before the commencement of a trial.[4]

A proactive Colombian government impeded OTP investigations, with US technical support, by establishing a complementarity-compliant domestic regime that still preserves impunity for elites. The Colombian government accompanied complementarity with Article 124 prevention of OTP war crimes investigations for seven years after Colombia's ratification.[5] However, for crimes against humanity, which the OTP alleges various parties in Colombia have committed, Article 124 does not apply.[6] Complementarity, therefore, remained the sole impediment to ICC investigation of crimes against humanity in Colombia. The Colombian government established the Colombian Justice and Peace Unit ('CJPU'). The CJPU initially refrained from targeting senior actors or using seniority as a case selection criterion, despite its public pledges to pursue those most

3 ICC Statute, Article 17, see *supra* note 2.

4 Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, Martinus Nijhoff Publishers, Leiden, 2008, p. 245; and International Criminal Court, *Prosecutor v. Kony et al.*, ICC-02/04-01/05, Decision on the Admissibility of the Case under Article 19(1) of the Statute, 10 March 2009, paras. 25 ff. (26, 28, 52).

5 OTP war crimes jurisdiction over Colombia began on 1 November 2009. International Criminal Court, Office of the Prosecutor ('ICC-OTP'), *Report on Preliminary Examination Activities*, 13 December 2011, p. 14.

6 *Ibid*., p. 15.

responsible.[7] US government support has been critical to enabling sophistication sufficient to avoid ICC investigation and pursuit of senior Colombian government suspects. Joint US-Colombian efforts to prevent ICC investigation demonstrate the predominance of functional rather than jurisdictional constraints over ICC case selection.[8] Under the US Justice Reform Program:

> The US Department of Justice provided assistance to the Justice and Peace Unit, including training of and technical assistance for prosecutors and investigators, equipment, database development, office and hearing room development, and forensic and operational support.[9]

The Department of Justice spent USD 1.54 million in 2006 and USD 2.58 million in 2007.[10] Simultaneously, the US government provides military support to the Colombian government to fight armed opposition. Secret US assistance, including substantial National Security Agency eavesdropping, is funded through a multibillion-dollar black budget. The secret support is, since 2000, supplemented by a public USD 9 billion package of mostly military aid called Plan Colombia.[11] This support implicates US actors for aiding and abetting what the OTP has reasonable basis to believe are crimes against humanity.[12] Therefore, OTP investigations in Colombia would likely shift US ICC policy towards hostile opposition. The ICC's Colombian threat to US interests dramatically heightens US engagement in softening OTP case selection independence, particularly in relation to complementarity.

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7 Maria Paula Saffon, "Problematic Selection and Lack of Clear Prioritization: The Colombian Experience", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, FICHL Publication Series no. 4, Second Edition, Torkel Opsahl Academic EPublisher, Oslo, 2010, p. 139 (http://www.legal-tools.org/en/doc/f5abed/); and ICC-OTP, *Report on Preliminary Examination Activities*, November 2013, p. 32.

8 Judith Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter, "Introduction: Legalization and World Politics", in *International Organization*, 2000, vol. 54, no. 3, pp. 385–99.

9 Committee on Foreign Affairs, House of Representatives, Subcommittee on the Western Hemisphere, *US-Colombia Relations: Hearing Before the Subcommittee on the Western Hemisphere of the Committee on Foreign Affairs*, Serial 110-39, US Government Printing Office, Washington, 24 April 2007, p. 116.

10 *Ibid*.

11 Dana Priest, "Covert Action in Colombia," in *Washington Post*, 21 December 2013.

12 ICC-OTP, 2013, p. 32, see *supra* note 7.

The Colombian government has sought to establish and refine complementarity compliance and political utility through its 2005 Justice and Peace Law. The German government commissioned the scholar Kai Ambos to study the law's compliance.[13] The Justice and Peace Law covers crimes by both left- and right-leaning armed groups after 25 July 2005.[14] The OTP has found that the Colombian armed forces, government-aligned paramilitary groups and left-wing armed groups committed crimes against humanity and war crimes since 1 November 2009.[15] Ambos found that the law, in conjunction with a 2006 Decree and Constitutional Court support, converts ordinary sentences to alternative five-year minimum and eight-year maximum sentences.[16] The "considerable" mitigation is contingent upon accused participation in "truth, justice and reparations".[17] Ambos also found that the law satisfied the ICC Statute's Article 17(1)(d) requirement of "some" State action greater than full criminal exemption, since punishment remained through considerable sentence reduction.[18] While Ambos acknowledges Supreme Court pressure to investigate State security forces, he also cites the discriminatory exclusion of the Fuerzas Armadas Revolucionarias de Colombia ('FARC') and other left-wing groups from sentence conversion due to drug trafficking or illicit enrichment.[19] Ambos notes the special Justice and Peace Chamber's filtering of eligible cases based on demobilisation and rejection of criminality. The executive, a party to the conflict, then wields final discretion to directly

[13] Kai Ambos and Florian Huber, "The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is There Sufficient Willingness and Ability on the Part of the Colombian Authorities or Should the Prosecutor Open an Investigation Now?", Institute for Criminal Law and Justice, Department of Foreign and International Criminal Law, Georg-August Universität Göttingen, 5 January 2011 (https://www.legal-tools.org/doc/e1b72d/).

[14] Kai Ambos, "The Colombian Peace Process (Law 975 of 2005) and the ICC's Principle of Complementarity", in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, New York, 2011, pp. 1072–3.

[15] Ambos and Huber, 2011, pp. 30–31, see *supra* note 13.

[16] Ambos, 2011, p. 1072, see *supra* note 14.

[17] Pablo Kalmanovitz, "A Law of Conditionally Reduced Penalty", in Morten Bergsmo and Pablo Kalmanovitz (eds.), *Law and Peace Negotiations*, FICHL Publication Series no. 5, Second Edition, Torkel Opsahl Academic EPublisher, Oslo, 2010, pp. 8, 13 (http://www.legal-tools.org/en/doc/ef7785/).

[18] Ambos and Huber, 2011, pp. 4–5, see *supra* note 13.

[19] *Ibid*., p. 5; Ambos, 2011, p. 1073, see *supra* note 14.

impede commutation of sentence.[20] Once the individual is approved, the government prosecution ascertains criminal responsibility and the authenticity of the provided testimony before a hearing is held to determine sentence.[21] An OTP member described Colombia's complementarity approach, which facilitates executive assistance and discriminatory justice, as "very sophisticated".[22]

The Colombian government's sophistication can be seen in Ambos's observations. He concludes that while amnesty impedes domestic prosecution or investigation, a pardon constitutes a post-trial exemption the ICC is unlikely to interpret as shielding criminal responsibility through inaction.[23] Ambos also considers the elements of 'unwillingness', including shielding, unjustified delay, and lack of independence and impartiality, to be assessed cumulatively, not individually in determining unwillingness.[24] Unwillingness, Ambos asserts, is determined by the underlying bad faith expressed in the actions or omissions of the national justice system. That interpretation provides broad OTP discretion to determine a 'bad faith' departure from 'genuine' proceedings. Ambos concludes that a five-to-eight-year sentence does not constitute shielding and that rendering of only one judgment after four years does not constitute unjustified delay.[25] He views the Colombian judiciary as adequately independent of 'direct' executive influence, suggesting indirect influence is acceptable.[26]

Ambos also recognises the very low threshold of 'unable', which requires total collapse, a substantial collapse or the unavailability of the national judicial system, including inability to obtain the accused, necessary evidence or testimony, or otherwise to carry out its proceedings.[27] Perceived political interference in efforts to obtain accused, evidence or testimony, without making value judgments about a justice system's func-

[20] Ambos, 2011, pp. 1073–5, see *supra* note 14.

[21] *Ibid*., pp. 1076–78.

[22] Interview with Member of the Office of the Prosecutor, International Criminal Court, The Hague, The Netherlands, 3 December 2012.

[23] Ambos, 2011, p. 1087, see *supra* note 14.

[24] *Ibid*., p. 1089.

[25] *Ibid*., pp. 1090–91.

[26] *Ibid*., p. 1092.

[27] *Ibid*.; ICC Statute, Article 17.

tion, Ambos asserts, may constitute inability.[28] This threshold is particularly low in that it excludes economic and other pressures on domestic courts' capacity to conform to international law and mitigate the interests of government actors.[29] In justifying the weak 'unavailability' threshold, Ambos cites the ICC Statute's use of 'substantial' instead of 'partial' (collapse) as requiring an external observer to make quantitative, easily verifiable determinations of substantial legal or factual obstacles without engaging value (quality) judgments about a justice system's functioning.[30] Thus, a poorly functioning and qualitatively corrupt national justice system may still meet Ambos's complementarity threshold as long as the system is not, for example, quantifiably over-burdened or under-capacitated.[31] Colombia's Constitutional Court, in requiring a "clear absence of necessary objective conditions to carry out proceedings", adopts Ambos's position.[32]

The OTP also determined, most importantly, that subject to appropriate sentencing, those bearing greatest responsibility have already been subject to national proceedings in Colombia.[33] By initiating 'proceedings' of ambiguous voracity and despite convicting only 11 persons after seven years of operation, Colombia's efforts continue to satisfy OTP standards.[34] The OTP's conclusions appear to correctly apply very weak, imprecise law that severely constrains the extent to which States have delegated international crimes prosecution. The very top of the Colombian

28 Ambos, 2011, p. 1093, see *supra* note 14.

29 Wolfgang Friedmann, *The Changing Structure of International Law*, London, Stevens and Sons, 1964, pp. 146–47; Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts", in *European Journal of International Law*, 1993, vol. 4, no. 1, pp. 159–83; Jan Paulsson, *Denial of Justice in International Law*, Cambridge University Press, Cambridge, 2005, p. 4; and André Nollkaemper, "The Independence of the Domestic Judiciary in International Law", in *The Finnish Yearbook of International Law*, 2006, vol. 17, pp. 261–305.

30 Ambos and Huber, 2011, pp. 6–7, see *supra* note 13.

31 *Ibid*., p. 7.

32 *Ibid*.

33 ICC-OTP, *Situation in Colombia – Interim Report*, November 2012, p. 50.

34 ICC-OTP, 2011, pp. 16–17, see *supra* note 5; International Center for Transitional Justice, "Justice and Peace: Progress and Great Challenges", 5 October 2012, available at https://www.ictj.org/news/justice-and-peace-progress-and-challenges, last accessed on 5 April 2015.

elite has been commonly cited as involved in the conflict's crimes.[35] However, the International Center for Transitional Justice ('ICTJ') found that Colombia's prosecution focused on illegal armed groups and low- and mid-level combatants rather than political, military and business leaders that aid and abet, or wield command control over, State security forces.[36] It is the very impunity provided to political, military and business leaders that constitutes the primary incentive for armed groups to prosecute crimes themselves.

The ease with which complementarity was satisfied emboldened the Colombian government. In 2012 it passed the Legal Framework for Peace ('LFP') as the basis for peace talks. The LFP, approved by the Constitutional Court, provides for suspension of sentences, allowing no incarceration for those convicted.[37] The OTP, in attempting to accommodate the Colombian government, stated it would approach reduced and suspended sentences on a case-by-case basis considering whether, in the circumstances, sentences are "consistent with an intent to bring the person concerned to justice".[38] However, in a leaked private letter to Colombia's Constitutional Court,[39] the prosecutor Fatou Bensouda signalled total commutation or suspension of sentence would impede complementarity:

> [T]he duration of the term of imprisonment may be a relevant factor in cases where the penalty is so disproportionate that the intent to bring the person concerned to justice can be questioned. For example, the Informal expert paper *The principle of complementarity in practice*, advanced by the Office of the Prosecutor, considered that "amnesties, pardons, or grossly inadequate sentences issued after the proceeding, in a manner that brings into question the genuineness of the proceedings as a whole" can be indicators of "shielding" or "intent". […] Since the suspension of a prison

35 An example is the use of death squads by former President Alvaro Uribe's brother alleged by a former police officer who states he was paid to turn a blind eye. See Associated Press, "Retired Colombian Police Officer Accuses Uribe's Brother of Leading 1990s Death Squad", in Fox News, 24 May 2010.

36 ICTJ, 2012, see *supra* note 34.

37 Helen Murphy, "Colombia's High Court rules FARC Peace Talks Law Constitutional", in Reuters, 29 August 2013.

38 ICC-OTP, 2012, p. 64, see *supra* note 33.

39 Rodrigo Uprimny, "Cartas Bombas", in *El Espectador*, 24 August 2013; and "Una 'Carta Bomba'", in *Semana*, 17 August 2013.

> sentence means that the accused does not spend time incarcerated, I would like to warn you that this would be manifestly inadequate for individuals allegedly bearing the greatest responsibility for the commission of war crimes and crimes against humanity.[40]

Another leaked letter also insisted those "most responsible" be pursued although the LFP appears to accommodate this demand.[41] Despite this warning from the ICC prosecutor, Colombia's Constitutional Court approved the LFP, but allowed scope for agreement via rejection only of total suspension. The prosecution responded with further accommodation in its 2013 report, citing the Constitutional Court's exclusion of total suspension of sentence for those most responsible.[42] The ICC's position suggests that anything less than a 'total' suspension of sentence may demonstrate sufficient Colombian commitment to compatibility with complementarity. The ICC position remains ambiguous as to whether, for example, a week of incarceration would be acceptable for those most responsible for core international crimes. However, it does note in its 2014 report that

> the Office has informed the Colombian authorities that a sentence that is grossly or manifestly inadequate, in light of the gravity of the crimes and the form of participation of the accused, would vitiate the genuineness of a national proceeding, even if all previous stages of the proceeding had been deemed genuine.[43]

The Colombian government's sophisticated efforts signal the importance of engagement at the prosecution table prior to ICC-OTP opening of investigations.

11.4. Post-Investigation Contestation: Raising the Bar

While the complementarity threshold is very low for situations prior to the initiation of an investigation, the bar is significantly raised once the prosecution initiates investigations. The cost of failing to 'sit at the table'

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40 Translated letter dated 25 July 2013, from the Prosecutor, ICC-OTP, to the Government of Colombia, received 28 October 2013 via e-mail from the translating author, an NGO worker.

41 "Una 'Carta Bomba'", in *Semana*, 17 August 2013.

42 ICC-OTP, 2013, p. 32, see *supra* note 7.

43 ICC-OTP, *Report on Preliminary Examination Activities 2014*, 2 December 2014, p. 27.

via a 'Colombia-like' negotiated domestic process raises the level of independence and integrity the ICC requires of a domestic process. After the ICC prosecution begins investigations, the ICC Statute requires domestic proceedings cover the same 'case' or conduct as that investigated by the court – a condition not required of States able to satisfy complementarity prior to ICC initiation of investigations. The Statute also requires post-ICC initiation of investigations that States are able and willing genuinely to carry out proceedings.[44] The Appeals Chamber, citing Jo Stigen's requirement of an examination of some detail reflecting a sufficient measure of thoroughness, should also include "steps directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses".[45]

The burden of proving those steps are taken falls to the State, which requires "evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case".[46] The ICC Pre-Trial Chamber found that Kenyan government "assertions" that ICC indictees were being investigated were of insufficient specificity and probative value to discharge the burden of proof.[47] However, the specific reference in Article 17(3) to inability "to obtain the accused, or the necessary evidence and testimony", or otherwise to "carry out proceedings" specifies that in order to meet the complementarity threshold, a criminal justice process must enjoy the investigative capacity to obtain evidence and to retain testimony from witnesses. The OTP demanded witness protection

44 International Criminal Court, Pre-Trial Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Situation in Libya, ICC-01/11-01/11, Decision on the Admissibility of the Case against Abdullah Al-Senussi ('Admissibility of the Case against Al-Senussi'), 11 October 2013.

45 International Criminal Court, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Situation in the Republic of Kenya ('*Prosecutor v. Francis Kirimi Muthaura*'), ICC-01/09-02/11 OA, 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", 30 August 2011, pp. 23, 15, citing Stigen, 2008, p. 203, see *supra* note 4.

46 *Prosecutor v. Francis Kirimi Muthaura*, 30 August 2011, p. 23, see *supra* note 45.

47 *Ibid*., pp. 32–33.

capacity of the Kenyan government in 2009 discussions regarding complementarity.[48]

The Pre-Trial Chamber, in the *Saif Al-Islam Gaddafi* case, also expressed concern about the inability of judicial and governmental authorities to ascertain control, access witness testimony and provide adequate witness protection.[49] The Pre-Trial Chamber cites elements absent from consideration in Colombia, such as governmental failure to protect detained former regime members from torture and mistreatment.[50] Unlike the threshold for trials, the ICC lowers the bar considerably when determining State ability to investigate and prosecute "in the context of the relevant national system and procedures", meaning "in accordance with the substantive and procedural law applicable" in that State.[51] Libyan law and procedure provide for protective measures. However, the Libyan government was unable to exercise control over detention facilities, or even to access, let alone protect, witnesses.[52] Further, the Pre-Trial Chamber appeared to require independent witness protection enjoying practical capacity and independence to cater to defence and prosecution witnesses.[53] It also required that the defendant be provided counsel, but remained ambiguous as to the accused's right to counsel during interrogation, given the right's absence from the Libyan Code of Criminal Procedure.[54]

In the *Abdullah Al-Senussi* case, the ICC appeared to reconsider the bar set in the *Saif Al-Islam Gaddafi* case. In *Al-Senussi*, the Libyan government, by providing material evidence of a difficult yet ongoing investigation, secured an inadmissibility finding.[55] Despite the abduction of an accused's counsel, the failure at the time of judgment to provide legal rep-

48 ICC-OTP, Agreed Minutes of the Meeting between Prosecutor Moreno Ocampo and the Delegation of the Kenyan Government, Press Release, The Hague, The Netherlands, 3 July 2009.

49 International Criminal Court, Pre-Trial Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, 31 May 2013, p. 86, para. 209.

50 *Ibid*.

51 *Ibid*., p. 82, para. 200.

52 *Ibid*., p. 83, para. 201.

53 *Ibid*., p. 87, para. 211.

54 *Ibid*., p. 88, para. 214.

55 Admissibility of the Case against Abdullah Al-Senussi, 11 October 2013, see *supra* note 44.

resentation to an accused and unavailable witness protection capacity, the situation in Libya did not "[…] necessarily entail 'collapse' or 'unavailability' of the Libyan judicial system such that it impeded Libya's ability to carry out the proceedings".[56]

The key discrepancy between the *Gaddafi* and *Al-Senussi* cases, other than a demonstrated investigation, appeared to be the fact that Al-Senussi was in the hands of the government. Sceptical commentary of the decision cites Al-Senussi's potential disclosure before the ICC of security details between Gaddafi, the CIA and MI6 as potentially motivating ICC apprehension about hosting the trial.[57] Robert Fisk observes that "when lawyers for Senussi demanded to know if MI6 operatives had interrogated him during his stay in Mauritania – and before his illegal rendition to Libya – Foreign Secretary William Hague declined to reply".[58]

Unlike the Kenyan government, the Libyan government bore no political risk of self-incrimination through providing sufficient evidence to demonstrate pursuit of the same persons and conduct. By refraining from providing genuine and potentially incriminating information, Kenya failed to demonstrate concrete and progressive steps to address the same case as the individuals and conduct before the ICC.[59] Kenya and Colombia are similar in that neither the governments nor the Security Council referred the situations, yet the OTP treated them differently. A former senior OTP member viewed Colombia as "a situation that should have been engaged" where "the Court did not provide an effective threat" and was not consistent.[60] The member noted: "The Prosecutor had made it clear he wanted to assist and co-operate in Colombia rather than apply pressure to see results at the national level. The opposite approach was taken in Kenya".[61]

The OTP experienced exaggerated pressure to initiate Kenyan investigations after the UN Secretary General, Kofi Annan, employed his

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56 *Ibid*., pp. 139–140.

57 Robert Fisk, "Is The Hague Making a Mockery of Justice so the CIA and M16 Can Save Face?", in *The Independent*, 31 October 2013.

58 *Ibid*.

59 Admissibility of the Case against Abdullah Al-Senussi, 11 October 2013, p. 88, see *supra* note 44.

60 Interview with Paul Seils, former Head of Situation Analysis, ICC-OTP, New York, USA, 16 December 2011.

61 *Ibid*.

significant agency as a norm entrepreneur by providing a list of names and accompanying evidence to the ICC Prosecutor. The Kenyan Judge who investigated the abuses had requested Annan provide the information if Kenyan complementarity efforts were not forthcoming. While the ICC prosecution still retained discretion, it constrained itself by providing a number of deadlines for the Kenyan government to initiate "genuine judicial proceedings against those most responsible".[62] Kenya's failure to meet these deadlines, after parliamentary refusal to approve a special tribunal, indicated parliament's disagreement with the executive as to the political cost of delegating authority. They refused to sit at the prosecution table. The ICC prosecution proceeded with investigations and indictments. Kenyan power dynamics shifted considerably when accused members of parliament won elections and took control of the executive in April 2013.

Other governments' token steps illuminate Kenya's complementarity failure to prevent ICC investigations. Guinea, for example, sought to assert absence of culpability by hiring former Special Court for Sierra Leone Prosecutor, David Crane, and Special Court investigator, Alan White, to assess its culpability. The Crane report, in alignment with the Guinean military's view, attributes responsibility for 2009 killings to a specific army unit, excluding Guinean junta culpability.[63] The report, which contradicted UN findings, was found not to be credible by the International Center for Transitional Justice.[64] The Guinean government then adopted incremental, but not self-incriminating, domestic processes sufficient to satisfy the OTP's complementarity threshold.[65]

11.5. Ugandan Utilisation of ICC Proceedings against Adversaries

Uganda has set itself a pre-emptive seat at complementarity's prosecution table. What distinguishes Uganda from Kenya is that President Yoweri Museveni's engagement with the ICC prosecution was calculated to initiate a domestic process signalling intent to prosecute crimes while stigma-

62 Chris Mahony, *The Justice Sector Afterthought: Witness Protection in Africa*, Institute for Security Studies, Pretoria, 2010, p. 132.

63 "Guinea Conakry: Stadium Killings Inquiry Not Credible", in Radio Netherlands Worldwide, 4 March 2010.

64 *Ibid*.

65 ICC-OTP, 2013, pp. 42–45, see *supra* note 7.

tising and isolating the opposition Lord's Resistance Army ('LRA') with ICC indictments. Ugandan engagement placated the OTP inclination to investigate Ugandan People's Defence Forces' ('UPDF') crimes. Although gravity and a narrow interpretation of forced displacement had already extinguished ICC jurisdiction over UPDF crimes, the Ugandan government had also provided evidence of domestic UPDF investigations.[66] Because Ugandan engagement prevented ICC investigation of UPDF crimes, Uganda avoided the heightened obligation to investigate the 'same cases'.

The Ugandan government's complementarity calculation is reflected in the views of its consultant, Payam Akhavan. Akhavan, citing the US State Department, concludes that Uganda's justice system is "recognized for its independence and […] has not collapsed".[67] Museveni, shortly after he referred the Ugandan situation, suggested the Ugandan government would prosecute crimes committed by the UPDF.[68] This assertion signalled to the ICC prosecution that Uganda would employ the primacy afforded it by complementarity if the prosecutor pursued UPDF crimes. The Ugandan sovereignty cost of fully implementing domestic complementarity is apparent in previous politically sensitive prosecutions. Museveni has experienced pressure to prosecute corruption involving ministers, family members and elements within the UPDF. In the case of fictional UPDF soldiers drawing salaries, Museveni used politicised military prosecution to purge UPDF elements viewed as opponents, rather than pursue those most culpable.[69] A low 'willingness' complementarity threshold, as established in the Libyan and Colombian cases, allows politicised prosecutions. This lever of case selection control constitutes the most powerful government instrument after explicit jurisdictional exclusion. It also constitutes the primary self-interest for armed forces in contemplating prosecution of core international crimes. The normative power of complementarity was diminished by the ICC's acceptance of jurisdic-

66 Interview with Ugandan Official, The Hague, The Netherlands, 1 December 2012.

67 Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court", in *American Journal of International Law*, 2005, vol. 99, no. 2, p. 415. While the US is an ally of President Museveni's, it should be noted that State Department Human Rights Reports do incriminate the UPDF.

68 *Ibid*., p. 411.

69 Mahony, 2010, p. 143, see *supra* note 62.

tion despite Uganda's ostensible willingness and ability genuinely to prosecute crimes.

OTP personnel inconsistently cite complementarity as further justification for avoiding UPDF indictments. Some OTP personnel cited gravity as the sole determinant.[70] However, other OTP members, as well as Ugandan government personnel, viewed Ugandan processes at the time of investigation as satisfying complementarity.[71] The OTP compiled a complementarity assessment of the military court system, including a detailed report of the number of prosecutions comparative to the number of crimes, the processes' quality, and draft legislation enabling prosecution of ICC Statute crimes.[72] The assessment, which has not been made public, drew on information from the public prosecutor's office, the Human Rights Commission, human rights organisations and a British government White Paper on the UPDF.[73] Where elements of compliance were questionable, the OTP was willing to assist, including with Human Rights Commission complaints and process effectiveness.[74] However, complementarity considerations ceased, along with engagement, once it was determined that UPDF cases would not be pursued due to insufficient gravity.[75] While civil society observers do not commonly view current or former processes as authentic, independent or capable of holding those most responsible accountable, Uganda's meagre efforts likely met the low complementarity threshold.[76]

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70 Interview with Matthew Brubacher, former Analyst, Jurisdiction, Complementarity and Cooperation Division, ICC-OTP, via telephone, 15 July 2013; and Interview with OTP Member, 2012, see *supra* note 22.

71 Interview with Gavin Hood, former Senior Policy Adviser to the Chief Prosecutor, ICC-OTP, via telephone, 24 May 2013.

72 Interview with Brubacher, 2013, see *supra* note 70; Interview with Duncan Laki Muhumuza, Ugandan Mission to the United Nations, New York, USA, 5 November 2012; and Barney Afako, "Country Study V: Uganda", in Max du Plessis and Jolyon Ford (eds.), *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries*, Institute for Security Studies, Pretoria, 2008, p. 93.

73 Interview with Brubacher, 2013, see *supra* note 70.

74 *Ibid*.; Interview with Hood, 2013, see *supra* note 71.

75 Interview with Brubacher, 2013, see *supra* note 70.

76 Interview with Nicole Zarifis, Justice Law and Order Sector Foreign Adviser, Kampala, Uganda, 18 November 2012; Interview with Adam Branch, Academic, Makerere University, Kampala, Uganda, 14 November 2012; and Interview with Lyandro Komakech, Refugee Law Project, Kampala, Uganda, 16 November 2012.

OTP gravity determinations excluding UPDF crimes considerably diminish the integrity of complementarity's compliance pull. However, complementarity considerations may re-emerge were the Ugandan government to apprehend LRA accused and decide to try them domestically, extinguishing sovereignty costs associated with their trial before the ICC. Domestic trials would diminish external pressure for accompanying ICC prosecution of UPDF cases.[77] Similarly, controlled domestic trials can avoid unforeseen consequences, including subpoenas of government personnel to testify to politically sensitive issues.[78] In early January 2015, the LRA commander, Dominic Ongwen, was taken into custody by US forces after surrendering. After negotiations between the African Union, the US, the Central African Republic and the Ugandan governments, Ongwen was provided to the ICC for prosecution.[79]

In 2004 the government, with US assistance, drafted an International Criminal Court Bill, which was finally passed in 2010.[80] The ICC Act provided Uganda requisite domestic jurisdiction over international crimes and modes of responsibility for the International Crimes Division ('ICD') of Uganda's High Court to hear cases.[81] Norm entrepreneurs have protested a combination of constraints including the Court's hearing of only a single LRA case, an absence of political will to try UPDF cases and poor donor support.[82] Norm entrepreneurs also cite the pre-existence of the Amnesty Act, providing amnesty for surrendering rebels who re-

77 Interview with former Member, Ugandan National Security Council, 2012; and Interview with Branch, 2012, see *supra* note 76.

78 Interview with Komakech, 2012, see *supra* note 76.

79 Marie Harf, Deputy Spokesperson, Daily Press Briefing, United States Department of State, Washington, DC, 13 January 2015.

80 Afako, 2008, p. 93, see *supra* note 72; Interview with Michael Ronning, USAID, Kampala, Uganda, 16 November 2012; and International Criminal Court Act, Act 11 of 2010, Uganda Gazette, no. 39, vol., CIII, 25 June 2010 ('ICC Act').

81 ICC Act, 2010, Sections 7–9, 11; and High Court of Uganda International Crimes Division Practice Directions, Legal Notice no. 10 of 2011, Legal Notices Supplement, Uganda Gazette, no. 38, vol. CIV, 31 May 2011.

82 Interview with Branch, 2012, see *supra* note 76; Interview with Zarifis, 2012, see *supra* note 76; Interview with Beth Van Schaack, former Deputy to Ambassador-At-Large for War Crimes Issues, US Department of State, Washington, DC, 8 November 2012; Interview with Komakech, 2012, see *supra* note 76; and Human Rights Watch, *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division*, Human Rights Watch, New York, 2012.

nounce and abandon war or armed rebellion.[83] The Act, which contravenes ICD jurisdiction, provides the Minister of Internal Affairs discretion to propose a list of names to parliament for amnesty approval.[84] In the ICD's sole case of the LRA commander, Thomas Kowelo, the Constitutional Court upheld amnesty, ordered the Amnesty Commission and the Director of Public Prosecutions to grant Kowelo a certificate of amnesty, and cease his trial.[85] All that appears to be required for complementarity compliance is for commutation of sentence to be used, as in Colombia, instead of amnesty.

Norm entrepreneurs cite enormous demands for 'credible justice' without addressing the technical complementarity threshold. Human Rights Watch's examination of the ICD found:

> For the ICD to render credible justice, including addressing crimes committed by both the LRA and Ugandan army and overcoming the legal obstacles, the Ugandan government will have to provide uncompromised political support. Donors also have a critical role to play, including by funding key needs for the ICD and stressing the importance of accountability for crimes committed by both sides.[86]

A group of donors to Ugandan justice sector reform, the Justice Law and Order Sector ('JLOS'), make more modest complementarity-oriented ICD demands of significant revision, particularly capacity to deliver prison terms.[87] JLOS actors, particularly in the context of a scaling down of ICD capacity,[88] are not optimistic about future ICD independence.[89] Early US enthusiasm for domestic processes diminished over time,

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83 *Ibid*.; Amnesty Act, Section 3(1), Chapter 294, 21 January 2000 ('Amnesty Act 2000').

84 Amnesty Act 2000, Section 2, see *supra* note 83; and Human Rights Watch, 2012, p. 5, see *supra* note 82.

85 Constitutional Court of Uganda, *Thomas Kwoyelo Alias Latoni v. Uganda*, Constitutional Petition no. 036/11, arising out of HCT-00-ICD-Case no. 02/10, 22 September 2011.

86 Human Rights Watch, 2012, p. 2, see *supra* note 82.

87 Interview with Zarifis, 2012, see *supra* note 76.

88 *Ibid*.; Interview with Justice Dan Kiiza, International Crimes Division (ICD), High Court of Uganda, Kampala, 15 November 2012; and Interview with Joanne Kagezi, ICD Prosecutor, interview no. 53, Kampala, Uganda, 19 November 2012.

89 Interview with Zarifis, 2012, see *supra* note 76.

as the threat of ICC pursuit of UPDF crimes diminished.[90] In May 2013, with US government support, Uganda reinstated Amnesty Act provisions for LRA combatants.[91]

11.6. Constraints on the ICC's Independence in Case Selection

The Ugandan government feels under insufficient pressure to use commutation of sentence rather than amnesty, despite amnesty achieving the same goal – exclusion of the threat of ICC prosecution of UPDF crimes. This section considers key sources of pressure on the ICC prosecution that constrain its case selection independence, thereby diminishing pressure on the Ugandan government to engage in authentic prosecution of core international crimes. The sources of pressure include fiscal constraints, the threat of State non-cooperation, the establishment of alternative justice institutions, and accusations that OTP case selection discriminates against Africans. These instruments advance a realist State objective that further controls ICC case selection independence – the closure of situations, of which Uganda may be the first. In this environment, norm entrepreneurs have diminished effect on ICC case selection independence, including over interpretation of complementarity. More importantly, States or armed forces engaged in prosecuting core international crimes feel more confident that the ICC will not pursue them.

11.6.1. Budgetary Constraint

The first instrument to consider is budgetary constraint. The OTP, in attempting to project efficiency, refrained from mentioning budget during its early years.[92] However, budgetary restraints have started to take effect as caseloads began to increase without proportionate budgetary expansion.[93] ICC Prosecution personnel assert that case selection will still pri-

[90] Interview with Officer, US Embassy, Kampala, Uganda, 16 November 2012; Interview with Member, USAID, Kampala, Uganda, 16 November 2012; and Interview with Kiiza, 2012, see *supra* note 88.

[91] Interview with US Embassy Officer, 2012, see *supra* note 90; and Amnesty Act (Revocation of Statutory Instrument No. 34 of 2012), Uganda Gazette, Instrument 2013, 24 May 2013.

[92] Interview with OTP Member, 2012, see *supra* note 22.

[93] *Ibid*., Interview with Pascal Turlan, Judicial Cooperation Adviser, ICC-OTP, The Hague, The Netherlands, 5 December 2012; and Interview with Cecilia Balteanu, Head of Field

oritise those most grave cases despite the prosecutor's statements, since 2011, that case selection is contingent on budgetary expansion.[94] Budgetary pressure is exacerbated by State pressure to engage other incidents or situations including in the Democratic Republic of Congo, Darfur and Myanmar.[95] Constrained budgets would have exaggerated effects where the ICC prosecution seeks to gather evidence in relation to the UPDF or any other party to a conflict that triggered ICC jurisdiction, particularly in the situation of a State self-referral. An attempt to investigate UPDF crimes in Uganda, without a global power providing information, renders the ICC particularly vulnerable to co-operative impediments. Unlike the situations in Darfur or Libya, where Security Council powers provide evidential support, State referrals from Western allies leave the OTP dependent on a direct party to the conflict to acquire evidence. An undercapacitated court exaggerates the problem of acquiring incriminating evidence in a case such as that involving the Ugandan armed forces or forces supported by Uganda or other co-operating States.[96] Budgetary constraints, therefore, constitute an entrenchment of institutional capture and a statist safeguard against entrepreneur-like ICC prosecution behaviour.

Budgetary constraint can also trigger resource reallocation, diminishing the chance of case selection reconsideration in a given situation.[97] The OTP has come under pressure to reallocate Ugandan resources, increasing the possibility of situation exit, and Ugandan abandonment of an ostensibly reassuring complementarity system – a system without politically sensitive consequence.[98] Financial pressure is particularly useful for global powers best positioned to provide evidence incriminating adversaries or complementarity support to protect allies.[99] In 2012, for example,

Strategic Coordination and Planning Unit, Registry, The Hague, The Netherlands, 4 December 2012.

94 Interview with OTP Member, 2012, see *supra* note 22; Interview with Turlan, 2012, see *supra* note 93; and ICC-OTP, *Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011)*, 2 November 2011, p. 5.

95 Interview with OTP Member, 2012, see *supra* note 22; Interview with Turlan, 2012, see *supra* note 93; and Nzau Musau, "Kenya: ICC Threatens to Drop Cases for Lack of Funds", in *The Star*, Kenya, 31 July 2013.

96 Interview with Turlan, 2012, see *supra* note 93.

97 Interview with Balteanu, 2012, see *supra* note 93.

98 *Ibid*.

99 *Ibid*.

the United Kingdom and Germany successfully sought to cut the ICC's budget, increasing prosecution dependence on State co-operation.[100]

11.6.2. Influence of Powerful States

To this end, US ICC policy has evolved to prefer domestic venues for dealing with crimes and, where they fail, mixed international/domestic processes like the Special Court for Sierra Leone may step in, leaving solely international processes as the last resort.[101] To that extent, the US policy generally reflects a theme the ICC itself increasingly seeks to emphasise – that the ICC is a court of 'last resort'.[102] Increasing space for powerful State influence appears to be opened by budgetary pressure. The ICC's reduced 2013 budget prompted consideration of Security Council funding, US government funding or voluntary contributions for Security Council referred situations.[103]

The threat of elevated US pressure towards the ICC, were its initial case selection in situations such as Colombia and Uganda to confront US interests, can be seen in its original policy of non-cooperation and active obstruction towards the ICC. President George W. Bush's Under Secretary for Arms Control and International Security, John Bolton, led policy towards the ICC. His position was made clear in his testimony to the Senate Foreign Relations Committee after the signing of the ICC Statute. He stated:

> Our main concern should be for the President, the cabinet officers on the National Security Council, and other senior leaders responsible for our defense and foreign policy. They are the real potential targets of the ICC's politically unac-

[100] ICC, Assembly of States Parties, 11th Session, The Hague, 14–22 November 2012, ICC-ASP/11/20, Official Records, vol. 1, p. 13; and The Greens/European Free Alliance, "10th Anniversary of ICC: Budget Cuts Send Wrong Signal", News, 13 November 2012, available at http://www.greens-efa.eu/de/10th-anniversary-of-icc-8522.html, last accessed on 6 April 2015.

[101] Interview with Clint Williamson, former US Ambassador for war crimes issues, via telephone, 20 November 2012.

[102] Tina Intelmann, "International Criminal Court – African Union", in *New Business Ethiopia*, 11 October 2013.

[103] Interview with OTP Member, 2012, see *supra* note 22.

> countable prosecutor and that is the real problem of universal jurisdiction.[104]

Bolton advised that the US adopt the following policy towards the ICC:

> I call it "the Three Noes": no financial support, directly or indirectly; no collaboration; and no further negotiations with other governments to improve the statute. This approach is likely to maximize the chances that the ICC will wither and collapse, which should be our objective. The ICC is fundamentally a bad idea. It cannot be improved by technical fixes as the years pass, and in fact it is more likely than not to worsen.[105]

This position materialised in a number of ways. First, the US sought Article 98 agreements with many States Parties which obligated those States to hand over US persons to US custody rather than to the ICC. Second, the US passed the American Servicemembers' Protection Act ('ASPA'). The ASPA restricts US co-operation with the ICC and with States Parties unless "in the US interest", requires US personnel impunity for US peacekeeping support, and allows the President to use "any means necessary" to free US citizens and allies from ICC custody.[106]

Leading actors within the Central Intelligence Agency disagreed with Bolton, viewing the ICC as a potential instrument of pressure to be applied to adversaries.[107] The impact of Bolton's concern on the Bush administration is reflected by the fact that efforts to achieve Article 98 agreements were reported to the White House by the Secretary of State two to three times per week.[108] The case of Darfur, Sudan was critical in shifting US policy towards the ICC. In 2005 the US stated its preference of a special, *ad hoc* or otherwise, UN/African Union hybrid tribunal.[109] After failing to persuade the Security Council to pursue an *ad hoc* or hy-

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[104] US Senate, Subcommittee on International Operations, Committee on Foreign Relations, *Is a U.N. International Criminal Court in the U.S. National Interest?*, US Government Printing Office, Washington, DC, S. Hrg. 105–724, 23 July 1998.

[105] *Ibid*.

[106] American Servicemembers' Protection Act of 2002, 107th Congress, 2002, H.R.4775, Sections 2004, 2005, 2006, 2007 and 2008.

[107] Interview with former Chief of Staff to the United States Secretary of State, Colonel Larry Wilkerson, Washington, DC, 7 July 2014.

[108] *Ibid*.

[109] US Department of State, Daily Press Briefing, Richard Boucher (spokesman), Washington, DC, 1 February 2005.

brid court rather than a Security Council referral to the ICC, the US position softened. The softening took the form of policy revision that allowed active co-operation where ICC case selection and US interests were congruent. However, the threat of non-cooperation persists were the ICC to employ case selection not viewed by the US as "responsible".[110] A prosecutor might favour US-friendly States in interpreting complementarity because of a perceived implicit threat from the US or States of essential strategic importance to other permanent members of the Security Council.

In time, the United States came to view the ICC as acceptable, on a case-by-case basis, where it acted in its interests. The Ugandan, Colombian and other governments enjoying warm relations with the US may presume that the threat of a return to the Bolton policy deters the ICC prosecution from pursuit of UPDF or other cases antithetical to US interests. This consideration, along with the knowledge of the Court's vulnerable infant status informed the Ugandan government's view that it was safe to refer the situation without concern as to government or UPDF indictments.[111]

As the global economic order has shifted, allowing China and Russia to become less acquiescent at the Security Council, the dependency of the ICC on State self-referral rather than Security Council referral has increased. Complementarity, as already discussed, makes *proprio motu* assertion of jurisdiction less probable. A less active Security Council leaves

[110] In 2006 the US Department of State Legal Adviser, John Bellinger, while insisting the Bush administration would never allow Americans to be tried by the ICC, stated, "we do acknowledge that it has a role to play in the overall system of international justice". In a May 2006 speech, Bellinger said "divisiveness over the ICC distracts from our ability to pursue these common goals" of fighting genocide and crimes against humanity. Jess Bravin, "US Warms to Hague Tribunal: New Stance Reflects Desire to Use Court to Prosecute Darfur Crimes", in *The Wall Street Journal,* 14 June 2006. That same year, Republican Senator John McCain and former Senator and presidential candidate, Bob Dole, stated in an op-ed:

> US and allied intelligence assets, including satellite technology, should be dedicated to record any atrocities that occur in Darfur so that future prosecutions can take place. We should publicly remind Khartoum that the International Criminal Court has jurisdiction to prosecute war crimes in Darfur and that Sudanese leaders will be held personally accountable for attacks on civilians.

John McCain and Bob Dole, "Rescue Darfur Now", in *The Washington Post*, 10 September 2006.

[111] Interview with former Member, Ugandan National Security Council, 2012.

the ICC prosecution more dependent on State referrals as a trigger of jurisdiction – further empowering weak States' bargaining positions with the ICC prosecution.

Weak States' negotiating position also benefits from a shifting global economic order via increased options for economic patronage. That competition diminishes international crimes-related pressure from powerful States and international justice's compliance pull. China recently made a statement in support of the African Union's pro-Kenya ICC position and recently commenced increased security co-operation to accompany its significant economic engagement.[112] The shifting global economic and military order can be seen in Figures 1 and 2 that indicate China's post-2000 economic emergence as well as US predominance in both the economic and military spheres during the 1990s.

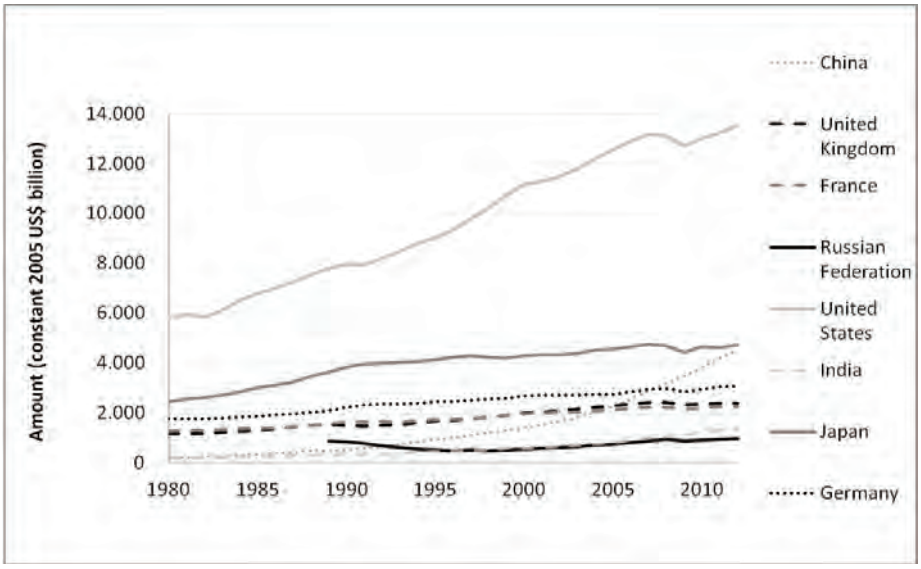

Figure 1: Country GDP, 1980–2012[113]

[112] Statement by Mr. MA Xinmin, Counsellor of the Department of Treaty and Law of Ministry of Foreign Affairs of the People's Republic of China, 12th Session of the Assembly of States Parties to the ICC Statute, The Hague, November 2013 ('Statement by MA Xinmin'); Simon Ndonga, "Kenya, China pact to secure borders, waters", in *Capital News*, Kenya, 3 January 2014.

[113] World Development Indicators, 1960–2014, The World Bank, available at http://data.worldbank.org/data-catalog/world-development-indicators, last accessed on 7 April 2015.

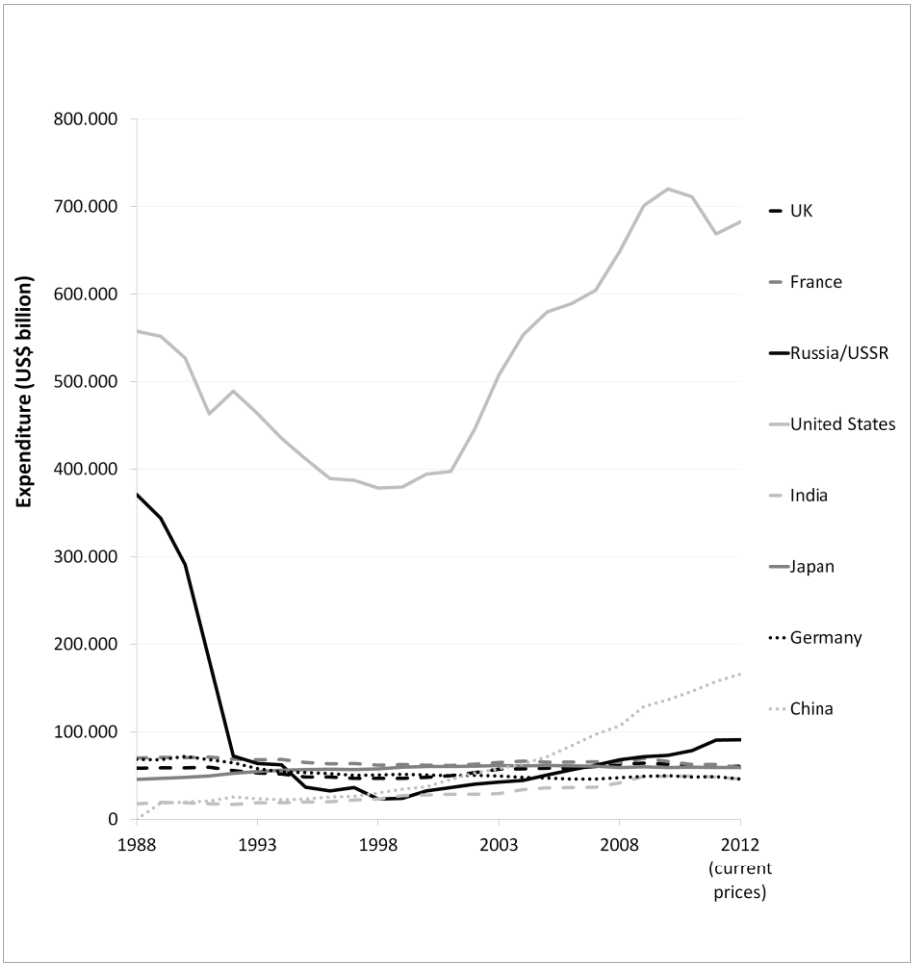

Figure 2: Military Expenditure, 1988–2012

African Union pressure perhaps provides one of the greatest deterrents to ICC prosecution pursuit of Ugandan government officials. Budgetary constraints exaggerated and have been exaggerated by co-operative leverage. The reluctance of Western powers to provide intelligence incriminating Museveni, Salim Saleh or other actors in international crimes in Uganda or the Democratic Republic of Congo is instructive to ICC prosecution inability to proceed with such cases. Goldstein *et al*.'s realist explanation of codified international institutions asserts that dominant

powers bind weak members and enforce rules only where they are able to bear the enforcement costs.[114] Former senior personnel within the ICC suspected colleagues of preferring perceived Western interests, particularly those of the United Kingdom, ahead of independent application of law to fact.[115] Key actors that worked on the Luis Moreno Ocampo's campaign to become prosecutor, including Gavin Hood from the British Foreign and Commonwealth Office and Silvia Fernández de Gurmendi, were then hired into case selection decision-making roles within the Office of the Prosecutor.[116] Those individuals informed key case selection decisions as to whether to formally open investigations into situations and which cases to pursue within those situations.[117] Western powers' shaping of ICC case selection away from allies such as Museveni, Paul Kagame, Joseph Kabila, François Bozizé, Alassane Ouattara and their regimes, and towards adversaries, including the Sudanese and Libyan leadership, reinforces Goldstein *et al*.'s theory.[118] However, the ICC also redistributes a great degree of jurisdiction-triggering power from the Security Council to State Parties. African governments' enthusiastic embrace in referring situations to direct the ICC against adversaries has been tempered by Security Council direction of the ICC against African leaders. Similarly, African leaders also bear antagonism towards the ICC prosecutor and Kofi Annan's triggering of the Kenyan situation.

11.6.3. Backlash of African States

African Union pressure perhaps provides one of the greatest deterrents to ICC prosecution pursuit of Ugandan government officials. Budgetary constraints exaggerated and have been exaggerated by co-operative leverage. African leaders clothe their attempts at case selection control in anti-colonial rhetoric that resonates among domestic constituencies by casting

[114] Goldstein *et al*., 2000, see *supra* note 8.

[115] Interview with former Senior Member of the ICC, 28 November 2012, San Francisco, USA; and interview with former Rome Conference Delegate and former Member of the ICC Office of the Prosecutor, The Hague, The Netherlands, 4 December 2012.

[116] *Ibid*.

[117] *Ibid*.

[118] Interview with former Member, Ugandan National Security Council, 2012.

the ICC as racist.[119] This 'interest-based' strategy intertwines the norm of ICC prosecution of international crimes cases with the realist interest of protecting African governments and encroaching upon Security Council case selection control.[120] That strategy promotes self-referred situations, controlled through State co-operation, as the only cases the Court should pursue.[121] The African Union backlash, employing a number of instruments, constitutes a weak State challenge to powerful State interests reflecting powerful States' greater interest in excluding jurisdiction over aggression than in retaining sole jurisdiction-triggering discretion through *ad hoc* or hybrid courts. The African Union has requested UN Security Council deferral of proceedings against the Kenyan and Sudanese leadership and passed resolutions refusing to co-operate after the Security Council refused to comply.[122] The African Union will also provide African governments an extra complementarity filter by endowing the African Court of Human and People's Rights with jurisdiction to try international crimes. The African Union also diminished normative pressure to support ICC case selection by refusing to endorse the new prosecutor's candidacy in 2011.[123] Finally, under Kenyan and Sudanese pressure, the African Union threatened mass ICC withdrawal, a measure that would cripple the institution but jeopardise the utility of self-referred situations.[124] It reaffirmed non-cooperation on cases against the Kenyan and Sudanese leadership. The African Union resolution expressed concern as to politicised ICC indictments against African leaders, particularly in Kenya. It stressed Kenya's anti-terror leadership, the gravity of indicting Kenyan leaders, the indictments' threat to State sovereignty, and the principle of immuni-

[119] *Ibid*.; Nicholas Kulish and Marlise Simons, "Setbacks Rise in Prosecuting the President of Kenya", in *New York Times*, 19 July 2013; and Justine Boulo, "Ramtane Lamamra: La CPI ignore la souveraineté de nos pays", in *Jeune Afrique*, 10 November 2013.

[120] Kenneth Abbot and Duncan Snidal, "Hard and Soft Law in International Governance", in *International Organization*, 2000, vol. 54, no. 3, pp. 421–56.

[121] Interview with former Member, Ugandan National Security Council, 2012.

[122] Rick Gladstone, "African Call to Delay Kenyans Trials Fails at UN", in *New York Times*, 15 November 2013; and African Union, Decision on the Meeting of African States Parties to the ICC Statute, Assembly/AU/Dec.245 (XIII), Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya, 3 July 2009, p. 2.

[123] Interview with Member, US Mission to the UN, New York, USA, 2 November 2012.

[124] "Kenyatta Mulls Nuclear Option", in *Africa Confidential*, 2013, vol. 54, no. 21.

ties for senior State officials.[125] Most importantly, the African Union decided that no charges should be commenced or continued against any person acting or entitled to act as Head of State, and called for ICC suspension of the Kenyan leadership cases.[126] The African Union also established a Security Council contact group to sensitise the Security Council to African Union concerns about case selection. Arguably the African Union's most confrontational step is to request ICC Statute amendments leading to ICC Chamber discretion to allow cases to be heard in another State, to allow accused to appear via video link and to excuse accused from attending trial.[127] In a sign of the continuing normative power of international crimes prosecution, Kenyan government attempts to revoke the prosecution's *proprio motu* power was unsuccessful.[128] The African Union's request that member States advise and consult it before referring situations demonstrates the invigorated collaborative and systematic African Union approach towards preventing even unintended ICC indictment of African leaders.[129]

The pressure upon the ICC from the African Union, Kenya, Sudan and others makes ICC prosecution inclination to reconsider UPDF investigations ever more remote, particularly given China's recent expression of support for African Union positions.[130] Observing and supporting contestations from the periphery also informs the utility of methods available to Museveni were OTP confrontation to occur. Kenyan efforts are particularly instructive. Kenya's parliament has voted to leave the ICC, it has withheld evidence and witness protection co-operation, and it threatened to cease regional terrorism co-operation with the US and other Western governments.[131] It also sought to have ICC cases transferred to the East

[125] African Union, Decision on Africa's Relationship With the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1, October 2013, pp. 1–2.

[126] *Ibid*., p. 2.

[127] ICC, Assembly of States Parties, 12th Session, Resolution ICC-ASP/12/Res.7, 27 November 2013, pp. 1, 3–4.

[128] Dann Mwangi, "Revoke Power of International Criminal Court Prosecutor to Initiate Investigations", in *Standard Media*, Kenya, 12 November 2013.

[129] African Union, 2013, p. 3, see *supra* note 125.

[130] Statement by MA Xinmin, 2013, see *supra* note 112.

[131] Nicholas Kulish, "Kenyan Lawmakers Vote to Leave International Court", in *New York Times*, 5 September 2013; "The International Criminal Court (ICC) Has Directed the Government to Officially Respond to Claims by the Prosecution that It Is not Co-operating with the Court", in *Citizen News*, 10 December 2013.

African Court of Justice. In a critical indication of the normative power of international crimes prosecution, Western States, facing increasing competition to access Kenya's natural resources and growing economy, have adopted passive positions or have indicated support for Kenya in the face of civil society protestation.[132] In the end, it was the "unprecedented" threats to witnesses that caused ICC suspension of the Kenyatta case after a witness admitted giving false evidence "regarding the event at the heart of the Prosecution's case".[133]

11.7. Conclusion

Like Kenya, Museveni has sought to diversify his economic patronage by engaging China.[134] The level of pressure applied to ICC case selection begs the question as to whether it would accommodate Ugandan preferences to try LRA accused domestically. To do so may only require replacing amnesty with commutation of sentence such that accused spend an ambiguously short time incarcerated, as in Colombia. ICC case selection independence has been systematically compromised by the accommodation of State self-interest in a complementarity regime that tolerates politicised prosecution – that says to governments: 'even if you take a disingenuous seat at the prosecution table, you'll remain off the menu'. This lesson may be applicable in the recent referral of the situation in the Palestinian Occupied Territories. The Israeli government has launched its own investigations of 2014 Israel Defense Force's alleged conduct in the Gaza Strip – investigations that may well meet the complementarity

[132] "In UN Report, ICC Urges Security Council Support to Enforce Decisions", in UN News Centre, 8 October 2013; and "Investors Don't Mind Kenya's ICC Problems", in eNews Channel Africa, 16 September 2013. See, for example, The Editorial Board, "Where Water Is Gold", in *The New York Times*, 19 September 2013; "China Steps into ICC, Kenyan Fray", in United Press International, 19 September 2013; and Geoffrey Mosoku, "France Says African Union International Criminal Court Plea Could Be Looked Into", in Standard Media, Kenya, 16 October 2013.

[133] International Criminal Court, *Prosecutor v. Uhuru Muigai Kenyatta,* Situation in the Republic of Kenya, ICC-01/09-02/11, Notification of the removal of a witness from the prosecution's witness list and application for an adjournment of the provisional trial date, 19 December 2013, p. 3; and Wambui Ndonga, "Witness 'Attrition' in Kenya Cases Alarming, Says ICC", in Capital FM*,* Kenya, 4 September 2013.

[134] China has secured a USD 2 billion oil concession and holds a contract to build a dam on the Nile. See "China's CNOOC wins $2bn Uganda oil field contract", in BBC News, 26 September 2013; and "Uganda Partners China's Sino-Hydro for $1.6 billion White Nile Dam", in African Globe, 21 June 2013.

threshold and prevent ICC assertion of jurisdiction over Israel Defense Force conduct.[135] The Palestinian administration, on the other hand, has not enabled investigations of alleged conduct by Palestinians that may trigger complementarity in order to exclude the possibility of ICC prosecution of that alleged conduct.[136]

In negotiating the ICC Statute, weak States reconciled abandonment of independent exercise of jurisdiction over aggression by procuring primacy of jurisdiction under complementarity – primacy not afforded by Security Council institutions that powerful States may have pursued. Emphasising the value of encouraging domestic prosecution of international crimes has co-opted many norm entrepreneurs advocating international crimes prosecution. Failure to communicate the weakness of domestic proceedings required by complementarity undermined ICC case selection independence and the emergence of the norm of international crimes prosecution. The ICC Statute constituted a significant victory in that it expanded the territorial and personal jurisdiction of international criminal justice, particularly via provision of *proprio motu* power to the prosecutor. However, the accommodation of realist State self-interest via the principle of complementarity constituted a major regression from predecessor international courts and tribunals.

The ICC has been further constrained by pressure from weak States seeking to obtain greater control over ICC case selection while diminishing powerful State capacity to deploy the ICC against weak State governments. To this extent, contestation of case selection control between weak States and powerful States has moved from Statute negotiating in New York and Rome to the arena of functional elements such as complementarity adherence and co-operative pressure from States or regional organisations on their behalf.

The examined cases illuminate the extent to which it is now in the clear realist interest of political and military leadership of armed forces to

[135] "Israel Opens More Criminal Investigations into Its Conduct during the Summer War in Gaza", in *Sputnik*, 7 December 2014. The United States Congress has also responded with condemnation at the Palestinian decision to sign the ICC Statute and trigger investigations of IDF conduct; see Josh Ruebner, "Activists Protest One-sided Hearing on Palestine and the ICC", in *The Hill,* 6 February 2015.

[136] Oren Dorell, "Amnesty: Palestinian Groups Committed War Crimes", in *USA Today*, 26 March 2015, available at http://www.usatoday.com/story/news/world/2015/03/26/gaza-war-amnesty-palestinian-war-crimes/70492688/, last accessed on 6 April 2015.

prosecute core international crimes cases themselves. The low requirements of complementarity for domestic proceedings exclude the sovereignty cost of having to pursue politically sensitive cases. Criminal justice systems are composed of multiple interacting and interdependent entities which may be affected in subtle or overt ways to secure control of who is prosecuted and who is not.

The ICC's unwillingness to make 'value judgments' about the integrity of domestic proceedings enables not only subtle but also overt political interference to protect the realist self-interest of political or military leadership and lines of patronage. Domestic proceedings, as in the case of Colombia's domestic process, may be skewed to purge armed forces of potentially threatening elements outside the perceived patrimonial constituency of political or military leaders. As is also clear in the Colombian case, domestic proceedings may also be designed to be far more punitive towards adversaries than government or government-aligned forces. Such a design lends the government an extra instrument of pressure in negotiations – the capacity to extinguish discriminatory sentencing and provide *ad hoc* amnesty via commutation of sentence to all parties.

The Colombian case demonstrates the benefits of early engagement prior to formal opening of ICC investigation – a lower threshold. The Kenyan case demonstrates the increasing demands required of domestic civil or military prosecution of core international crimes cases when States fail to put in place even politicised 'Colombia-like' processes. While elements within the ICC believe Kenya was not treated equally to Colombia, Kenya may well have avoided formal ICC investigations were it to have launched a similar domestic process to that in Colombia. The Kenyan lesson to self-interested elements of the armed forces or political leadership is that the ICC raises the requirements to that of the same 'suspects' and 'conduct' as those investigated by the ICC when a Colombia-like process is not pursued. Domestic investigation of the same conduct and suspects poses its own costs to political and military leaders, particularly if those leaders or critical constituents must be investigated. African governments, through the African Union, now appear far more cognisant not only of the potential sovereignty costs of *proprio motu* ICC investigation, but also of the ease with which sovereignty costs can be extinguished, via early engagement in domestic prosecution of core international crimes cases.

The Ugandan case demonstrates the elevated utility of combining a domestic process that extinguishes sovereignty costs of sensitive ICC indictments while deploying ICC stigmatisation against adversaries. That scenario maximises the benefits of both excluding oneself and one's allies from the menu while placing one's adversaries squarely on it.

The examined cases demonstrate that complementarity under the ICC Statute provides armed forces and governments the greatest self-interest in prosecuting core international crimes. Many of the arguments made elsewhere in this anthology indicate that progressive and utilitarian interests are increasingly instructing State behaviour, including within the sphere of prosecution of core international crimes. The examined cases suggest the primary interest driving State behaviour remains one of realist self-interest in guarding sovereignty costs by retaining political control of core international crimes prosecutions – by taking a seat at the table, and taking yourself off the menu.

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Military Self-Interest in Accountability for Core International Crimes

Morten Bergsmo and SONG Tianying (editors)

Is it in the enlightened self-interest of armed forces to have perpetrators of core international crimes brought to justice? This anthology adds the 'carrot' perspective of self-interest or incentives to the common rhetoric of 'stick' – legal obligations and political pressures. Twenty authors from around the world discuss why military actors themselves often prefer accountability: Richard Saller, Andrew T. Cayley, William K. Lietzau, William J. Fenrick, Arne Willy Dahl, Richard J. Goldstone, Elizabeth L. Hillman, Bruce Houlder, Agus Widjojo, Marlene Mazel, Adel Maged, Kiki A. Japutra, Christopher Mahony, Christopher Jenks, Franklin D. Rosenblatt, Roberta Arnold, Róisín Burke, Elizabeth Santalla Vargas, Morten Bergsmo and SONG Tianying.

The self-interests presented in this book are multi-dimensional: from internal professionalisation to external legitimacy; from institutional reputation to individual honour; from operational effectiveness to strategic stakes; from historical lessons to contemporary needs; from religious beliefs to aspirations for rule of law; from minimizing civilian interference to pre-empting international scrutiny. The case is made for long-term self-interest in accountability and increased military 'ownership' in repressing core international crimes. In his foreword, William K. Lietzau observes that of "all the international community's well-intended endeavours to foster accountability and end impunity, none is more important than that addressed in this book".

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