**Bad Analogy: Why the Divergent Institutional Imperatives of Ad Hoc War Crimes Tribunals and the ICC mean Lessons Learned from the Ad Hoc Tribunals are Inapplicable to the ICC’s Complementarity Regime**

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 **Abstract**

The International Criminal Court (‘ICC’) lacks the capacity to pursue accountability for all but a handful of alleged perpetrators. Scholars and policy-makers have argued that the natural response to this state of affairs is for the ICC to reconstruct, enhance or develop both the ability and the willingness of the national legal system to effectively account for international crimes that lie beyond the reach of the Court, and assume the success of the ad hoc Tribunals’ Rule 11*bis* process (adopted as a result of their Completion Strategies) in transferring responsibility to the states concerned offers a model for so doing. However, this first comprehensive comparison of the two processes demonstrates that the institutional imperatives of Rule 11*bis* process ensured it would have a more beneficial impact on the domestic justice sector than the ICC, whose imperatives rely far less on the domestic assumption of the responsibility to prosecute. This article traces how the ad hoc tribunals’ institutional Completion Strategy promotes different incentives to those of the ICC’s institutional continuation strategy. While the latter has undermined domestic prosecutions by seeking co-operative relationships with self-referring states under burden-sharing (and indeed congratulates itself on such collaboration), the former has been more successful in catalysing domestic trials by adopting a more competitive, transactional approach to jurisdiction that was modified over time in accordance with the emerging institutional capacities of the states in question.

 **Key words**

International Criminal Court — Ad Hoc Tribunals — Rule 11*bis* — Complementarity — Justice Sector Reform

[A]n institution, once established, acquires a life of its own, independent of the elements that gave birth to it, and must develop not in accordance with the views of those who created it, but in accordance with the requirements of international life.[[1]](#footnote-1)

**1 Introduction: An Overview of the Argument**

One of the organisational realities the International Criminal Court (‘ICC’ or ‘Court’) must deal with is that it lacks the capacity to pursue accountability for all but a handful of alleged perpetrators.[[2]](#footnote-2) Scholars, policy-makers and Court actors argue that the natural response to this state of affairs is for the ICC to reconstruct, enhance or develop both the ability and the willingness of the national legal system to effectively account for international crimes that lie beyond the reach of the Court. This expectation fits with the emerging realization that the future of international law lies in its ability to “affect, influence, bolster, backstop and even mandate specific actors in domestic politics” through checking and monitoring of the state’s performance of its legal obligations in a global society reliant more on fulfilment of duties at the national level than actual enforcement at the supranational level.[[3]](#footnote-3) As such, domestic courts form a crucial component of the international judicial enforcement mechanism, creating a deep divide between the ideal of the international rule of law and its effective realization.[[4]](#footnote-4) Core crimes may transcend mere internal state interest because they amount to an assault on human dignity and diversity, but effective punishment in all but the most exceptional cases will rely on delegation to individual states as agents of the international criminal law regime.[[5]](#footnote-5) A commonly-asserted corollary of this dependence is the assumption that the introduction of international law or the scrutiny of international legal institutions in the domestic legal sphere can form a “constitutional moment” to bridge rule of law gaps and thereby empower national courts to apply international law in particular areas like criminal justice, or to foster judicial will to pursue justice more vigorously than would otherwise be the case.[[6]](#footnote-6)

The transfers of cases from the ad hoc tribunals for the former Yugoslavia (‘ICTY’) and Rwanda (‘ICTR’) to domestic jurisdictions under Rule 11*bis* bear out these intuitions. The Rule was introduced in 2003, primarily to reduce the extraordinary expense to the UN incurred by the Tribunals’ caseloads and to ensure a timely completion of their mandates as part of their Completion Strategies.[[7]](#footnote-7) The rule permitted a Referral Bench — consisting of three Permanent Judges at either tribunal — to determine whether or not the case of an indictee should be referred to a national jurisdiction to be pursued further in order to alleviate the Tribunal’s case-load.[[8]](#footnote-8) Security Council Resolutions 1503 (2003) and 1534 (2004) dealing with the Completion Strategies mandated the Tribunals to concentrate their work on the civilian, military and paramilitary leaders like Karadzic, Mladic and Bizimungu suspected of being responsible for the most serious violations of international criminal law while transferring cases involving “intermediate and lower-rank accused” to the former Yugoslav and Rwandan judiciaries.[[9]](#footnote-9) In their determination of the propriety of referral, the Referral Bench considered the gravity of the crimes charged and the level of responsibility of the accused.[[10]](#footnote-10) However, of more relevance to this article is the necessity for the Bench to be satisfied that “the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.”[[11]](#footnote-11) Where a suspect had not been indicted, the decision to transfer was left solely to the discretion of the Prosecutor, in so-called Category 2 cases.[[12]](#footnote-12) These Category 2 transfers vastly outweigh the total number of Rule 11*bis* transfers in both the ICTR and the ICTY contexts. Both Rule 11*bis* and Category 2 cases required an intrusive but largely fruitful relationship between the tribunals and the states.

The domestic trials that took place in the pre-Completion Strategy decade after the Balkan wars and Rwandan genocide were characterized primarily by selective and vindictive domestic trials featuring a questionable application of international criminal law in Bosnia-Herzegovina, Serbia, Croatia and Rwanda. However, the desire on the part of these states to assume responsibility for trials that Rule 11*bis* stimulated has led to significant increases in domestic ability and willingness to provide fair trials for suspects in a short period of time. As late as 2004, ICTY President Meron doubted the wisdom of referrals to courts in the former Yugoslavia as they were not in the position to try ICTY indictees in proceedings that could satisfy international human rights trial standards.[[13]](#footnote-13) Few expected reversals of ethnically-biased prosecutions in the former Yugoslavia or any tempering of Rwanda’s almost industrial process of detention, conviction and execution. Reports by independent international non-governmental organizations characterized trials in Croatia, Serbia and Bosnia as ethnically biased and chronically lacking in due process. The situation in Rwanda was worse, defined as it was by detention without trial, judicial interference, application of the death penalty and systematically unfair trial. The operations of the ad hoc tribunals in their first decade were largely isolated from these domestic criminal processes and had little reason to remedy them.[[14]](#footnote-14)

However, as Section 3 of this article illustrates in greater detail, Rule 11*bis* radically altered the institutional interests of the ad hoc tribunals. While for ten years the exclusive occupation of the ad hoc tribunals was defining the parameters of international criminal law through the first such prosecutions since Nuremberg, the biggest hurdle for the ICTR and ICTY now became “to ensure that national judiciaries can be entrusted to provide trials that meet international due process standards so that cases can be transferred for prosecution.”[[15]](#footnote-15) This in turn altered the political calculus behind domestic justice in these states. Within a few years, Croatia, Bosnia-Herzegovina and Serbia had all developed the necessary legal frameworks and specialized national or cantonal tribunals to deal with Rule 11*bis* transfer cases to become truly capable of emulating international standards for trial and detention. In Bosnia, Radovan Stankovic became the first indictee at the ICTY to be transferred to Bosnia-Herzegovina in September 2005. In Serbia, all but one case at the specialized Belgrade War Crimes Chamber involved alleged Serbian perpetrators of crimes against non-Serbs by 2007, in a radical reversal of prosecutorial attention.[[16]](#footnote-16) All three Balkan states completed all Rule 11*bis* cases at first instance within five years, a rate of completion far more efficient than that of the ICTY.[[17]](#footnote-17) By 2007, significant co-operation between then three states in terms of evidence and witnesses located across borders was evident,[[18]](#footnote-18) a dramatic change from the “catastrophic” level of inter-state co-operation before the Completion Strategy commenced.[[19]](#footnote-19) Progress in Rwanda has been slower, but perhaps even more impressive if one bears in mind its starting point. The Kagame government abolished its death penalty, punishments in breach of human rights obligations, interference with defence witnesses and permitted extensive international monitoring of its cases to increase the possibility that the Arusha tribunal would transfer cases to it for prosecution.

In so doing, the ad hoc courts rendered redundant what in their first decade had been the most frequent (and, on the whole fair) critique of their operation, namely that they impeded the development national judicial capacity in states where serious crimes had occurred by substituting themselves for the domestic legal system.[[20]](#footnote-20) Though the ad hoc tribunals have been criticized for numerous reasons, the domestic effects of their ‘completion’ or ‘legacy’ strategies rank among their greatest successes, and are believed the provide a valuable reference point for the ICC’s complementarity regime.[[21]](#footnote-21) Under the Article 17 complementarity regime, the ICC may only commence proceedings where the relevant State is not investigating or prosecuting the case, or purports to do so but in actuality is unable or unwilling to genuinely carry out proceedings. As such, the commencement of genuine proceedings to prevent impunity has become the dominant criterion determining which of the two legal regimes— international or domestic — can exercise jurisdiction. Just as under the Rule 11*bis* system, national effectiveness becomes the key determinant of where trial should take place. As Section 2 of this article examines, a number of writers in the field presume the largely beneficial experience of Rule 11*bis* provides applicable lessons for complementarity-based interactions between the ICC and states.

However, this article examines how the different institutional imperatives of both processes impacted upon the development of national competence and willingness to undertake trials of international crimes like war crimes, crimes against humanity, and genocide. The article argues that after an initial decade in which the assumed superiority of international trial over domestic processes dominated relations between the ad hoc tribunals and the states, the Completion Strategies of the ICTY and ICTR made it essential for the Tribunals to foster working domestic legal systems in Serbia, Croatia, Bosnia-Herzegovina and Rwanda. By contrast, the interactions of the ICC with states in practice are significantly different to those imagined at the Rome Conference in 1998, when the expectations were that it would fulfil a merely residual role. Its institutional imperatives are to build a case-load and secure domestic co-operation with international prosecutions in The Hague, notwithstanding a preference expressed in the Preamble and Article 17 for domestic assumption of the responsibility to prosecute. The ICC Prosecutor has evinced a preference for a burden-sharing policy in which the Office of the Prosecutor (‘OTP’) initiates prosecutions of the leaders who bear the most responsibility for the crimes and encourages national prosecutions for lower-ranking perpetrators.[[22]](#footnote-22) Since at least 2006 (and probably earlier), the Prosecutor has committed to a formal “policy of inviting and welcoming voluntary referrals as a first step in triggering the jurisdiction of the Court.”[[23]](#footnote-23) In practice, and notwithstanding the language of burden-*sharing*, the ICC architecture has appropriated the state’s duty to prosecute and prioritized co-operative relations with the state, largely compromising any incentive for the Court to catalyse justice sector competence and willingness to prosecute in the likes of Uganda, the Democratic Republic of Congo (‘DRC’), and Côte d’Ivoire.

This article explores the difference between Rule 11*bis* and complementarity by taking cognisance of Alejandro Chehtman’s argument that the prospects for an international criminal tribunal to foster effective domestic capacity and willingness to prosecute serious crimes at the domestic level depends on (a) the kinds of incentives it has for improving domestic practice and (b) key kinds of relationships it develops with the state (collaboration, competition, resentment, indifference).[[24]](#footnote-24) Section 2 notes the widespread assumption that the lessons of the ad hoc tribunals’ Completion Strategies are of general application to the ICC’s admissibility regime, before sketching some of the more obvious legal and political-institutional differences between the Rule 11*bis* process on the one hand, and the Rome Statute complementarity regime on the other. Section 3 illustrates how the ad hoc tribunals shifted from a restrictive model of primacy that eschewed engagement with domestic justice before the Completion Strategy to one with a strong incentive to develop the state’s capacity and willingness to combat impunity across all elements of post-conflict society after the Completion Strategy. It contrasts this in Section 4 with the move of the ICC in the opposite direction, ostensibly created on the basis of state primacy but whose institutional imperatives began to emphasize negotiated burden-sharing which promoted the state’s acquiescence in its own redundancy. Section 5 looks at how these different imperatives impacted positively on the states’ willingness to undertake wide-ranging criminal justice, not only against its enemies, but against elements friendly to domestic regimes in the Balkans, but facilitated less even-handed approaches in some of the states with which the ICC has a co-operative arrangement. Section 6 looks at how the Rule 11*bis* process encouraged self-improvement in the domestic justice sector in terms of fairness and competence, while the logic of burden-sharing promotes a perverse incentive for the ICC to disengage from domestic reform, notwithstanding the suggestion in the wording of ‘burden-sharing’ of progressive allocation of responsibility. As Stahn describes, “[t]raditionally, cooperation regimes with international tribunals have been constructed in a one-sided fashion, namely as entailing assistance and support from states to the respective tribunal.”[[25]](#footnote-25) Where the Completion Strategy broke new ground, and where the ICC has yet to, is in reversing this traditional direction of co-operation.

 The article concludes by arguing that even though the ad hoc tribunals were established on the basis of primacy and without any specific remit to foster national processes of transitional accountability in their founding Security Council Resolutions,[[26]](#footnote-26) the Rule 11*bis* process adopted as a result of its Completion Strategy ensured it would have a more beneficial impact on the domestic justice sector than the later ICC, which was ostensibly premised on providing a supportive international environment for the primary goal of domestic assumption of the responsibility to prosecute. In effect, it traces how the ad hoc tribunal’s institutional *Completion* Strategy promotes different incentives to those of the ICC’s institutional *continuation* strategy. While the latter has undermined domestic prosecutions by seeking co-operative relationships with self-referring states under burden-sharing (and indeed congratulates itself on such collaboration), the former has been more successful in catalysing domestic trials by adopting a more competitive, transactional approach to jurisdiction that was modified over time in accordance with the emerging institutional capacities of the states in question. None of this is to instead argue the ICC’s approach is wrong or illegitimate: the purpose of this article is to articulate arguments against the assumption that Rule 11*bis* and the ICC’s complementarity provisions are so similar that lessons from the former are of direct application to the latter.

**2 Peas in a Pod? Comparisons and Contrasts Between Rule 11*bis* and the Complementarity Regime**

The assumption that the complementarity regime is, or should be, informed by Rule 11*bis* is readily comprehensible if one takes into account the similarities between them. Both mechanisms enable an international criminal court to defer to competent national jurisdictions and to monitor them to ensure the relevant state adheres to certain standards in the conduct of trials. Both the complementarity scheme outlined in the Preamble and Article 17 of the Rome Statute and Rule 11*bis* manifest an *a priori* preference for national courts to conduct reliable and impartial proceedings. Indeed, the belief that Rule 11*bis* should serve as a model for ICC-state interaction in the complementarity regime is something of an article of faith in international criminal law, and one that is largely unquestioned. Tolbert argues that the Rule 11*bis* model could be adopted by the ICC in some form in order to regulate the interaction of, or division of labour between, domestic and international fora.[[27]](#footnote-27) Canter, similarly, suggests that a Rule 11*bis* transfer provision should be incorporated as a matter of course in international criminal tribunals.[[28]](#footnote-28) Norris, arguing Rule 11*bis* provides “an excellent template to consider a similar rule for the ICC,” suggests a number of advantages that would flow from such a relationship, including the establishment of clear frameworks for state attempts to regain jurisdiction, the articulation of a benchmark of international legitimacy for the domestic state to strive towards, the provision of a flexible tool for alleviating case-loads and a layer of ICC reputational protection against allegations that indictments are politically motivated.[[29]](#footnote-29) One can also argue that such a policy would be more deferential to state sovereignty, promote the diffusion of international norms domestically and is considerably more economical.[[30]](#footnote-30) The systematic nature of the complementarity regime is seen by some as an improvement on the ad hoc nature of transfers to domestic courts in the ICTR and ICTY.[[31]](#footnote-31) El Zeidy contends that Rule 11*bis* “reﬂect[s] a new angle in the understanding of primacy and complementarity” on the basis that the decision by a Referral Bench to send back a case to the national authorities resembles a practice of complementarity based on co-operation and the distribution of tasks.[[32]](#footnote-32) Donlon and Onsea see the Bosnian War Crimes Chamber’s Srebrenica trials and Rwanda’s transfers respectively as inadvertent examples of complementarity in practice,[[33]](#footnote-33) while former ICTY President Fausto Pocar saw the Tribunal’s Completion Strategy as “a way to implement complementarity in its truest form and meaning”.[[34]](#footnote-34) Burke-White, likewise, sees Rule 11*bis* as a shift from the earlier primacy model to a “modified complementarity” allowing for the transfer of cases to willing and able domestic courts.[[35]](#footnote-35) Chehtman goes further, arguing that the ICC can surpass the beneficial Rule 11*bis* model by replicating the influence of the ad hoc tribunals and augmenting it with the perceived obligation to implement the Rome Statute and criminalize the offences outlined in it.[[36]](#footnote-36) Melman, similarly, contends that the ad hoc tribunals’ application of their transfer requirements may prove useful when the ICC determines whether it should defer to a domestic judiciary.[[37]](#footnote-37) Human Rights Watch and the Open Society Justice Initiative have argued that the ICC and Democratic Republic of Congo should form a jurisdictional relationship based on that between the ICTY and the Bosnian War Crimes Chamber.[[38]](#footnote-38) The ICC’s complementarity regime is seen by some as having an inherently developmental relationship with the domestic rule of law through the interactions it facilitates between the Court and the state concerned,[[39]](#footnote-39) much like the Rule 11*bis* process. This possibility is examined in greater detail in Section 6. Even those more cautious about the parallels between Rule 11*bis* and complementarity (Waldorf, for example, sees Rule 11*bis* not as complementarity per se but as a “harbinger” of how it will play out at the ICC,[[40]](#footnote-40) while Schabas views it as “complementarity in reverse”)[[41]](#footnote-41) appear satisfied of its relevance as a body of practice and law defining the relationship between national jurisdictions and international criminal tribunals.[[42]](#footnote-42)

 The belief that Rule 11*bis* offers guidance for the ICC on issues of complementarity becomes all the stronger when one looks at the practicalities of the Court. Given that the ad hoc tribunals had 34 judges for two situations at their highest staffing levels while the Court has 18 for seven-plus situations, the urgency seen in the ad hoc tribunals’ Completion Strategies for developing domestic capacity seems an even greater imperative for the ICC. Furthermore, the division of labour with domestic jurisdictions through the policy of burden-sharing with its attendant tests for gravity more than superficially resembles that of the ad hoc tribunals’ preference for retaining jurisdiction over the most high-profile accused. Aptel argues that the ad hoc tribunal Completion Strategies articulate a model whereby an international criminal court assumes responsibility for prosecutions temporarily, allowing the state time to reconstruct its criminal justice capacity, which fits neatly with the ICC’s burden-sharing ideal of the national judiciary progressively recovering responsibility for prosecutions over time.[[43]](#footnote-43)

 However, these views do not pay sufficient attention to the significance of the differences between the ad hoc and permanent systems of international criminal justice. The first, and most obvious, is the fact that the ICTY is founded on a primacy that it has never relinquished, as evidenced by its retention of jurisdiction over the most senior cases, notwithstanding the vast improvements in state willingness in the Balkans and Rwanda. As one scholar puts it, by taking charge of jurisdiction in Rwanda, “the international community is, in essence, declaring itself to be a better judge of Rwandan events than Rwandans themselves.”[[44]](#footnote-44) The ICC, by contrast, is based on the first-mover status of the state because delegates at the Rome Conference on the ICC emphasized the need to normalize international criminal justice after the unprecedented primacy enjoyed by the ICTR and ICTY.[[45]](#footnote-45) Consequently, whereas the ad hoc tribunals had their jurisdictional primacy confirmed *ex ante* for the entire time frame of their existence at the very start (and self-modified only with the introduction of the completion strategy), the ICC’s jurisdiction over any given case must be decided *ab initio* in every case.[[46]](#footnote-46) Rule 11*bis*, therefore, was a relatively straightforward transfer mechanism from The Hague or Arusha to the domestic tribunal. The ad hoc tribunals retained the authority to recall a transferred case from the state if established safeguards for competence and fairness were not met at any time before the accused had been found guilty or acquitted by the national court, giving effect to the primacy of the Tribunal.[[47]](#footnote-47) By contrast, in any instance in which a case is admissible before the ICC, jurisdiction travels from the state impliedly (in cases of total inaction) or explicitly (where a state admits it is unwilling or unable to prosecute) or acrimoniously (where the state is found unwilling or unable genuinely to prosecute by the ICC) through agreements with the state or complex proceedings under Articles 18 and 19. Consequently, as later sections go on to illustrate, the relevant considerations by an ad hoc tribunal Referral Bench of a transfer to the domestic state are radically different in legal terms to implied or explicit agreements over burden-sharing on the one hand, or contested admissibility hearings in ICC-state interactions on the other.

**2.1 Divergent Strategies**

Those who assume the ICC’s complementarity regime can replicate the successes of the Rule 11*bis* process ignore two of the fundamental differences seen between all types of international courts or tribunals that define their ultimate objectives. These fundamental differences are:

(a) whether an institution is prospective and open-docketed (like the ICC) or retrospective and fixed-docketed (like the ad hoc tribunals);[[48]](#footnote-48) and

(b) whether it is wide-application, community-originated (the ICC aspires to apply to the entire international community and was formed at an international Conference) or narrow-application, party-originated (the ad hoc tribunals apply primarily to Rwanda and three states of the former Yugoslavia, though given the role of the Security Council it might better be described as ‘community-targeted’).[[49]](#footnote-49)

As Caron argues, if an institution exists for a wider community (like the international community as a whole), the focus of its work can shift away from the parties most immediately concerned, or at least be less intensely focussed on them, than a court or tribunal established on a more narrow basis.[[50]](#footnote-50) An institution with this narrower life has a finite docket, which in turn guarantees a finite life, and vice-versa.[[51]](#footnote-51) Measures like the ICTY’s Completion Strategy are an inevitable response in this context. By contrast, an institution with an open-ended, community-wide focus, has an indefinite life span, strategizes for the future on a relatively impromptu basis and has wider concerns that prevent any one state dominating its attention at any given time.[[52]](#footnote-52) Put quite simply, the narrower and retrospective nature of the ad hoc tribunals guaranteed there would ultimately have to be a systemic Completion Strategy oriented towards Rwanda and the former Yugoslav states even in the absence of concerns over costs, while the broader, prospective and international community-oriented nature of the ICC means it may never have similar imperatives, preferring instead to conclude a series of representative prosecutions in target countries before attention shifts to another situation in another country.

 These generally divergent jurisdictional trajectories are compounded by the initial prosecutorial strategies of the bodies. Because an early desperation for cases led the ICTY to accept jurisdiction over relatively small fish like Dusko Tadic (*a posteriori* characterized as a pyramidal strategy of first targeting low-level suspects before gradually moving on to more senior leaders and commanders),[[53]](#footnote-53) the tribunal suffered “quasi-asphyxiation” due to the high number of indictments, which guaranteed high running costs and demanded the return of the lower-level indictments that clogged up the Court to the state.[[54]](#footnote-54) By contrast, the ICC disavows any pyramidal structure to concentrate only on the upper echelon of criminal or military regimes. Simply put, it will rarely, if ever, have any criminals to specifically return to the domestic sphere. For these reasons, “the public iterations of the Completion Strategies are substantially aimed at donor states, that they express, at least in part, the promise of efficiency [i.e. a reduction in activity] in return for continued support.”[[55]](#footnote-55) By contrast, early expectations that the ICC would defer to national jurisdictions has diminished in practice given the Court’s consistent need to justify its budget and avoid the type of inactivity that would ‘kill’ the Court.[[56]](#footnote-56) As Schabas notes, “the suggestion that the Court might measure its success by a paucity of cases was not a very compelling message for States Parties, who were investing large sums of money in the institution and who expected to see trials and convictions.”[[57]](#footnote-57) To put it more simply still, institutional demands have ensured that the ad hoc tribunals since 2003 became bodies with a *docket-clearing* imperative that compelled the development of national capacity, while the institutional demands on the ICC have given it a *docket-building* imperative that at best compels indifference to national capacities. Moreover, as Sections 5 and 6 later illustrate, the strict transfer requirements incentivized the Balkan and Rwandan judiciaries to reform, whereas the cosy burden-sharing relationships between the ICC and self-referring states that dominate the ICC’s burgeoning docket almost guarantee pressure from the former on the latter to develop willingness or ability will be significantly less forceful than that employed by the ad hoc tribunals.

 While the purpose of this article is to examine the impacts of this difference on the ground, evidence of the different approaches can at this stage be pointed out with reference to what happens in the courtroom. The ICC Chambers have applied an extremely exacting “same conduct” test under Article 17 to determine whether a state is proceeding with the same case as the Prosecutor and thereby making international admissibility more likely.[[58]](#footnote-58) By contrast, the ICTY Referral Bench has held that exact correlation with the crimes and sentences in the founding Statute is not required, and equivalent provisions that address “most, if not all” of the alleged criminal acts of the accused have been found sufficient to permit the transfer of the case to the state.[[59]](#footnote-59) While the ICC has been criticized for self-interestedly accepting the inability or unwillingness of states like Uganda and the DRC with a proven record of judicial competence (Uganda) and actual custody of suspects (DRC) to genuinely prosecute,[[60]](#footnote-60) the diametrically opposed criticism has been levelled at the ad hoc tribunals of too willingly accepting the bona fides of the national governments, particularly that of Rwanda.[[61]](#footnote-61) While Article 17 of the Rome Statute requires a detailed consideration of the nature of domestic proceedings to gauge willingness,[[62]](#footnote-62) the Rule 11*bis* process is premised on the largely unquestioned assumption of state willingness.[[63]](#footnote-63) Indeed, Williams argues that the Referral Bench at the ICTY “has effectively adopted a presumption of referral.”[[64]](#footnote-64) Similarly, while the ICC’s bench has adopted a flexible multi-factor approach to the gravity threshold that “enables them to justify admitting virtually any case within the Court’s jurisdiction” on the basis that interpreting the gravity threshold to exclude certain types of defendants or crimes from the Court’s reach would amount to an impermissible revision of its jurisdiction,[[65]](#footnote-65) the ICTY has been content to refer *genocidaires* and the perpetrators of mass atrocities to Rwanda and the former Yugoslavia in Category 2 cases without any jurisdictional qualms. It is for these reasons that Seils criticizes the ICC for employing a “looking for business” model that has severely limited the court’s impact on national proceedings,[[66]](#footnote-66) while others allege it works more to attract cases for prosecution than insisting states fulfil their obligations.[[67]](#footnote-67)

**2.2 A Caveat: The Adequacy of the Comparison**

Before examining further the similarities and dissimilarities of the Rule 11*bis* and complementarity regimes, it is necessary to justify the comparison between the Balkan states and Rwanda with the types of states the ICC engages with. An obvious point can be made that the context of the former Yugoslav states is radically more favourable than that in the likes of the Central African Republic or Côte d’Ivoire, meaning that drawing contrasts between the successes of Rule 11*bis* there and the failures of the ICC in Africa risks over-simplification. The presumptions examined herein that Rule 11*bis* are of obvious application to the ICC miss this conspicuous reality. The Dayton Peace Agreement ending the wider Yugoslav war was imbued with a series of human rights protections that the international community was determined to ensure. The European Union (‘EU’), United States of America and the United Nations (‘UN’) operated as “surrogate enforcers” of the settlement (and justice) in a way not commonly seen in the developing world.[[68]](#footnote-68) Bosnia was subject to pressures and supports “almost determinant in terms of the institutional reconstruction of the state” of the Office of the High Representative (‘OHR’) appointed by EU countries to oversee the civilian implementation of this agreement[[69]](#footnote-69) and the UN Mission in Bosnia and Herzegovina, while the *1950 European Convention on Human Rights* became the key normative framework as applied directly by the Dayton-mandated Human Rights Chamber.[[70]](#footnote-70) The Organisation for Security and Co-Operation in Europe (‘OSCE’) made judicial assistance to Serbia and Croatia for war crimes one of its primary goals from 2003 onwards.[[71]](#footnote-71) The desire of Croatia, Serbia and Bosnia to seek EU entry was influential in garnering the political willingness to secure fair, ethnically-balanced and competent trials in a manner not available outside Europe.[[72]](#footnote-72) To the extent that the Rule 11*bis* process catalysed justice sector reform in the Balkans, it did so in a relatively benign environment, making it difficult to disentangle what Rule 11*bis* actually achieved from the wider process of regional and international carrots and sticks (for example, Bosnia’s War Crimes Chamber was the result of an agreement between the OHR and ICTY, and funded primarily by the former).

 Given its level of development, geographical location and authoritarian system of government, Rwanda’s Rule 11*bis* experience offers better comparisons with the types of countries the ICC is involved with. As Sections 5 and 6 of this article go on to examine, Rule 11*bis* had a more directly traceable impact on the domestic justice system,[[73]](#footnote-73) even if overall it was more limited than the more thoroughgoing process in the Balkans. To summarize: the former Yugoslavian states offer a model of best practice for international court-state relations, while Rwanda offers a lesser example of success but a better comparative context. Both, therefore, are imperfect but valid comparators to the ICC’s engagements with states (usually African) subject to investigations and prosecutions.

**3 The Impetus of International Criminal Justice**

3.1 The Slow Domestication of the Ad Hoc Tribunals

If it is possible to speak of international criminal law, it is also possible to speak of an epistemic community of international criminal law; or, in Haas’s terms, a transnational network of “professional actors with recognized expertise and competence capable of making authoritative claims of policy-relevant knowledge.”[[74]](#footnote-74) This epistemic community combines both scholars and practitioners. Indeed, there is a very significant overlap between them. Those most prominent in the everyday practice in international courts frequently write and those most authoritative in the academy frequently practice. These figures largely accept and promote the necessity of international criminal tribunal (though not uncritically) with the intent of improving its public legitimacy and its ongoing operation.[[75]](#footnote-75) Snyder and Vinjamuri note[[76]](#footnote-76) that the

[l]egalists who stress the … justifications for war crimes tribunals have permeated human rights-based nongovernmental organisations (NGOs), international bodies, and universities. More than any other professional class, lawyers have moved freely among these institutions and taken leadership roles in the international tribunals whose creation they have advanced.

Scholars have long noted that a legal cosmopolitanism premised on the need to construct a global political order incorporating institutional schemes to protect the rights of all human beings everywhere in the world underpins much of the theory and substance of international criminal law. It is for these reasons that Koller argues that international criminal law has developed to a significant extent because of the individual and collective cosmopolitan identities of those influencing the course of international law.[[77]](#footnote-77) Because ICC judges and agents of the OTP come from a specialized community and metajuridical culture of international criminal law and human rights which inevitably incorporate their own pre-formed inclinations towards the evolution and expansion of international criminal justice, there is a justifiable expectation that judicial and prosecutorial actors might engage in policy-making to improve the status and functionality of the international criminal courts they participate in.[[78]](#footnote-78) The international stakeholders of international tribunals — namely intergovernmental organisations, NGOs and human rights activists — are generally sympathetic to policies that increase the effectiveness and relevance of international criminal law, and make this their primary professional focus.[[79]](#footnote-79) These individuals and groups are distinctly different from domestic stakeholders who have very different interests. A corollary of the faith in the superiority of international judicial bodies as embodiments of the community of all human beings over their domestic equivalents is the tendency of most scholarship in the field of international criminal law to implicitly or explicitly present the reduction of sovereignty in the name of enforcing international human rights norms as desirable.[[80]](#footnote-80) Certainly, where national and international interests conflict, “the preponderance of influence tends to reside with actors and interests at the international level.”[[81]](#footnote-81)

 International courts generally manifest a normative bias favouring international legal completeness and dynamism,[[82]](#footnote-82) a tendency magnified in international criminal tribunals by its dominant culture of progressive development.[[83]](#footnote-83) These tendencies were manifest in the foundation of the ad hoc tribunals. The ICTY and ICTR were the first bodies to apply international criminal law since the Nuremberg and Tokyo tribunals. The very creation of the tribunals, therefore, validated hitherto-unenforced international rules prescribing certain atrocities and symbolized the force that an international judicial process could exert in the face of barbarity.[[84]](#footnote-84) Because the ad hoc tribunals were set up by the Security Council under its Chapter VII powers to deal with a threat to international peace and security, it was felt more appropriate for perpetrators of these crimes to be held accountable before all humankind.[[85]](#footnote-85) One of the notable features of the earliest years of the tribunals was the automatic assumption that international prosecution was inherently superior to domestic trial. Because domestic justice would be so emotionally charged and politically contentious, the Commission of Experts established to consider the possibilities for justice in Rwanda argued that an international tribunal would guarantee the trial process enjoyed “independence, objectivity and impartiality.”[[86]](#footnote-86) In the seminal *Tadic* decision, the ICTY Appeals Chamber held that an international criminal tribunal created by the Security Council “must be endowed with primacy over national courts” because human nature will create “a perennial danger” of international crimes being characterized as ordinary crimes or trials being designed to shield the accused.[[87]](#footnote-87) As later experience would demonstrate, this initial scepticism about the domestic Rwandan and Balkan processes was justified. This legalistic desire to seal law off from politics (of the domestic variety, at least) through the mechanical, zealous application of an authoritative international criminal apparatus as the path to a more peaceful world is one of the prime animating impulses of international criminal law.[[88]](#footnote-88) However, policy-makers responsible for the ICTY and ICTR took things a step further, reasoning that the institutional interests of the tribunals, and the wider interests of the revived project of international criminal law, would require maximising their distance from the subject state:[[89]](#footnote-89)

[T]he institutional culture of the ICTY was, at least initially, one of lack of interest in building relationships with the Balkans. The ICTY positioned itself ‘in some great historical narrative stretching over from Nuremberg, Tokyo and onwards to the ICC’. This culture of general detachment from the region was presented as a way to safeguard the perception of impartiality.

Perhaps more importantly, retaining as much international control of justice in the Balkans and Rwanda as possible was crucial to the ongoing process of developing international criminal justice:

[B]y keeping cases in the ad hoc tribunal system, international legal theorists hope to create a substantive body of international criminal law with precedential value, which could act to deter (or at minimum, punish) acts of mass violence and genocide in the future…. Preferring the ICTR’s right to hear cases over that of Rwanda enhances the authority and scope of international law in the present and the future.[[90]](#footnote-90)

The ICTY’s self-identified “Five Core Achievements” — namely spearheading the shift from impunity to accountability, establishing a historical record of the conflict, bringing justice to victims, accomplishments in international law and the strengthening of the (international) rule of law — demonstrate the internality of its interests: the fostering of domestic capacity and will to undertake credible, fair proceedings found no place in this assessment.[[91]](#footnote-91) The ICTR’s website at one stage declared its main achievement to be “forging a substantial body of case law (jurisprudence)” and thereby form a “solid foundation” for the ICC.[[92]](#footnote-92) A review of the Court in 2005 by its President, Erik Møse, identified the key achievements of the Tribunal as its efficiency in conducting fair trials, the creation of important jurisprudence, and its significant contribution to the development of international criminal justice.[[93]](#footnote-93) The catalysis of, or assistance to, domestic trials, was not identified as a key achievement, nor indeed was its absence acknowledged as a key failing. The type of activity that would justify the Tribunals’ existence and the fragile rebirth of international criminal law was everything: as former ICTY judge Louise Arbour put it, “there was only one overwhelming, all-encompassing and … life-threatening issue for the ICTY as it had been conceived: arrests.”[[94]](#footnote-94) Though much was made of the physical distance between the sites of the atrocities in Yugoslavia and Rwanda and the tribunals in Netherlands and Tanzania, the larger impediment was this psychological distance which meant there was little or no connection between the affected population and the trials. As one ICTR judge put it, “you must remember that the Tribunal is not just about Rwanda, it is about the world.”[[95]](#footnote-95) The ad hoc courts had no capacity-building or training remit towards the domestic courts. Any contact between the ad hoc courts and the domestic courts has been more about the pursuit of accountability in the former than development of the latter.[[96]](#footnote-96) The mandate of the ad hoc courts to develop the long-term security and stability of two post-conflict societies was construed as narrowly as possible, with no specific tasks of training or judicial reconstruction for the self-evidently shattered domestic systems. Indeed, there was judicial antipathy to the idea that the Tribunals should have such a role. Palmer cites one ICTR judge she interviewed as follows: [[97]](#footnote-97)

This is not just for Rwanda nor is it our way to fix the Rwandan judiciary. The ICTR does not exist to please the Rwanda community. If the issue had been about strengthening the Rwandan judiciary then the trials should have happened in Rwanda. There could have been assistance through foreign staff and training. There would have been an application of Rwandan law. In this instance there was a need for an international response.

This judicial attitude impacts on on-the-ground performance. A recent study by Bayliss describes how post-conflict justice actors employed by international criminal tribunals exhibit common professional norms and skills, a strong sense of collective purpose in developing the core norms of international criminal justice and creating a globalized international criminal law system, and a defined end-point for their work in the form of international trial judgments as opposed to domestic accountability.[[98]](#footnote-98) Crucially, these actors tend to conceive of their relevant community as being a transnational one stretching across all international tribunals, and not necessarily the state concerned.[[99]](#footnote-99) International post-conflict justice actors are relatively isolated from domestic justice institutions unless they are involved in outreach.[[100]](#footnote-100) UN figures admit that unless actors working on international criminal law on the ground are given an explicit mandate to foster local justice capacity, “many will automatically gravitate to an approach which focuses on the efficient disposing of cases.”[[101]](#footnote-101) For example, because the ICTY was judged by largely internal goals in its first decade, the actors within it had little incentive to invest time or energy in domestic prosecutions since they would have no “payoff” as the established criteria of success “firmly prioritised international prosecution.”[[102]](#footnote-102) Capacity-building of any sort “was never considered one of the Tribunal’s goals. The [judges] had ‘a job to do and they were doing it well, and by doing that they were making a substantive contribution.’”[[103]](#footnote-103)

 The contemporaneous hybrid tribunals in Sierra Leone, East Timor and Kosovo were similarly criticized for their failure to contribute to the development of the rule of law domestically. The Special Court for Sierra Leone (‘SCSL’), for example, was described as “an international tribunal largely concerned with talking directly to the international community, breaking new ground with its case-law.”[[104]](#footnote-104) This is merely symptomatic of a wider marginalisation by international justice policy-makers of purposes not immediately related to ending impunity. Any intention to integrate international criminal trials with holistic rule of law reform has historically remained at the margins of policy-making when formulating and operating internationalized judicial responses to gross human rights violations.[[105]](#footnote-105) Those who negotiated and operated the Nuremberg and Tokyo trials, the ad hoc tribunals in their first decade and the various hybrid courts have proven more concerned with clearing defined case-loads, developing international law and creating a global culture of accountability or non-impunity as a goal in itself than fostering the domestic capacity to prosecute atrocity crimes. Indeed, many actors in international criminal justice are at best agnostic as to whether international criminal law has a beneficial impact on the national justice system:[[106]](#footnote-106)

[W]hile other sectors have paid more attention to the idea of building domestic capacity and creating exit strategies, war crimes tribunals have remained largely unconcerned with these projects.... The human rights community has concerns about whether it is even normatively desirable to elevate the goal of capacity-building to the level of other goals of accountability mechanisms. This position assumes that certain important principles intrinsic to fully achieving accountability will be sacrificed if collaboration increases with domestic institutions and people.

3.2 *Volte-face* — The Dawn of the Completion Strategy

What few had realized at the time of their creation, however, was the cost of the Tribunals. By the time the Completion Strategies emerged, they time amounted to 15 per cent of the UN budget with costs between 1995–2003 of US$22.5 million and US$45.5 million per conviction respectively.[[107]](#footnote-107) In the eyes of the international community, the “tribunal fatigue” that resulted from these costs began to outweigh the benefits of the trial.[[108]](#footnote-108) It was also significant that numerous defendants were being kept in pre-trial detention for periods of three years and more without any prospect of commencement of trial. Overnight, a dramatic alteration in the interactions of the ICTY with the former Yugoslav judiciaries and the ICTR with the Rwandan government occurred. From positions of indifference or outright hostility to national prosecutorial initiatives, judges suddenly “developed a prompt and strong interest in the capacity of local legal systems being up to the relevant standards.”[[109]](#footnote-109) The obvious solution was to rid the Tribunal of responsibility for those more minor criminals who clogged the system up to begin with. The result was the Completion Strategy, the fundamental precepts of which were sketched in the Introduction and which will be elaborated on in Sections 5 and 6 below, which describe in greater detail how successful this shift in emphasis was. This turn towards domestic judiciaries ran somewhat against the grain of the revived international criminal justice project as hitherto seen in the absolute primacy of the ad hoc tribunals and the insulation from wider capacity-building of the hybrid tribunals. As such, the incentives set in train by the Completion Strategy can be seen as something of a welcome aberration.

 Before examining this, however, it is necessary to examine the ICC, formed at the height of international primacy. The Rome Statute’s complementarity regime was designed as a reaction against the primacy of the ad hoc tribunals. However, once the Court became operational, the earlier institutional culture of the ad hoc tribunals of promoting the development of international criminal law in the international community and of a lack of interest in building relationships with domestic tribunals ran the risk of being revived.

**4 The Impetus of International Criminal Justice: The Thwarted Domestication of the Rome Statute**

The Rome Statute was finalized in 1998, five years before the Completion Strategy commenced, and it appeared to mark a retreat from the primacy of the ad hoc tribunals. The admissibility regime was formulated on the presumption that the ICC was not inherently superior, forming a hierarchy of jurisdiction with the state at the apex while the court in The Hague constituted merely a permanent reserve court.[[110]](#footnote-110) For the majority of states, complementarity arose out of a genuine belief that the ad hoc tribunals were an exceptional response and that emphasis on national responsibility was the only way a now-permanent international criminal legal system could be legitimate and sustainable.[[111]](#footnote-111) State delegations made a further argument (subsequently justified by the ICC’s record of one conviction in its first ten years of operation and two after 12) that national proceedings offer enormous comparative advantages over more interventionist international mechanisms in terms of ready availability of institutions and relevant statutes, the familiarity of procedural rules, punishments and precedents, plus the lack of difficulties in terms of language or securing evidence and witnesses.[[112]](#footnote-112) The Preamble to the Rome Statute provides that the ICC should be “complementary to national criminal jurisdictions” and notes that the effective prosecution of the most serious crimes “must be ensured by taking measures at the national level.” Article 17 outlines the legal basis for complementarity and specifies when and how the default expectation of national jurisdiction must give way to the exercise of ICC jurisdiction, ostensibly as a last resort. Under Article 17, for a case to be admissible before the ICC, the Court must be satisfied that domestic authorities have not pursued or are not pursuing the case. If they have pursued it or are pursuing it, the Court must satisfy itself that these efforts are/were the product of genuine willingness and ability to investigate or prosecute. Article 17 primarily describes the meaning of ‘unwilling’ and ‘unable’ (examined in Sections 5 and 6 below), while the subsequent Articles 18 and 19 cover preliminary rulings on admissibility and challenges by the state to jurisdiction and admissibility respectively. The standards set for a declaration of admissibility, though broad, were deliberately set quite high to secure the state’s priority over investigation and prosecution from ICC intrusion.[[113]](#footnote-113)

 Complementarity was the most divisive issue in negotiations on the creation of the ICC. Its primary function was to provide “detailed procedural guidance designed to balance sovereign enforcements against unreasonable extensions of ICC prosecutorial power.”[[114]](#footnote-114) The first ICC Prosecutor famously emphasized at his swearing-in that the success of the Court would be determined not by the number of international prosecutions undertaken, but rather by the number of international prosecutions avoided because of increased functioning of domestic legal systems eager to avoid a finding of admissibility.[[115]](#footnote-115) An early Office of the Prosecutor policy paper on complementarity echoed this, acknowledging that it would “take action only where there is a clear case of failure to take national action.”[[116]](#footnote-116) This balancing exercise clearly paid off, as the compromises based on complementarity removed a barrier to achieving the 60 ratifications necessary for the Statute to enter into force, many of which came from developing world states that some predicted would never choose to belong to the Rome System.

 There is some evidence that the international criminal law epistemic community never reconciled itself to this change from the ad hoc model of primacy that revived international criminal law. In the negotiations for the Rome Statute, members of this community (scholars, practitioners, activists, etc.) called for the ICC to serve as the sole venue for prosecuting crimes on the basis that universal jurisdiction rendered certain “hard-core” crimes outside the exclusive authority of states,[[117]](#footnote-117) while others argued it should enjoy primary jurisdiction with national courts merely exercising residual jurisdiction.[[118]](#footnote-118) The diplomats, NGOs and scholars who drove the ICC negotiations were largely indifferent as to the possibility that national courts would fulfil their duties under international law and discussed the idea of the Court “long before they even had given the slightest attention to the issue of relations with national jurisdictions.”[[119]](#footnote-119) After the exacting complementarity provisions were finally agreed upon, elements of the international criminal law epistemic community characterized the elevation of the duty of national criminal justice systems to prosecute over the new international apparatus in The Hague as a deeply regrettable sacrifice of justice to sovereignty.[[120]](#footnote-120) Human rights organisations argued that the Court’s admissibility requirements were “at variance with the better objectives of international criminal justice.”[[121]](#footnote-121)

 Once the ICC left the control of the Rome Conference and became active on the ratification of 60 states, it would exist autonomously. It would be run by international criminal lawyers and critiqued by international criminal lawyers. The Assembly of States Parties would exercise relatively little control over it, given that the Assembly operates not as a management body but as a management-oversight body with little in the way of decision-making power.[[122]](#footnote-122) NGOs and scholars have encouraged the ICC’s Registry, bench and Office of the Prosecutor to retrospectively mend the Statute through practice to reflect a more “progressive” view than the Rome Conference’s consensus.[[123]](#footnote-123) They are helped in this by the fact that the phrase ‘complementarity’ itself is somewhat opaque: the word is not stated anywhere in the Statute and lacks a dictionary definition, seemingly leaving considerable latitude to infer more proactive visions of the principle. This scholarly re-interpretative process would find a receptive audience in the Court and Office of the Prosecutor. International tribunals have internal interests in being active and prominent which are distinct from the external interests of other entities such as states.[[124]](#footnote-124) At the ad hoc tribunals, Schabas noted that the personnel involved demonstrated the “difficulty of knowing when to stop…. They may develop momentum of their own that soon becomes unhinged from the rationale that justified their creation in the first place.”[[125]](#footnote-125) One obvious and similar risk with the ICC was that the judges as gate-keepers of their docket may construe the Statute opportunistically to generate activity.[[126]](#footnote-126) In particular, even before the Court became active, scholars’ predictions that Statute’s admissibility limitations “may chafe an ICC prosecutor that sees them as an overly restrictive manifestation of arcane sovereignty principles” have been vindicated.[[127]](#footnote-127) Indeed, while activity in the earliest years seemed desirable, the travails of the Court in its decade of existence may now make it absolutely necessary. Given the consistent failure of the ICC to process cases with even a minimum degree of expediency and its repeated failures in securing the co-operation of the likes of Sudan, Libya, Kenya and Uganda, admissions that we are in the “post-romantic” phase of the ICC[[128]](#footnote-128) or that the “honeymoon” is over are becoming more frequent.[[129]](#footnote-129) Constant activity appears to provide some antidote to this permanent status anxiety.[[130]](#footnote-130)

4.1 Towards Burden-Sharing

The ICC’s policies on burden-sharing through self-referrals have borne out these expectations as the Court has moved stealthily towards an approximation of the primacy model. Far from working constructively to achieve the end of improved domestic fulfilment of their legal obligations, greater attention has been given to how to make the Court a more relevant and effective actor in the international legal order. The Preambular declarations that the Court’s purpose is to “put an end to impunity” and “contribute to the prevention of crimes” have operated to offer endless scope for the Statute to be re-interpreted teleologically in the light of these objects and purposes, above all to reflect a ‘modern’ model of international relations between states that would affirm the advantages of the *Tadic* approach and reject restrictive interpretations of the Statute that might limit ICC jurisdiction.[[131]](#footnote-131) As Jurdi describes it, there is a negative view of complementarity which sees the ICC merely as a substitute for national trials when the national justice system fails to prosecute, and a positive view among jurists wherein Article 17 is only ever of relevance where there is an overt clash between the ICC and a state’s criminal jurisdiction.[[132]](#footnote-132) These are significantly divergent ways of viewing the Statute provisions: any view adopted would be as much a matter of institutional preference as it would be a matter of strict textual interpretation.

 The more ‘positive’ view (though this label itself is of course quite pejorative) is the one the Court seems to have adopted. As noted earlier, the ICC Prosecutor has evinced a preference for a burden-sharing policy in which the OTP initiates prosecutions of the leaders who bear the most responsibility for the crimes and encourages national prosecutions for lower-ranking perpetrators.[[133]](#footnote-133) Since at least 2006, the Prosecutor has adopted a formal modus operandi “of inviting and welcoming voluntary referrals as a first step in triggering the jurisdiction of the Court.”[[134]](#footnote-134) If a voluntary referral is forthcoming from the state, the OTP will initiate prosecutions of the leaders who bear the most responsibility for the crimes (those in de jure or de facto hierarchical control and actors who commit exceptionally egregious crimes) and will encourage national prosecutions, where possible, for the lower-ranking perpetrators.[[135]](#footnote-135) This policy, it is argued, would “enhance the delivery of effective justice, and is thus consistent with both the letter and the spirit of the Rome Statute and other international obligations with respect to core crimes.”[[136]](#footnote-136) The OTP agreed on a division of labour with Uganda whereby the former would prosecute those who bore the greatest responsibility,[[137]](#footnote-137) and repeated this with the DRC.[[138]](#footnote-138) Investigations in Côte d’Ivoire consented to initially by Laurent Gbagbo and later requested by his antagonist and successor Alessane Ouattara in effect represent a self-referral via Article 12(3), notwithstanding its technical status as a *proprio motu* investigation.[[139]](#footnote-139)

 A general, pro-active policy of burden-sharing was not anticipated at the Rome Statute, although individual self-referrals by the territorial state arguably were. While some critics initially argued that where national courts are willing and able to prosecute any relinquishing of jurisdiction was impermissible,[[140]](#footnote-140) the general consensus is now that self-referrals fit within the regime of State Party referrals in Article 13(a), while the jurisdictional checks of Article 17 are not applicable where for any reason a case is not being investigated by the state.[[141]](#footnote-141) However, advocates of a more assertive role for the ICC have not stopped at this, and have instead argued that the ICC should assume jurisdiction even in cases where a state appears willing and able to prosecute, for many of the same reasons that ad hoc tribunal primacy was based on:[[142]](#footnote-142)

Yet, even if a country is capable and willing to prosecute a well-known defendant, in particularly heinous cases involving well-known offenders, or in situations involving countries such as Sierra Leone, Sudan, or the former Yugoslavia, where horrible human rights violations occurred, it would be warranted to have the prosecution take place in the ICC, mainly because such a prosecution sends a stronger message to the rest of the world that this type of behavior will not be condoned and that the international community will act to stop such behavior.

Burden-sharing appears to split the difference between this global role of the ICC and the apparent preference in the Rome Statute for domestic assumption of responsibility to prosecute, offering obvious opportunities for co-ordinated investigations and evidence gathering between the state and The Hague. The expectation is that it can foster an environment of co-operation that might mutually enhance arrest, detention, transfer/extradition and enforcement of sentences. Since the *Katanga* case, the Appeals Chamber has deemed self-referrals as permissible under Statute and as consistent with its goal of limiting impunity, and accepts there may be “merit” in assumption by the ICC of some of the state’s obligation to prosecute.[[143]](#footnote-143) In justifying this novel concept, supporters of it have needed to depart from strict textual arguments based on Article 17 to a type of teleological-constitutional reasoning based on the implicit normative premises on which the Rome Statute is based, which of necessity incorporates a greater degree of verticality reminiscent of the ad hoc tribunals. In terms of teleology, advocates of expansive roles for the ICC can point to the gravity of crimes, the link to global security, its superior standards of fair trial and the need to clarify international law as purposive justifications for extending the openings for activity, and neglect textual provisions that suggest a more limited remit for the Court. On this basis, scholars argue the ICC and national courts naturally form a unit in the enforcement of ICC crimes in which the choice of forum is decided by which option offers the greatest advantages in terms of effectiveness, efficiency, and impact.[[144]](#footnote-144) Moves by the ICC to simply assume the state’s duty to protect regardless of the state’s relative willingness or ability to undertake proceedings have therefore been treated as entirely natural and beneficial. Burden-sharing is presented not as a reactive exception to the state’s duty to prosecute, but rather as something that is consistent with this duty and at the same time preferable to it.

 An examination of some of the more obvious side-effects to burden-sharing demonstrates how strong the institutional imperative of the ICC towards any kind of activity is. The ICC’s one-sided and enthusiastic collaborations with the relatively repressive government of Uganda, which blatantly appeared to be using the Court less as a means to secure justice than as a tool to marginalize the Lord’s Resistance Army (‘LRA’), has been seen as indicating a desperation for trials.[[145]](#footnote-145) Indeed, some allege that neither the Ugandan nor Congolese self-referrals were fully voluntary: in both cases, the first ICC Prosecutor requested a self-referral by letting the state know that if one was not made, he would employ his *proprio motu* powers to investigate after authorisation by the Pre-Trial Chamber.[[146]](#footnote-146) Schabas argues that the Congolese self-referral of Thomas Lubanga (who at the time was being prosecuted by the DRC for crimes of greater gravity than the recruitment of child soldiers, for which he was ultimately indicted) was the product of impatience where “we had to get an indictment quickly,” setting a pattern for future conduct.[[147]](#footnote-147) Above all, the active solicitation of self-referrals and activity signals the rapid evolution of the Court in a direction not anticipated at the Rome Conference. Complementarity in practice is significantly different to complementarity in principle as enunciated in the Rome Conference:[[148]](#footnote-148)

In treatment and conceptualisation, the concept of complementarity has undergone a dynamic transformation. At the Rome Conference, complementarity was traditionally associated with the protection of domestic jurisdiction…. This focus has gradually shifted in the light of the first policies and practice of the Court, which were largely dictated by ideas of ‘partnership’, ‘dialogue’, and the promotion of co-operation by states.

There is nothing objectionable *per se* about proactively seeking self-referrals and sharing the burden with the state. As a pragmatic response to a situation in which a state freely admits it cannot or will not prosecute a situation or case, acceptance by the ICC of self-referrals would be unobjectionable and, it might be added, unavoidable. The wisdom of the uncontested admissibility situations originally envisaged by the OTP, namely where the state justice system is too incapacitated to undertake any trial (e.g. Central African Republic) or where “[g]roups bitterly divided by conflict may oppose prosecutions at each other’s hands and yet agree to a prosecution by a Court regarded as neutral and impartial,” (e.g. a highly precarious military stalemate or power-sharing peace agreement) is self-evident.[[149]](#footnote-149) Because the division of labour is negotiated and consensual, it allows for individuals and crimes to be considered on a case-by-case basis, and in effect permits the state a choice of jurisdiction.[[150]](#footnote-150) As the evidence of the ad hoc tribunals’ latter years demonstrate, significant advantages in efficiency may be gained by close international and national co-operation in investigations and evidence gathering.[[151]](#footnote-151) The general thrust of the argument is that the Rome Statute formalizes the idea that impunity must be fought at both the international and the domestic levels, and as a result there should be no objection to a policy where they mutually reinforce each other. However, burden-sharing as a systemic response to international crimes only makes sense if it *actually* fosters the will and the ability of the national justice system to pursue accountability in the same way that Rule 11*bis* does. If this does not occur, the prosecutorial initiative of burden-sharing looks less like the realisation of the shared system of justice envisaged in the Rome Statute than a cloak to veil what Akhavan describes as “the temptation of institutional self-perpetuation.”[[152]](#footnote-152)

**5 Willingness: The Impact of Transactional and Co-operative Relationships**

Article 17 of the Rome Statute clarifies when a state manifests unwillingness to secure criminal accountability, thereby rendering a case admissible at the ICC. The Court must examine whether:

(a)     the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;

(b)     there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; or

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

These criteria have yet to be fully tested in the ICC. The paltry number of contested admissibility cases provide little illumination: the Libyan challenge to ICC admissibility considered the question of inability to secure domestic custody of Saif Gaddafi and not unwillingness,[[153]](#footnote-153) while the Court’s consideration of unwillingness in Kenya’s admissibility challenge examined it under the very narrow question of whether the state was conducting an investigation covering the same individuals and substantially the same issues as alleged before the ICC.[[154]](#footnote-154)

Although the ICC considers willingness in the context of individual cases, the stated expectation that the ICC can learn from the Rule 11*bis* experience makes a wider claim about the ability of an international tribunal to foster domestic willingness to prosecute that must be understood in a general sense. It is not enough that a state is willing to pursue some justice or any individual case. Willingness to prosecute suggests something more thoroughgoing. If the pursuit of justice is intimately connected to the maintenance of peace, then the type of victor’s justice in which only members of the losing side are prosecuted compromises the objectives of reconciliation by unjustly discriminating among victims. Subotic describes the historical norm of domestic transitional justice thus:[[155]](#footnote-155)

[D]omestic commitment to justice that is the basis of much transitional justice literature is very fickle and narrow; it does not extend to a full commitment to universal criminal accountability that pays no attention to identity politics (issues of ethnicity, religion, or race) and the victim/aggressor matrix. In plain words, the domestic public is much more likely to support transitional justice if its political opponents (the other guys) are put on trial. It will very rarely offer the same commitment if the perpetrators come from its own ranks.

When the Rome Statute Preamble stated its aspiration to combat impunity, it did not mean simply impunity for certain crimes or certain situations, but also included impunity for one side to a conflict. The stated goals of international criminal justice like retribution, deterrence, social pedagogy and truth are fatally undermined by gross selectivity. Universal justice was adopted as a corrective to the prevailing tendency for criminal culpability to neatly track political or military powerlessness when pursued domestically. As one scholar argues, “[t]he credibility of the ICC will depend on whether it competently prosecutes crimes regardless of whether the suspects are on the victors’ or losers’ side.”[[156]](#footnote-156)

 However, it is clear that the ICTY’s Rule 11*bis* has been far more successful than the ICC in fostering domestic willingness to undertake credible prosecutions of actors from *all* sides alleged to have committed serious crimes. The latter’s activities have done little to stimulate the domestic will to prosecute either side. In illustrating this, it is first necessary to examine the state of domestic prosecutions in Bosnia, Serbia, Croatia and Rwanda before the completion strategy.

5.1 Blowing Hot and Cold: The Question of Willingness in Balkan Domestic Prosecutions

The will to prosecute was never absent per se in the states of the former Yugoslavia. The commonly-proposed utilitarian advantages of prosecution (retribution, enhancing the legitimacy of the legal system, deterrence, expressivism) were as apparent to the leaders of these states as they were to those in most post-conflict societies. The problem was that one ethnicity would prosecute others to the general exclusion of their own community. This chauvinism was something the ICTY also had to grapple with: whenever the tribunal indicted Croats for crimes against non-Croats, Bosnian Muslims for crimes against non-Muslims, or Serbs against non-Serbs, local support for the Tribunal would drop dramatically. The popularity of the ICTY was inversely proportional to the number of accused that come from the various communities.[[157]](#footnote-157) This problem endured in more virulent form domestically. Before Croatia began to respond to the Rule 11*bis* process in 2003, victor’s justice was the norm. The OSCE monitored trials there in 2002–2003 and found that while 83% of Serbs were found guilty in 2002, only 18% of indicted Croats were convicted during that period.[[158]](#footnote-158) It noted elsewhere that “[a]t all stages of procedure from arrest to conviction, the application of a double standard against Serb defendants and in favour of Croat defendants continues as a general rule.”[[159]](#footnote-159) While Serbs were often convicted on the basis of group indictments, *in absentia* trials and trials based on scant evidence,[[160]](#footnote-160) the relatively few Croats who were prosecuted were rarely charged with war crimes, could successfully plead participation in the Homeland War as a mitigating circumstance and enjoyed light sentences.[[161]](#footnote-161) Serbia-Montenegro itself saw only seven war crimes prosecutions by 2003:[[162]](#footnote-162) as Ellis notes, “[i]ndividuals in Serbia do not see any reason why local citizens accused of war crimes should be held accountable because, in the eyes of many individuals, these citizens remain heroes.”[[163]](#footnote-163)

 Bosnia illustrates the problem best. Before Rule 11*bis*, obtaining justice was “subject to geographical chance. War crimes in one entity or canton are still hailed as acts of heroism in another.”[[164]](#footnote-164) Trials were seen primarily as vehicles for ethnic justice: the few prosecutions were almost exclusively directed against suspects belonging to the war-time adversary.[[165]](#footnote-165) For example, in Republika Srpska, only one war crime trial against a Bosnian Serb suspect had been undertaken by 2004.[[166]](#footnote-166) A joint ICTY-Office of the High Representative Report found that domestic war crimes prosecutions had “proven, thus far, to be ineffective and not in compliance with international standards.”[[167]](#footnote-167) A Rules of the Road Programme developed in 1996 to prevent ethnically-motivated prosecutions provided that the ICTY had to review case files from the Bosnia-Herzegovina authorities to ascertain there was sufficient evidence to justify the belief that a suspect may have committed a serious violation of international criminal law before domestic indictments could be issued. Though effectively operating as a procedural filter to weed out ethnically-biased prosecutions, it ultimately “relieved local authorities from the expectation of having to conduct effective prosecutions in war crimes cases.”[[168]](#footnote-168) Between 1997 and 2005, the ICTY reviewed approximately 1072 cases involving over 3300 suspects before handing them over to the Bosnian State Prosecutor. However, this resulted in only 94 trials and 73 investigations,[[169]](#footnote-169) while doing nothing to alleviate the prevalent bias.[[170]](#footnote-170) These would form the bulk of the unindicted Category 2 cases that would later be referred to Bosnia at the ICTY Prosecutor’s discretion. Indeed, far from developing the domestic will to prosecute, the ICTY might have impeded the process. Because of the bottlenecks in the Rules of the Road Programme (moves to refer cases to national authorities attracted little attention and few resources within the Tribunal)[[171]](#footnote-171) and the risk that any politically significant prosecution could be removed from national authorities by the ICTY, the Programme “shut down all efforts by Bosnian government authorities to utilize justice to remove war criminals from powerful post-war positions.”[[172]](#footnote-172) Burke-White contends that ICTY generally “froze out” judicial reform in Bosnia-Herzegovina between its foundation 1993 and the development of the completion strategy in 2002: the jurisdictional relationship of absolute international primacy which conditioned the exercise of any domestic jurisdiction on affirmative authorisation by the ICTY led domestic authorities to under-invest in the institutional forms necessary to promote an effective judiciary.[[173]](#footnote-173) By the time the Completion Strategy was being promulgated, the infantilising effect of ICTY judicial hegemony was such that Bosnian entity governments neglected to undertake meaningful reform of their judiciaries to deal with war crimes because they “did not believe that state institutions could or should do the job.”[[174]](#footnote-174)

5.2 The Catalytic Effect of Rule 11*bis*: Restoring Judicial Sovereignty

On the basis of his experiences in Arusha, the ICTR’s former Senior Legal Officer Frederick Harhoff argues that concurrent jurisdiction between an international criminal court and the domestic state involves both uncertainty and rivalry as they seek to prosecute the same perpetrators.[[175]](#footnote-175) The underlying reason for this is not so much the positive of undertaking prosecution as avoiding the negative of loss of judicial sovereignty, a core element of sovereignty itself. Sovereignty-anxious states are extremely reluctant to renounce this jurisdiction. To the extent that an international tribunal assumes responsibility after finding national jurisdictions wanting:[[176]](#footnote-176)

it is perhaps one of the worst assaults on sovereignty there is, adding insult to injury by implicitly accusing a domestic system of not being up to its international obligations to stand up to impunity. Essentially, in that context, the accusation shifts from the individual accused of having committed an international crime to the State accused of having tolerated it by not trying him effectively.

It is argued that division of labour between the international and domestic parties is the best way to avoid this type of destructive rivalry.[[177]](#footnote-177) Indeed, as we have seen, the ICC’s burden-sharing policy is justified on the basis of its “friendlier,” more “amicable” basis than contested admissibility proceedings would be.[[178]](#footnote-178) However, the Rule 11*bis* process demonstrates that a more antagonistic, transactional process can reap significant rewards in terms of fostering willingness to prosecute wrongdoers from all factions in a conflict that is catalysed by the state’s desire not to be found wanting.

 That ICTY primacy was deeply resented by the former Yugoslav states concerned is incontestable. For example, in Serbia, it was a matter of professional or national pride on the part of the post-Milosevic Kostunica government that Serbia regain responsibility for at least some trials, even those of individuals who fought for it.[[179]](#footnote-179) As Orentlicher notes, in a survey of Serbians, “71 percent believed that it would be better to institute such prosecutions in local courts than in The Hague. Thus anti-Hague sentiment *may have helped foster a more receptive attitude toward domestic war crimes prosecutions than would have been possible without the ICTY*”(emphasis added).[[180]](#footnote-180) As she puts it:[[181]](#footnote-181)

The Serbian public seems ‘more open to the [Belgrade] War Crimes Chamber’ — more ready, that is, to accept the legitimacy of its prosecutions even when the defendants are people who would be considered ‘patriots’ or ‘heroes’ if they were prosecuted in The Hague.

Consequently, the Serbian government’s commitment to domestic trials seems more animated by antipathy to trial of Serbs abroad than by any genuine commitment to justice.[[182]](#footnote-182) Croatians were reported to offer “widespread, if not unanimous” support for domestic trials within its regional courts.[[183]](#footnote-183) It is not just the public and political leaders that are stung into action by what Canter describes as the carrot of transfer to the state and the stick of denial (or revocation) of transfer.[[184]](#footnote-184) Before the Completion Strategy, Bosnian judges and prosecutors argued that they felt “disrespected” and were viewed as inferiors by actors within the ICTY.[[185]](#footnote-185) For them, it was a “matter of pride and self-respect” for them to undertake proceedings of this magnitude.[[186]](#footnote-186) As the President of the Court of Bosnia-Herzegovina tellingly put it:[[187]](#footnote-187)

[t]hese cases are within our jurisdiction. It is not so much that we want them, but that we have a right to try them. And when the ICTY hands them back to us it validates our work in building this court and expands our credibility.

Similarly, Serbian legal professionals resented the fact that Serbian war crimes were prosecuted before the ICTY, placing the state on the same level as war-ravaged countries whose legal systems were seen domestically as far less developed.[[188]](#footnote-188) On similar lines, Rwanda had been dismayed when the ICTR was established as a fully international court outside its territory, which was among the reasons it voted against the formation of the tribunal in the Security Council.[[189]](#footnote-189) The ICTR and the Rwandan government repeatedly clashed when attempting to get custody of the same suspect from third states.[[190]](#footnote-190) The early refusals of the ICTY of Rule 11*bis* requests for transfer to Rwanda (examined in the next section’s consideration of inability) were felt to be national humiliations and spurred further improvements.[[191]](#footnote-191)

 As noted earlier, before Rule 11*bis* the concerned states had little motivation to develop credible commitments to seek accountability for suspects from all national communities, as the ad hoc tribunals could simply demand transfer to The Hague or Arusha, thereby rendering any good work redundant in national terms. Rule 11*bis*, by contrast, reversed this calculus and also gave the ICTY significant leverage over the domestic states. The domestic states would have to prove the existence of courts with sufficient independence and impartiality to guarantee the freedom to pursue prosecutions across all ethnicities.[[192]](#footnote-192) As noted in Section 2, some judicial reform may have emerged in any case due to democratisation and EU accession processes, but there was no guarantee this would be extended to highly-sensitive war crimes cases. In response, the three former Yugoslav states developed specialized courts to deal with category 1 Rule 11*bis* transfers and/or Category 2 cases from the ICTY Prosecutor. In Serbia, the parliament in 2003 passed a War Crimes Law that established a War Crimes Prosecutor’s Office and a War Crimes Chamber in Belgrade to try persons for any crime within its jurisdiction *ratione materiae* committed anywhere in the former Yugoslavia during the wars. Internal political factors played a part in motivating this move,[[193]](#footnote-193) but the international community exerted decisive pressure in ensuring the independence of these institutions.[[194]](#footnote-194) Croatia designated four district courts (Zagreb, Osijek, Split and Rijeka) that could try war crimes cases and diverted special training and resources to this end. To meet the requirements of Rule 11*bis*, the ICTY started collaborating closely with the Bosnian court system, developing close working relationships, training, providing technical support and access to files on war crimes developed through prosecution. In 2005, a Bosnian War Crimes Chamber (‘BWCC’) was created within the State Court, while a Special Department for War Crimes was established within the State Prosecutor’s Office consisting of a hybrid international-domestic bench and prosecution with the ultimate aim of becoming fully national.[[195]](#footnote-195)

 The increased technical ability of these specialized bodies to conduct war crimes trials will be addressed in the next section, which deals with judicial capacity. For now, it will suffice to note its effect on domestic willingness to genuinely pursue prosecutions. Between 2005 and 2010, the BWCC handed down trial verdicts in over 60 cases of war crimes, crimes against humanity and genocide that arose during the war.[[196]](#footnote-196) Because judges and prosecutors are deliberately recruited from the three main ethnic groups, prosecutions are pursued against perpetrators from all communities. Over time, the cases prosecuted became much more diverse in terms of the underlying crimes, geographical areas where they occurred, and ethnicity of the accused.[[197]](#footnote-197) This has helped rebuild the legitimacy of the Bosnian criminal justice system overall: the OSCE has argued that the “11*bis* mechanism has been a great success both in terms of assisting the ICTY completion strategy and demonstrating the independence, professionalism, and capacity of the Court of BiH and Prosecutor’s Office of BiH, in particular.”[[198]](#footnote-198)

 Croatia had made significant progress in terms of judicial reform, and from 2001 onwards it began to charge some members of the hitherto-untouchable army and police forces.[[199]](#footnote-199) After the initiation of the Completion Strategy, the ICTY Prosecutor signalled his intent to leave Croatia to handle its war crimes trials, beginning with the referral of the prosecution of the former General Mirko Norac and the transfer of Rahim Ademi from The Hague to Croatia. The ICTY Referral Bench agreed in September 2005 after seeking assurances about the law and practice of war crimes in Croatia,[[200]](#footnote-200) and the men were prosecuted domestically. Both men had fought in the Homeland War, and approximately 150,000 people protested in Split against Norac’s earlier extradition to the ICTY in 2001. That these individuals could be tried domestically shows how far things had improved. Though more Serbs are generally prosecuted than Croatians, Croatian army figures were later convicted in very contentious cases like the *Paulin Dvor* and *Gospic* cases,[[201]](#footnote-201) while the nationalist politician Branimir Glavas was found guilty of torture and murder of Serb civilians in Osijek during the war.[[202]](#footnote-202) Where once Serbs were charged in their thousands and Croatian in their tens,[[203]](#footnote-203) a ratio of 11 Serbs to 9 Croats was achieved by 2011.[[204]](#footnote-204)

 Serbia presents a more qualified success. Its prosecution unit has been deprived of resources, it has pursed fewer cases than its neighbours, focusses more on trigger-pullers than masterminds of crimes, and appears reluctant to bring charges against higher ranking officials.[[205]](#footnote-205) In its first six years, it completed 25 trials involving 64 defendants at first instance.[[206]](#footnote-206) Prosecutions took place against the high profile ‘Scorpions’ elite police unit for crimes committed in the Bosnian town of Trnovo in 1995, and the Chamber convicted 14 Serbs for the murder of 200 Croat prisoners of war at Ovcara in 1991 after a re-trial in 2010.[[207]](#footnote-207) Prosecutions for war crimes committed in Suva Reka (Kosovo) and Zvornik (Bosnia) relied heavily on ICTY evidence,[[208]](#footnote-208) though concerns remain that responsibility was not pursued to the top of the chain of command and that sentences have fallen short of their ICTY equivalents. As noted earlier, all but one case at the specialized Belgrade War Crimes Chamber involved alleged Serbian perpetrators of crimes against non-Serbs.[[209]](#footnote-209) Significantly, even though Serbia received only one Rule 11*bis* case,[[210]](#footnote-210) its war crimes institutions have forged links with the ICTY and subjected themselves to informal monitoring by the ICTY prosecutor as state authorities prosecute the numerous incomplete case files transferred from the ICTY containing evidence against individual suspects.[[211]](#footnote-211)

 It should be noted that no such success was recorded in Rwanda. Though the predominantly Tutsi Rwandan Patriotic Army (‘RPA’) soldiers fighting against the genocidal regime were observed to have committed war crimes and crimes against humanity, and to have killed between 25,000 and 45,000 civilians between April and August 1994,[[212]](#footnote-212) accountability has largely been one-sided against their Hutu antagonists.  Kigali has a strong incentive not to pursue senior Rwandan Patriotic Front (‘RPF’) figures who directed crimes in 1994, as they permeate the government and military. Only 32 RPA soldiers have ever been prosecuted between 1994 and 1998 for crimes committed in 1994, and of these only 14 were found guilty and given light sentences.[[213]](#footnote-213) As noted earlier, when the ICTR announced investigations of RPF figures, Kigali obstructed witnesses from travelling, thereby crippling the Tribunal for months. As part of the Completion Strategy, the ICTR Prosecutor and the Rwandan Prosecutor-General announced that Rwanda would assume responsibility for trying four unindicted RPF military officers for the Kabgayi massacre of 15 civilians in 1994 that the former had investigated on the understanding that he could reassert jurisdiction if the process was not fair or effective.[[214]](#footnote-214) The trials of the four resulted in two guilty pleas from the lower-ranking officers and two acquittals for the higher-ranking ones.[[215]](#footnote-215) As Waldorf notes, despite scrupulous attention to due process, there are significant reasons to doubt the genuineness of the proceedings given that the prosecution’s witnesses were extraordinarily weak (“they might just as well have testified for the defence”), failed to challenge the defence’s account of events, and made a weak case for command responsibility of those acquitted.[[216]](#footnote-216) Human Rights Watch founds the acquittals unjust on the basis of the evidence presented and labelled the trial a “political whitewash”.[[217]](#footnote-217) Nevertheless, in 2009 the ICTR Prosecutor stated that he found the Rwandan trials fair and that therefore he did not need to take back the case, without engaging with the question of whether they were a genuine attempt to secure accountability.[[218]](#footnote-218) No trials of RPF figures have occurred subsequently. Considering that no trials of RPF figures had taken place between 1998 and 2008, this experience demonstrates the potential of Rule 11*bis* to catalyse domestic prosecutions, and may have generated a more credible prosecution process if it was matched by a credible determination on the part of the ICTR prosecutor to ensure this occurred. The fault lay less in the Rule 11*bis* mechanism than with the determination with which it was employed: the docket-clearing imperative can be a double-edged sword.

5.3 Summarising the Ad Hoc Tribunal Transfer Process

The transactional — at times antagonistic — carrot-and-stick approach of the ad hoc tribunals to transfers played a significant role in fostering domestic willingness in Bosnia, Croatia and Serbia to pursue accountability across ethnic lines in a relatively short time period in the years after the Completion Strategy was outlined. The experience in the Balkans shows that states were keen to establish credible prosecution apparatuses that would encourage the Prosecutor to release files and, perhaps just as importantly, that would ensure that the judicial process was independent to avoid the political embarrassment of having an ongoing case recalled to The Hague.[[219]](#footnote-219) The evident desire of states to avoid the ongoing political embarrassment of foreign trial undermines simplistic claims of burden-sharing advocates in the ICC that antagonistic relations are automatically unconducive to securing justice. In fact, as the next section goes on to show, the use of self-referrals on which this burden-sharing model rests “significantly diminish[es] the likelihood that state officials will be indicted by the ICC”,[[220]](#footnote-220) a logic that can be extended to the ethnic, religious or military community with which they identify more generally. It is to this that attention now turns.

5.4 Carrots and Sticks: The Complementarity Regime on Paper

Almost any country can conduct some high-level prosecutions and trials if the correct combination of international assistance and political pressure are applied. At first glance, there appears to be ample opportunity for the ICC to repeat the carrot-and-stick approach of the ICTY in states in which there is reluctance to prosecute either generally across the state, or particularly against certain factions or groups, by acting as what Gioia calls an “interfering watchdog” to spur state activity through *proprio motu* investigations.[[221]](#footnote-221) On paper, the complementarity regime encapsulates a vision of the Court as a catalyst for state action and a monitor of that action. The OTP’s 2003 Informal Expert Paper labelled its two guiding principles as “partnership” and “vigilance”.[[222]](#footnote-222) Partnership was interpreted conservatively as encouraging the state to undertake national proceedings, while vigilance referred to the principle that the OTP could gather and request information on national proceedings to ensure they were genuine.[[223]](#footnote-223) In the Rome Statute system, otherwise unwilling states must be aware of the risk of ICC admissibility: the hope at the Rome Conference in designing Article 17(2) was that these states would subsequently commence investigations and prosecutions to preclude it. The Article 17(2) inquiry begins when there exist reasons to believe that the domestic proceedings are not genuinely directed towards delivering justice. The stick of admissibility in the The Hague is coupled with the carrot of a public endorsement of the bona fides of national prosecutorial initiatives by a finding that the case is inadmissible at the ICC.

 The Court is specifically mandated to assess the Article 17(2) definition of unwillingness in Articles 15, 18, 19 and 53, which regulate this carrot-and-stick vision of complementarity. This framework of complementarity envisages an active court operating less on its own account like the ad hoc tribunals before 2003, but instead as a post-2003 Completion Strategy-type catalyst for states that might otherwise be reluctant to allow their judicial institutions to investigate, prosecute and try cases on the basis of an implied or express threat that the case might be made admissible.[[224]](#footnote-224) The State is the “first mover”; and can determine to investigate or prosecute before the OTP is even aware of the crimes; but any such decision is concluded while the state is fully cognisant of the potential for ICC action.[[225]](#footnote-225) The ICC becomes involved in Article 53(1) and (2), which require the Prosecutor to evaluate whether a case would be admissible before proceeding with an investigation, which will involve inquiry into domestic proceedings. The state would, of course, be aware of such an assessment. At this stage, and at the Article 15 stage (in which the Prosecutor may initiate preliminary investigations *proprio motu* ), the OTP has made its activities public to notify states of a potential full investigation and (in theory) to encourage them to take action themselves.[[226]](#footnote-226) From the requirements in Article 18 (preliminary rulings regarding admissibility) for the Prosecutor to provide notice of a pending investigation[[227]](#footnote-227) through to Article 19 (challenges to the jurisdiction of the Court or the admissibility of a case), states are given ample opportunity to commence effective proceedings that would lead to the suspension of ICC activity. Once it has initiated a case, the OTP is entitled to specify benchmarks for domestic proceedings under its Article 54(1)(b) mandate to ensure the effective investigation and prosecution of crimes. The most obvious example is the Agreed Minutes outlined between the OTP and Kenya, which established timelines and indicators for domestic proceedings to foster compliance, though ultimately Kenya proved too dilatory.[[228]](#footnote-228) Where action has been catalysed and the state ostensibly undertakes proceedings, Articles 18 and 19 allow the court to monitor them for genuineness under the criteria defined in Article 17, with admissibility permitted where the proceedings fail.

Scrutiny of prosecutorial or trial activity at the national level in ICC admissibility proceedings will fall short of the type of system-wide examination found in the Yugoslav and in particular in the Rwandan Rule 11*bis* cases. The ICC will be more concerned with impunity in the case at hand than in the general conditions that permit it. Any complementarity analysis will be case-specific and not state/situation specific, so there will be no overall evaluation of the national judiciary of the sort seen in Ademi and Norac, for example.[[229]](#footnote-229) Indeed, the former Prosecutor was at great pains to deny that any admissibility proceedings would serve as a judgment on the overall national justice system.[[230]](#footnote-230) Nevertheless, even this more narrow inquiry can throw an unforgiving and official light on impediments to judicial autonomy which could in theory stimulate the kind of response seen in the Balkans and Rwanda (as opposed to the type of Potemkin proceedings to forestall or mitigate ICC scrutiny seen in Sudan). The experience of the ICTY in working with international organisations and domestic NGOs to advance accountability is instructive. Scholars who favour an ICC that defers to national prosecutions argue the Court can support reform constituencies domestically in its interactions with the state by identifying and empowering reformers within the government and judiciary, building support for and co-operating with reformist elements in civil society, publicly identifying political obstacles to justice, and pressing for aid to be made conditional on reform.[[231]](#footnote-231) However, in its day-to-day operations the ICC has pursued a radically different model.

5.5 A Different Type of Carrot: The Complementarity Regime in Practice

Contrary to the expectations of scholars in the years between the signing of the Rome Statute and its entry into effect, the complementarity regime has not replicated the model of pressure and assistance that the vigilance and partnership model appeared to outline. An examination of the Court’s twelve years of practice makes apparent the vision of a Court pressing aggressively through its actions, and diplomacy to force the state to pursue accountability has not been realized. The version of complementarity that has emerged is less one of motivating and empowering states to conduct prosecutions, but instead a paradigmatically contrary one in which the Court largely relieves the state of its duty to combat impunity. A division of labour has emerged in which the OTP adopts an interventionist policy of soliciting self-referrals from states who refer a situation themselves, make explicit their inaction in all or certain defined cases, and neglect to challenge admissibility.[[232]](#footnote-232) The institutional imperatives of the ICC favour this approach for three reasons. The first, namely activity that would preserve the Court from fatal redundancy, has been examined already. The second builds on this by ensuring this activity is fruitful: voluntary acceptance of ICC admissibility by states has been welcomed by the OTP on the basis that it would lead to more effective justice on account of the ICC’s expertise and the likelihood of co-operation with the state.[[233]](#footnote-233) Evidence-gathering in post-conflict states is extremely difficult on account of the magnitude of the crimes, their contextual elements, the temporal and geographical distances from the crimes, and logistical impediments of language and culture. Co-operation with the state can mitigate these difficulties, but state defiance compounds them to the point of impossibility. The best example of this is Rwanda in its periods of pre-Completion Strategy obstreperousness, when it imposed insurmountable travel restrictions on witnesses from travelling to the ICTR in Arusha to give evidence which led to three trials being adjourned.[[234]](#footnote-234) The ICTY’s ongoing travails in the Gotovina and Mladic cases also illustrate the difficulties. The ad hoc tribunals could ultimately surmount these problems through their links to Chapter VII powers, the pressure applied by EU neighbours and the luxury of being able to wait for over fifteen years. The ICC has none of these advantages, making co-operation with the state absolutely imperative and unavoidable. However, the problem arises that a co-operative relationship over prosecutions in The Hague appears to have taken priority over a more vigilant relationship regarding prosecutions domestically, a problem compounded by the fact that the former makes domestic prosecutions less likely (because the state deferring to the ICC can claim it is fulfilling its *aut dedere aut judicare* obligations in full)[[235]](#footnote-235) and because the need to preserve the relationship makes it far more difficult to apply meaningful critical pressure on the state in question.

 Because with self-referrals the state relinquishes its duty to exercise jurisdiction, the OTP and Court’s encouragement of inactivity has been criticized. At a time when the national judiciary should be establishing its credentials, it creates a “pernicious incentive” to do nothing in terms of post-conflict justice other than externalize the responsibility.[[236]](#footnote-236) The policy has been criticized for running contrary to the ethos of the Rome Statute which prioritized the state duty to prosecute and for contradicting the Prosecutor’s stated policy to encourage national prosecutions.[[237]](#footnote-237) Early optimism about the catalytic effect of the Article 17 apparatus in motivating states to make difficult choices to abandon de facto amnesty and prosecute have given way to a gradual realisation that the system as it presently operates encourages “laziness” on the part of the state’s criminal justice system.[[238]](#footnote-238) This leads to the third reason why self-referrals are preferred. Actors in the ICC can present self-referrals not as a shirking of responsibility but rather as a form of collaboration and assistance to the national justice system, the virtue of which is that it obviates the need for the Prosecutor to aggressively prod the state into activity through *proprio motu* investigations.[[239]](#footnote-239) As such, self-referrals split the difference between the type of inertia that would kill the court and the types of interference that would provoke state recalcitrance. Instead of shining a harsh light on prosecutorial torpor or judicial inertia, the Appeals Chamber in *Katanga* held that regardless of how functional and well-regarded a national judicial system is, if a state determines that it does not want to pursue the case then the reasons for this decision are not deemed relevant to the admissibility decision.[[240]](#footnote-240) The 2009–2012 and 2012–2015 Prosecutorial Strategies’ concept of positive complementarity are largely silent as to the use of threat of investigation or prosecution to encourage national governments to pursue accountability. As Burke-White argues, the Court appears to have renounced its most powerful tool, namely the ability to “incentivize, nudge or cajole” reluctant national governments to undertake domestic prosecutions.[[241]](#footnote-241)

 This trend was made clear in the self-referrals by the DRC and Uganda. In the former instance, the Pre-Trial Chamber in the *Lubanga* case accepted a self-referral by Kinshasa, though ultimately the admissibility decision was founded on national inaction on the basis that the arrest warrants issued by national authorities did not refer to Lubanga’s alleged responsibility for recruiting child soldiers.[[242]](#footnote-242) Even though there are serious problems in the Congolese judiciary overall,[[243]](#footnote-243) Lubanga, Ngudjolo Chui and Katanga were all either in custody or ready for prosecution by authorities in the Ituri region where an EU justice capacity-building program had yielded considerable progress in terms of abilities, the UN’s Stabilisation Mission (‘MONUC’) provided protection to judges, and several war crimes prosecutions had already taken place. Schabas convincingly argues that the Congolese justice system was doing a better job of prosecuting than the ICC because it was prosecuting Lubanga for crimes of greater gravity than recruitment of child soldiers.[[244]](#footnote-244) Critics argue the Court could have made a more effective contribution to combatting impunity in the DRC by encouraging the national judiciary to assume primary responsibility and monitoring the trials thereafter.[[245]](#footnote-245) Though the OTP has argued that “voluntary acceptance of ICC admissibility does not necessarily presuppose or entail a loss of national credibility”,[[246]](#footnote-246) it amounts no less than the Rules of the Road programme to a high-profile accusation that the state lacks faith in its judicial institutions:[[247]](#footnote-247)

[Removal of the *Lubanga* and *Katanga* cases from the DRC] undermines the confidence of domestic judiciaries; it send a message that they might be trying to reform themselves and might be trying to deal with very complicated justice questions, but that’s not necessarily going to stop an international body from intervening.

 Uganda’s self-referral reflected the fact that it was unable to gain physical custody of LRA indictees, though it also had the calculated advantage of turning the rebels into international pariahs.[[248]](#footnote-248) The logic of complementarity and state sovereignty would dictate that should the indictees return to Uganda or be captured elsewhere, every opportunity should be given to a Ugandan justice system that has proven relatively functional and autonomous and which has successfully prosecuted members of the LRA in the past. However, on two occasions the ICC Prosecutor stated that Joseph Kony and the other LRA indictees would have to be tried in The Hague.[[249]](#footnote-249) As Seils notes, this positions appears to “discount completely the possibility that the Ugandan prosecutions initiative could pass muster under the Statute.”[[250]](#footnote-250) This blanket denial of any role for the Ugandan courts in any future case of the LRA indictees privileges the Court’s internal institutional interests over the putative state-led system enunciated in Rome. Observers suggest that the OTP’s dominance has actually discouraged the Ugandan courts from taking cases domestically due to the reinforcement of the norm that international justice is better justice.[[251]](#footnote-251) Far from stimulating the rule of law by buttressing the independence of the judiciary, the ICC has been complicit in a handful of states in undermining their independence by assuming judicial autonomy does not exist, while crystallising choice over accountability as lying with the executive and not the institutions of justice.

5.6 The Court as a Facilitator of One-sided Impunity

While the existing operation of complementarity fails to catalyse domestic trials generally in the way that Rule 11*bis* did, this failure is evident in particular in relation to prosecutions of state forces or those who side with the government. The trials of Croats by Croats or Serbs by Serbs which mark the restoration of criminal accountability in the Balkans are unlikely to be replicated in states in which the ICC engages in highly collaborative relationships with the state. Because the ICC lacks enforcement power, it is dependent on national co-operation for access to crime scenes, execution of arrest warrants and protection for witnesses, which makes investigations that would jeopardize relations with the Congolese, Malian or Central African republic leaderships unattractive to the Prosecutor. This can call into question the impartiality an international court was assumed to exemplify. The OTP has been seen as soliciting self-referrals as a means of securing “buy in” for its investigations given the feebleness of its enforcement capacities.[[252]](#footnote-252) A justifiable suspicion exists that self-referral by the territorial state gives it too much control over the process, allowing it to discredit its internal enemies while securing its own impunity as the ICC will be too reluctant to alienate it lest ongoing prosecutions be jeopardized through lack of co-operation.[[253]](#footnote-253) As Rodman and Booth, who have written the main study on these “manipulated commitments”, put it:[[254]](#footnote-254)

If ICC prosecutions are viewed as threatening to the regime, the relationship is likely to change from cooperative to adversarial, thereby denying or restricting access to evidence and witnesses and undermining the very reason why the prosecutor encouraged self-referrals in the first place.

This risk was noted by defence counsel in the *Bemba Gombo* case, in which the Defence argued the ICC put itself “at risk of manipulation by transient governments” who might “exploit the ICC to eliminate their old enemies”.[[255]](#footnote-255)

 After a request by Ugandan president Musaveni in 2003, in 2004 the OTP opened an investigation into possible crimes committed in northern Uganda, and in 2005 issued warrants for a handful of LRA leaders for crimes against humanity and war crimes.[[256]](#footnote-256) The ICC Prosecutor Moreno-Ocampo communicated his acceptance of the referral in a joint press conference with Musaveni in London, establishing early concern that his government would have little to fear from the OTP notwithstanding credible evidence of extrajudicial killings, rape, forcible displacement of over a million citizens and the child soldier recruitment by the army (‘UPDF’) or its militias.[[257]](#footnote-257) Both the Prosecutor and Musaveni justified the focus on the LRA on the basis that it was motivated solely by the impossibility of apprehending them across borders and that any UPDF crimes could and would be prosecuted by the domestic courts.[[258]](#footnote-258) However, no such prosecutions have occurred, either for crimes committed before the referral or afterwards. Comments by Ugandan officials made it clear the government saw the ICC proceedings as directed solely against the rebels without any possibility of indictment of UPDF figures.[[259]](#footnote-259) Though the OTP have denied suspicions of a quid pro quo agreement with Kampala,[[260]](#footnote-260) ongoing UPDF impunity has been met by a deafening silence on the part of the ICC.

 Similar concerns about the ICC’s tolerance of self-serving government impunity are raised by the experience in DR Congo. The focus of the ICC was on the Ituri region where President Kabila’s *Forces Armées de la République Démocratic du Congo* (‘FARDC’) were not significantly implicated in serious criminality, while his political rivals Jean-Pierre Bemba and Azarias Ruberwa were.[[261]](#footnote-261) In its engagements with the DRC, the ICC has shown greater alacrity in investigating crimes committed by rebels than those committed by the Congolese national army.[[262]](#footnote-262) Elsewhere in DRC, FARDC is no less conspicuous than any of the other factions for its violations of international law, most notably its recruitment of child soldiers[[263]](#footnote-263) and its perpetration of an estimated 40 per cent of sexual violence in Eastern Congo.[[264]](#footnote-264) Kinshasa has allowed some prosecutions of minor figures, but allegations against senior government and military figures are not pursued.[[265]](#footnote-265)

 Côte d’Ivoire exhibits many of the same problems. Although the initial Article 12(3) declaration accepting the Court’s jurisdiction on an ad hoc basis was made by President Laurent Gbagbo, once it became apparent that the ICC would investigate crimes committed by his army, he paralysed proceedings, thereby preventing the OTP from visiting to conduct investigations.[[266]](#footnote-266) The earliest interactions with the Ouattara regime that ousted Gbagbo suggests a determination on the part of the OTP to avoid this withdrawal of assistance in the ongoing Gbagbo and Charles Blé Goudé cases. Domestic accountability is more thoroughgoing in Côte d’Ivoire than in Uganda and DRC (perhaps because the conflict has largely ended), but no less imbalanced. As of late 2013, over 150 cases had been taken against individuals affiliated with Gbagbo, while no cases were brought against pro-Ouattara forces.[[267]](#footnote-267) This is so notwithstanding the recording of serious crimes such as massacres, the burning of villages and rape committed by these forces by human rights organisations and the National Commission of Inquiry.[[268]](#footnote-268) Though the OTP has claimed it is pursuing a “sequential” approach in investigating the Gbagbo forces before the Ouattara side, the domestic perception is that the Court is taking a softly-softly approach with the government whose help it is largely reliant on if ongoing activities are to be successful.[[269]](#footnote-269)

 Evidence from Uganda, DRC and Côte d’Ivoire (and Central African republic, where President Bozizé’s self-referral requested the ICC to only investigate crimes committed by the predecessor Patassé regime) suggests that governments realize they can free-ride on the ICC’s prosecutions of their enemies as long as self-referral is presented by its advocates in the Court and OTP as a fulfillment of the state’s duties.[[270]](#footnote-270) The ICC’s undeviating focus on its high-profile cases may result in the neglect of perpetrators that in theory have been left to the state. Though presented as collaboration, burden-sharing in effect often means the Court can be opportunistically “co-opted” by friendly but rights-abusive governments, and in so doing can assume almost all responsibility for prosecution.[[271]](#footnote-271) Some argue that the ICC has adopted a position “that it is better to support partial justice for atrocity crimes than no justice at all”,[[272]](#footnote-272) an approach that is morally defensible but falls far short of the hopes expressed at the Rome Conference and the standard set by Rule 11*bis* process in the Balkans that supposedly offers a replicable model.

**6 The Impact of Rule 11*bis* and Complementarity on Capacity-Building**

Section 4 of this article examined how Rule 11*bis* fostered the willingness of the former Yugoslav states to undertake domestic prosecutions of even those who the general public and national power-brokers supported, even if this success was not replicated in Rwanda. As this section goes on to examine, the Completion Strategy also had significant success not only in helping develop the capacity to undertake trial in both the Balkan states and Rwanda, but also in ensuring that this was done with respect for human rights standards in contexts in which such respect had not been the historical norm. Indeed, it could hardly be otherwise, given that Security Council Resolution 1503 (2003) called on the Tribunals and international community “to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR.”[[273]](#footnote-273) Because with the issue of an indictment both Tribunals assumed the obligation to ensure its indictees receive the rights guaranteed in the Statute, non-refoulement concerns made it inconceivable for them to transfer cases to a judicial system that did not respect international due process standards and international human rights law, or that allowed the death penalty as a sentencing option.[[274]](#footnote-274) As such, the Rule 11*bis* process exhibit to a greater or lesser extent what Koh refers to as norm internalization, the complex process “whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes.”[[275]](#footnote-275) By contrast, the relationship of the ICC with domestic states is unlikely to be as fruitful in these respects, lacking as it does the same “cycle of interaction, interpretation, and internalization” the ad hoc tribunals enjoyed that would make this penetration of norms a reality.[[276]](#footnote-276) The imperatives of the ICC to concentrate on international prosecutions, coupled with the aforementioned historical reluctance of international courts to engage significantly with domestic judiciaries, mean that assistance to states is more likely to revolve around ensuring the state has the capacity to assist the ICC than to undertake trials on its own, while there are significant institutional and financial barriers to helping states undertake trial domestically.

6.1 Rule 11*bis* and capacity-building in Bosnia, Croatia and Serbia

The weaknesses of the domestic judiciaries in Croatia, Bosnia and Serbia was one of the prime reasons why recourse to an international tribunal was so automatic. In addition to inevitable war-time damage to institutional structures, facilities and personnel, it must be remembered that each judicial system was in its infancy on the break-up of Yugoslavia. These weaknesses, both in terms of the technical proficiency with which proceedings were conducted and in terms of due process guarantees, were apparent in the earliest post-conflict trials that occurred in each state. At the time the ICTY became inundated with cases, the Prosecutor stressed to the Security Council the potential problems with referral of cases to national courts in their current condition, and urged the Council and the international community to develop the capacity of national justice systems.[[277]](#footnote-277) A generic list of shortcomings extant in trials in Bosnia-Herzegovina at this time included ineffective witness provision, lack of adequately trained judges and law professionals, insufficient financial and logistical resources, delays and incompatibility of national law with international law and failure to adhere to generally accepted professional defence standards among the main problems. [[278]](#footnote-278) In one municipality alone (Orasje) between 1993 and 1995, 47 suspects were convicted *in absentia*, many of whom received the death penalty.[[279]](#footnote-279) Overall, the judicial system “display[ed] shortcomings too great for it to constitute a sufficiently solid judicial foundation to try cases referred by the tribunal.”[[280]](#footnote-280) As noted earlier, these shortcomings manifested themselves in ethnically-biased prosecutions which in turn led to the Rules of the Road Programme which effectively terminated all domestic initiatives to punish war crimes, suspended judicial reform and led domestic authorities to under-invest in the institutional forms necessary to promote an effective judiciary. By contrast, under Rule 11*bis*, the Referral Bench had to consider specific fair trial issues raised by the accused who does not wish for such transfer. Issues discussed have included the perceived or actual partiality of domestic institutions, systematic delays in bringing cases to trial before national authorities, conditions and duration of detention before and after trial, availability of defence counsel, equality of arms and witness protection issues.[[281]](#footnote-281) This significantly altered the incentive structures for ICTY figures to interact with the Balkan judicial systems. The possibility of this external validation (plus, of course, the ability of the Prosecutor to send observers to monitor domestic procedures[[282]](#footnote-282) and to request the Referral Bench to revoke a referral)[[283]](#footnote-283) in turn made domestic actors more concerned with the competence and fairness of national prosecutions than had hitherto been the case.

 The stick of removing cases from Bosnian jurisdiction under Rules of the Road clearly did not suffice to impel fair trial domestically,[[284]](#footnote-284) but the carrot of transfer back to the domestic justice system did. Once the internationalist paradigm of the ICTY gave way to the need to devolve responsibility to the states, the proposed solution was the aforementioned War Crimes Chamber created within the State Court and while a prosecutorial Special Department for War Crimes formed inside the national Prosecutor’s Office. Until 2008, there were five trial panels and two appellate panels containing two international judges and one domestic judge. The Special Department for War Crimes was also composed of hybrid personnel. After 2008, the composition switched to include two Bosnian judges and one international, eventually switching to full Bosnification: the organising principle of the Chamber was that accountability should remain the responsibility of the Bosnian people.[[285]](#footnote-285) Within five years there were forty-one national judges compared to seven international, all of whom had received training in procedural and substantive elements of the law. International judges and prosecutors deliberately adopted a secondary, supportive role, deferring to their national counterparts in all but the initial Rule 11*bis* referrals.[[286]](#footnote-286) The general perception among observers is that these trials have been conducted effectively and fairly.[[287]](#footnote-287) ICTY case-law has been applied consistently, if rarely innovatively.[[288]](#footnote-288) Protective measures for witnesses improved immeasurably, and specialized infrastructure was built. Because criminal defence was delegated almost exclusively to Bosnians, the Criminal Defence Support Division trained approximately 350 lawyers within two years.[[289]](#footnote-289) The Chamber was “born primarily as a result of a drive to ensure the completion of the work of the ICTY ... it would appear that, were it not for the ICTY Completion Strategy, national capacities such as those which are now in existence may never have been created.”[[290]](#footnote-290) It should be noted that some problems persisted in terms of political interference, witness protection and adherence to substantive standards of international law which compelled an extension of the participation of international judges beyond the initial 2009 deadline for complete Bosnification, but on the whole these problems were eradicated progressively over time.

 Similar developments could be seen in Croatia and Serbia, even where the influence of the international community was less hands-on. Prior to the aforementioned referral of Ademi and Norac, the ICTY had to satisfy itself that conditions for referral were satisfied. At the Rule 11*bis* proceedings, the bench established that arrangements for witness availability and witness protection in Croatia were sufficient to ensure a fair trial and that all necessary legal and technical requirements were in place in Croatian law to ensure a fair trial, and registered no concerns about the competence of the criminal justice system.[[291]](#footnote-291) By the middle of the last decade, Croatia passed new legislation to facilitate fair trials, increased judicial training and made material investments in courts thought likely to receive Rule 11*bis* referrals.[[292]](#footnote-292) Serbs began to get convicted at lower rates and unsubstantiated charges were systematically dropped at trial.[[293]](#footnote-293) Acquittal rates for Serbs rose dramatically in the years when Croatia was soliciting its first referral, albeit from a very low level.[[294]](#footnote-294) Assessments of Croatia’s domestic proceedings have “evolved from highly-critical to cautiously optimistic” around the time of the *Ademi-Norac* transfer[[295]](#footnote-295) to something approximating good practice over time. Between 15 and 25 war crimes trials have been held every year since 2006, notwithstanding the political climate of opposition to prosecutions evidenced by the reaction to the ICTY’s initial conviction of Ante Gotovina.[[296]](#footnote-296) The four Croatian courts responsible for war crimes trials suspended several cases that had been heard *in absentia* at lower level, while the practice of considering military service as a mitigating factor has been abandoned.[[297]](#footnote-297)

 By 2003, Serbia’s judiciary was deemed incapable of carrying out potential war crimes trials competently or fairly.[[298]](#footnote-298) Trials of Serbs evinced “poor indictments and almost disinterested prosecution, acquittals because of lack of evidence, or inappropriately low sentences.”[[299]](#footnote-299) As noted earlier, internal and external pressures, not least of which included Rule 11*bis*, compelled a change in direction. In July 2003, the Serbian parliament enacted the Law on Organisation and Competence of Government Authorities in War Crimes Proceedings which established the aforementioned Belgrade War Crimes Chamber and Prosecutor’s Office. The Law obligated the Prosecutor to base national charges on the same facts as those in the referred ICTY indictment.[[300]](#footnote-300) To ensure standards of trial competence would be achieved, the OSCE with the help of the ICTY organized multi-year programmes of assistance to the new bodies, as well as defence, police investigation, outreach and witness protection.[[301]](#footnote-301) Every judge in the Chamber visited the ICTY at least two or three times by the time of the first Rule 11*bis* referral, which has been credited with inspiring much procedural reform and improved treatment of victims and witnesses.[[302]](#footnote-302) The first Rule 11*bis* case was transferred in 2006,[[303]](#footnote-303) though a number of non-11*bis* transfers of cases under ICTY investigation but which were not yet indicted also followed.[[304]](#footnote-304) These trials were monitored by the OSCE and Serbian prosecutorial authorities reported back regularly to the ICTY Prosecutor. As in Bosnia and Croatia, much of the impetus for reform may have come from internal factors and the influence of the EU. However, at least as regards war crimes trials, Orentlicher observes that “virtually all of our Serbian interlocutors, including those who have otherwise been at best ambivalent about the Tribunal, consider the ICTY’s contributions to be significant.”[[305]](#footnote-305) It is seen by some domestically as a “civic education” into fair trial rights and the ICTY’s greatest achievement.[[306]](#footnote-306) Once more, it is important to note that progress has not been without limitations. There were significant concerns about witness protection in cases involving the police, obstacles to the effective mounting of defence and largely unsuccessful outreach programmes, which did little to alter public attitudes to the wars.[[307]](#footnote-307) ICTY findings that crimes committed in Bosnia were committed in the context of an international armed conflict have been ignored.[[308]](#footnote-308)

6.2 Rule 11*bis* and capacity-building in Rwanda

Commendable as the improvements in criminal justice function in the three former Yugoslav states are, the better illustration of how the ad hoc tribunals positively affected domestic capacity is Rwanda, where the ICTR endured a much more fraught, transactional process with a state less committed to liberal human rights norms than democratising governments of Croatia or Bosnia. Rwanda also started from a much lower level. By the end of the genocide in the latter half of 1994, very few of the country’s judges remained within the state and those absent could not be replaced in the short- or medium-term.[[309]](#footnote-309) There was no defence bar, and most of the few Rwandan defence counsel present within national borders announced they would not defend suspected *génocidaires*.[[310]](#footnote-310) Rudimentary facilities needed to run a justice system like buildings, vehicles, books, were almost entirely absent.[[311]](#footnote-311)

 It was in this environment that the RPF-led government passed Organic Law No. 08/96, which authorized Special Chambers to try individuals suspected of involvement and planning of the genocide in a four-tiered prosecutorial hierarchy.[[312]](#footnote-312) Chastened by the experience of the genocide and conscious of the Hutu-Tutsi demographic imbalance, the RPF government pursued a policy of “maximal accountability” at all levels for genocide and crimes against humanity to contain potential Hutu challenges to their political control.[[313]](#footnote-313) The anti-Hutu climate in Rwanda is best illustrated by the criminalisation of “genocidal ideology” whereby any denial or minimisation of the genocide is punishable, and the vague law against ethnic “divisionism” which is open to politically-motivated and selective enforcement.[[314]](#footnote-314) These laws have led potential defence witnesses to withdraw co-operation lest their denial that an individual participated in the genocide be mistaken for “genocidal ideology.”[[315]](#footnote-315) Category 1 crimes under the Organic Law (those of the most senior planners or most notorious offenders) had a mandatory penalty of death: in 1997, 30.8 per cent of defendants were thusly sentenced, though this percentage dropped over time.[[316]](#footnote-316) Indeed, the unavailability of the death penalty was another of the primary reasons why Rwanda voted against the establishment of ICTR in the Security Council.[[317]](#footnote-317) The public execution of 22 convicted *génocidaires* in a Kigali stadium in 1998 suggested the domestic trials were more like “government-endorsed revenge” than the rule of law.[[318]](#footnote-318)

 This climate was reflected in the manner by which justice was pursued. Many judges in the Special Chambers had only six months of legal training.[[319]](#footnote-319) Almost immediately there was credible evidence of these judges being influenced by the government or being threatened with death or serious injury.[[320]](#footnote-320) Though there were an estimated 100,000 prisoners awaiting trial, only 16 defence lawyers practised in Rwanda at the time.[[321]](#footnote-321) Though Rwanda’s constitution provided a plethora of fair trial rights, typical due process shortcomings included lengthy delays before trials and appeals, apparently partisan judges (“it was frequently clear that those accused of genocide and other crimes against humanity were already considered guilty by both judge and prosecutor”) and denials of the rights to present witnesses, cross-examine and adequate time to prepare defence, as befits a grossly rushed process in which between over 8000 genocide suspects were tried in the first seven years. [[322]](#footnote-322) Arbitrary arrests, unlawful detention, re-arrests of acquitted suspects and concerns regarding the competence, independence and impartiality of the judiciary endured well into the 2000s.[[323]](#footnote-323) Prison conditions were characterized by physical abuse, unsanitary conditions, overcrowding and lack of sustenance.[[324]](#footnote-324) That Rwanda has surmounted some of these difficulties to the extent that cases can now be referred testifies to how the structural and institutional dynamics of the Rule 11*bis* process were employed to make the domestic re-assumption of the prosecutorial duty with due process guarantees a reality.

 Though it was accepted early on by the Trial Chamber (sitting as a Referral Chamber) that Rwanda’s domestic law provided a sufficient legal framework for trials of genocide and crimes against humanity,[[325]](#footnote-325) both Prosecutor and Court were cautious about the possibility of Rule 11*bis* referrals in the immediate aftermath of the announcement of the ICTR’s Completion Strategy. As late as 2006, when the transfer of an accused named Michel Bagaragaza to Norway was being decided by the Tribunal, the Prosecutor stated he would not permit transfer to Rwanda due to the risk of the death penalty being imposed.[[326]](#footnote-326) It was made clear that informal agreements between the Prosecutor and Rwanda not to apply the death penalty to transferees were not sufficient to satisfy the requirements of Rule 11*bis*.[[327]](#footnote-327) On this basis, the Prosecutor determined to work for domestic repeal of the death penalty and guarantees of fair trial in Rwandan law for potential Rule 11*bis* indictees as necessary preludes to transfers,[[328]](#footnote-328) beginning a process whereby shortcomings in domestic trial standards were subject to “searing reviews”[[329]](#footnote-329) by agents of the Tribunal and consistently ameliorated by Kigali. In March 2007, Rwanda abolished capital punishment for any cases transferred from the ICTR or third-party states to it in the Organic Law No. 11/2007 of 16 March 2007 concerning Transfer of Cases to the Republic of Rwanda from the ICTR (‘Transfer Law’).[[330]](#footnote-330) This was later followed in July of that year by full abolition of the death penalty from the entire judicial system.[[331]](#footnote-331) The inapplicability of the death penalty to Rwandan transfers was welcomed by the ICTR and disappeared as an issue thereafter.[[332]](#footnote-332) Agreements with Rwanda relating to monitoring and prison conditions also followed. These agreements fostered the Prosecutor’s willingness to finally make Rule 11*bis* applications, reversing his earlier declarations that Rwanda could not provide a fair trial.[[333]](#footnote-333)

 By late 2008, it appeared that the Trial Chamber was adopting a “protectionist” approach by going through the list of due process guarantees listed in the Statute of the ICTR and recommending against transfer on the basis of any failure to achieve these standards again in relation to detention, fairness of trial, witness protection and judicial independence.[[334]](#footnote-334) After a series of Rule 11*bis* referral rejections, the Prosecutor announced to the Security Council that his Office was engaging in consultations with the Rwandan government to identify which measures should be taken to meet the concerns of the Chambers.[[335]](#footnote-335) In mid-2009, the Prosecutor “urge[d] the [Security] Council to call upon Member States to redouble their efforts in support of capacity-building for the Rwandan legal system.”[[336]](#footnote-336) Indeed, once transfers to Rwanda became a priority for the international community, bilateral and multilateral agencies began to express willingness to provide material and technical assistance for capacity-building for war crimes and genocide trials at the local level.[[337]](#footnote-337) The ICTR’s Outreach Programme within the Tribunal’s Registry led to the training of judges, lawyers and human rights activists in anticipation of transfers, which accelerated between 2007 and 2011.[[338]](#footnote-338) Though there had been professional development within the justice system independent of the ICTR (most notably in 2004 when very significant and beneficial reforms were applied to the judiciary and prosecution service in terms of educational requirements, autonomy and the numbers of personnel),[[339]](#footnote-339) the Tribunal’s work has been seen by domestic justice system actors as beneficial and has allowed them to circumvent criticism raised against the earlier genocide trials:[[340]](#footnote-340)

Inside the national courts it was understood that changes in legislation were insufficient to satisfy international critics. Within the national courts, there was a need to differentiate between the first set of trials, which had been widely discredited following the immediate transition, and the capacity of the national courts to receive current genocide-related cases from the ICTR.

The problem, however, was that technical and professional improvements in laws and judicial competence generally were not matched by the necessary assurance of rights to fair trial of genocide-related cases particularly.

 The relevant fair trial rights for consideration under Rule 11*bis* are listed in Article 20 of the ICTR Statute and contain the usual provisions like freedom from compulsion to testify against oneself, adequate time and resources to prepare a defence, trial without undue delay and so forth. Rwanda agreed with the ICTR that it would guarantee domestic fair trials in accordance with international standards in order to secure transfers.[[341]](#footnote-341) However, these informal guarantees alone were again not enough. In ensuring these rights, the structure of the justice system needed to be adequate. The Transfer Law therefore did much to build upon ongoing judicial reform. Article 2 provided that the High Court was the court competent to try transfer cases. Although initially a trial was to be undertaken by only one judge, Rwanda responded to concerns expressed by the Trial Chamber in *Munyakazi* by passing new legislation which provided that the President of the High Court could designate a quorum of three or more judges depending on the complexity or importance of a transferred case.[[342]](#footnote-342) Article 16 provided for appeal to the Supreme Court, while Article 13 guaranteed all the fair trial rights already contained in the ICTR Statute. The *Kanyarukiga Trial Decision* and *Munyakazi Appeal Decision* saw findings that Rwanda possessed sufficient judicial autonomy in the High and Supreme Courts to permit transfer.[[343]](#footnote-343) In *Gatete*, the Trial Chamber acknowledged that lawyers who represented *genocidaires* had been threatened and arrested in the past but concluded the accused would now be able to find adequate representation.[[344]](#footnote-344) Article 19 operates as a safeguard by providing that the ICTR Prosecutor (or his nominated observer) shall have the right to designate individuals to observe the progress of cases transferred to document errors and deter unfair tendencies, while Article 20 accepts the potential for an order of referral to be revoked should trial not be fair.

 Much of the concern related to the fact that the Abolition of Death Penalty Law replaced capital punishment in all previous legislative texts with either “life imprisonment” or “life imprisonment with special provisions”, which was synonymous with solitary confinement.[[345]](#footnote-345) The Appeals Chamber in the *Munyakazi Appeal* held that because Rwanda had no protections in place to limit the imposition of solitary confinement it fell short of international standards, and so “the penalty structure was inadequate, and the referral must be denied.”[[346]](#footnote-346) A month after the *Munyakazi Appeal Decision*, Rwanda’s Special Representative to the Tribunal announced that Rwanda would look at measures to respond to the ICTR’s fears.[[347]](#footnote-347) In early November 2008, the legislative branch in Rwanda enacted the Organic Law Modifying and Complementing the Organic Law on the Abolition of the Death Penalty which clarified that “life imprisonment with special provisions” could not be imposed on persons transferred from the Tribunal or from third-party states.[[348]](#footnote-348)

 The other major concern was witness safety. Article 14 of the transfer law gave the Rwandan High Court the power to provide appropriate protection for witnesses similar to those set forth in the ICTR Rules of Procedure and Evidence, required the Prosecutor General of the Republic to facilitate witnesses in giving testimony, and gave immunity from search, seizure, arrest or detention to witnesses during their travel to and from the trials. However, in the *Kanyarukiga Trial Decision*, the Chamber noted that notwithstanding these safeguards, many Rwandans outside the state territory had a legitimate fear of being charged with “genocidal ideology” if they were to deny a defendant’s role in the events of 1994 and would be afraid to testify in Rwanda.[[349]](#footnote-349) The provision of video-link evidence was insufficient to rectify this as different weight could be given to in-court testimony of prosecution witnesses,[[350]](#footnote-350) while in *Hategekimana Appeal* it was decided that African Commission for Human Rights monitoring was an insufficient solution to the unavailability of witnesses.[[351]](#footnote-351) Overall, the Chamber concluded that “defendants will not be able to call witnesses residing outside Rwanda to the extent and in a manner which will ensure a fair trial” if their cases were transferred.[[352]](#footnote-352)

 Again, Rwanda responded to this judicial criticism. Within 6 months of these decisions, Organic Law No. 66/2008 provided that no person could be criminally liable for anything said or done during trial, excepting relevant laws on contempt of court and perjury in response to the fear of prosecution for spreading genocidal ideology.[[353]](#footnote-353) Rwanda also revised its witness protection measures by providing greater resources and removing it from the remit of the national prosecution authorities.[[354]](#footnote-354) Finally, in June 2011 a referral bench ruled in favour of the Prosecutor’s application for transfer of Jean Uwinkindi.[[355]](#footnote-355) The Chamber held that the new legislation’s “immunities and protections provided to the witnesses under the Transfer law are adequate to ensure a fair trial of the Accused before the High Court of Rwanda” and that these laws “must be given the chance to operate before being held to be defective.”[[356]](#footnote-356) The Referral Chamber commended Rwanda for demonstrating “the willingness and the capacity to change by amending its relevant laws over the past two years”[[357]](#footnote-357) and noted a general capacity and willingness to try referred cases in accordance with international fair trial standards. It also appointed the African Commission of Human and Peoples’ Rights to monitor the domestic proceedings.[[358]](#footnote-358) In the aftermath of *Uwinkindi*, Canada and Norway granted extradition requests from Kigali,[[359]](#footnote-359) while the European Court of Human Rights in *Ahorugeze* v*. Sweden* found itself unable to conclude that substantial grounds existed for believing that the applicant faced potential breaches of Articles 3 or 6 if extradited to stand trial in Rwanda.[[360]](#footnote-360)

 Ryngaert has labelled this a victory for Rwanda in its “tug-of-war”[[361]](#footnote-361) with the ICTR, but this is a contest the ICTR was content to lose: the Referral Chamber stated that it “will only consider the revocation mechanisms as a remedy of last resort” should issues arise in domestic proceedings.[[362]](#footnote-362) Ryngaert argues that Rwanda’s legal system was given a lighter touch than the 2008 decisions and that “sometimes it appears that the referral was a foregone conclusion for which *ex post* some legal arguments had to be found”, which certainly encapsulates the Tribunal’s desire to transfer but does something of a disservice to the degree to which this desire catalysed meaningful change on the ground which ultimately justified this lighter touch.[[363]](#footnote-363) Until *Uwinkindi*, Rule 11*bis* represented a process whereby the Tantalus of Rwanda saw the fruit of referral eluding its grasp, and the water of international vindication always receding before a drink could be taken. In their concluding remarks, the judges of the *Kanyarukiga* Chamber noted that “the Republic of Rwanda has made notable progress in improving its judicial system,”[[364]](#footnote-364) while in *Munyakazi* the “positive steps taken by Rwanda to facilitate referral” were commended with the promise that “if Rwanda continues along this path, the Tribunal will hopefully be able to refer future cases to Rwandan courts.”[[365]](#footnote-365) Nevertheless, until a threshold competence and fairness level was reached, referral was not forthcoming. Any suggestion in 2001 that the European Court of Human Rights would assent to genocide suspects being extradited to the Rwandan courts within a decade would be greeted with derision. Nevertheless, interactions between the institutional imperatives of the ICTR and offended sovereignty of Rwanda led to precisely this outcome. As Canter puts it, Rule 11*bis* “has been a catalyst for change and, ultimately, brought the national into greater compliance with international legal norms and human rights standards.”[[366]](#footnote-366)

 It should be pointed out that these dramatic improvements in Rwanda have not translated to the judicial system as a whole.[[367]](#footnote-367) The Rule 11*bis* process has ensured Rwanda possesses a twin-track judicial system where referrals from Arusha enjoy monitoring, freedom from the death penalty or life sentences of solitary confinement, strong witness protections and high-quality detention facilities, while no such advantages are guaranteed in domestic trials, be they for genocide or non-genocide related crimes. Bearing in mind that at the time of the Uwinkini transfer, Rwanda ranked 166 out of 187 in UNDP’s Human Development Index 2011[[368]](#footnote-368) and effectively remained a repressive one-party state, it represents a significant achievement in a difficult peace-building ecology and may ultimately allow for “democratic learning”.[[369]](#footnote-369)

6.3 Capacity-Building and the Complementarity Regime

Though his work does not address the Rwandan, Croatian or Serbian contexts, the experiences of the ICTR-state interactions in these countries bears out Chehtman’s argument that[[370]](#footnote-370)

effective capacity development is not merely the result of successful (or less successful) initiatives. It is, by contrast, determined to a large extent by structural factors and institutional dynamics … certain structural features, such as the institutional position of the international or internationalized tribunal, the law it is mandated to apply, and their exit or transition strategy, that are not usually considered as related to capacity development but which have a far greater importance than more evident direct and indirect means.

Developing capacity for atrocity crimes was not simply a matter of providing training and funding to post-conflict states: it needed the institutional incentives of referral or rejection of referral to ensure trials would approximate international standards of competence and fairness at trial. Though this section examines how the ICC is willing to serve as a locus for various capacity-building initiatives in states that come to its attention who manifest an inability to undertake proceedings, no such institutional incentives arise in the Rome Statute context in practice that would give the same goal-oriented direction to them as was seen in the Rule 11*bis* cases. Because the ICC operates primarily on the basis of self-referrals, this creates distinctly different imperatives in state-Court interactions to those of states with the ad hoc tribunals.

 The underlying premise of much capacity-building is that the state in question is willing to secure accountability, but lacks the ability due to one or all of three disabling circumstances, namely total collapse of the judicial system, substantial collapse, or unavailability. These shortcomings must then render the state unable to obtain evidence or the accused or otherwise unable to carry out proceedings. Total collapse of the judiciary (systematic, crippling dysfunctionality) will usually result from destructive civil war or the absolute impoverishment of the state, leading to complete inaction and automatically making the case admissible, as was the case with Central African Republic, which to date is the only state to present this degree of decrepitude. The necessary reconstruction of the judicial system is not feasible in the short-to-medium term, making internationalisation of accountability in The Hague unavoidable. Situations of substantial collapse, however, raise a distinctly different potential for capacity-building. Though undoubtedly signalling a significant level of justice sector degradation, if the right combination of technical assistance, resourcing and political will were imported or fostered, most countries would have the potential to conduct at least some important, high-level prosecutions.[[371]](#footnote-371)

 Two main theories for how the ICC could stimulate domestic capacity building for breaches of international criminal law have been advanced. The first is through the ordinary, carrot-and-stick approach of classical, ‘passive’ complementarity, wherein the Court acts as a catalyst for action and a monitor of that action. In this conception, states would be encouraged to undertake national proceedings by the initiation by the ICC Prosecutor of an investigation under Article 53, and to forestall admissibility the state might begin domestic criminal justice reform to this end. The state would reform its criminal justice system in such a way to guarantee that it can commence genuine proceedings, thereby avoiding international embarrassment or loss of control over the case. Once it has initiated a case, the OTP would then be entitled to specify benchmarks for domestic proceedings under its Article 54(1)(b) mandate to ensure the effective investigation and prosecution of crimes.[[372]](#footnote-372) Though such an approach would bear affinities with the combination of rewards and punishment to induce behavior seen in Rule 11*bis*, any analogy is inapposite. The former Yugoslav states and Rwanda needed, and were given, years to achieve the standards set under Rule 11*bis*, and in the case of Bosnia required a hybrid court to do so. The foreshortened time horizons of the ICC imposed by Articles 15, 17, 18 and 19 make it highly unlikely any organ of the ICC would adopt what Jalloh calls a “let’s take a big picture”[[373]](#footnote-373) approach with a state who requested time to re-order their prosecution, defence and judicial functions to remedy existing incapacity. Once Kenya breached the aforementioned Agreed Minutes by scuttling a proposed Special Tribunal to deal with the 2007–08 election violence, the ICC Appeals Chamber was dismissive of Kenya’s claims that judicial reforms were underway that would render its stated intention to try post-2007 election violence cases credible.[[374]](#footnote-374) Likewise, Libya appealed for additional time to conduct prosecution of Saif Al-Islam Gaddafi (this time with the support of the OTP), citing the help it had requested from the High Commissioner for Human Rights and other organisations to build specialized capacity for the prosecution of Rome Statute Crimes,[[375]](#footnote-375) but again the Pre-Trial Chamber rejected any such approach and instead looked primarily at whether Libya was investigating the same case as the ICC.[[376]](#footnote-376)

 The second theory for how the ICC could stimulate domestic capacity building for Rome Statute crimes posits a more activist ICC that uses its provisions to lend assistance to domestic transitional accountability, sometimes labelled ‘positive complementarity’. After Rome, there was a confident intuition that the vagaries of the complementarity regime would demand the reconstruction of domestic criminal justice capacity for the purpose of reducing the impunity gap.[[377]](#footnote-377) As one state delegate argued, complementarity would permit the ICC to[[378]](#footnote-378)

play a twofold role: first, in motivating States to strengthen their judicial mechanisms; and secondly, in assisting States, especially weakened States, during or after a conflict, for instance in delivering justice in accordance with the Rome Statute.

Delegates and scholars expected that complementarity would be tied to other rule of law efforts in the country concerned[[379]](#footnote-379) and that the perpetual nature of the Court would inevitably facilitate better knowledge-exchange with national jurisdictions.[[380]](#footnote-380) States have strongly endorsed this view of complementarity.

 Given the desire on the part of the Court to ensure its own activity noted in Section 4 above, the potential for Court actors to help develop domestic capacity in order to preclude admissibility is more apparent than real. As noted earlier, instead of critically examining the state’s reasons for inactivity in a manner that might spur or shame it towards activity, the *Katanga* Appeals Chamber held that if a state elects to not pursue the case before it then the motives for this decision are not deemed relevant to the admissibility decision, irrespective of how competent or well-regarded a national judicial system is.[[381]](#footnote-381) This softly-softly approach has also been adopted by the Office of the Prosecutor so as not to endanger the state co-operation on which it is reliant, holding that “[c]ooperative states should generally benefit from a presumption of bona fides and baseline levels of scrutiny”.[[382]](#footnote-382) Critics argue this superficial deference to national judiciaries facilitates the abdication domestic prosecutorial authority.[[383]](#footnote-383) There nevertheless would appear to be some scope for capacity-building under the burden-sharing policy if states are going to deal with less senior offenders. Even if a division is drawn between ‘big fish’ cases in The Hague and ‘small(er) fish’ cases retained domestically, the state cannot be presumed to be equipped to cope with the latter, which will still involve immense technical difficulties.[[384]](#footnote-384) Though the OTP presumed that national justice processes broadly understood will be supported (albeit in an undefined way) in their prosecutions of other perpetrators as part of a phased withdrawal to leave a sustainable impact,[[385]](#footnote-385) the ICC has no specific mandate to develop the domestic criminal justice sector. Nevertheless, it would appear that the Court possesses an implied power under the terms of the Preamble and complementarity provisions to revitalize a national state’s judicial system.[[386]](#footnote-386) Article 93(10) states that the Court “may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court.” This may provide an appropriate means for the ICC to lend technical assistance to a state to overcome problems of ‘inability’ or ‘unavailability.’

 The organs of the ICC appear unwilling to interpret the Statute so broadly. The ICC Prosecutor’s 2009–2012 Prosecutorial Strategy makes clear that the ICC will encourage national prosecutions but only “without involving the Office directly in capacity building or financial or technical assistance.”[[387]](#footnote-387) The succeeding 2012–2015 Strategy is silent in relation to domestic capacity-building.[[388]](#footnote-388) The first Prosecutor consistently emphasized the Court is not a “development agency”,[[389]](#footnote-389) and that tasks like training judges or building institutional functionality is the role of others, presumably bilateral and multilateral organisations.[[390]](#footnote-390) Given the ICC’s funding shortfalls and the variety of available NGOs and development agencies with superior experience in remedying capacity deficits, the ICC, OTP and Registry have instead emulated the ad hoc tribunals by accepting a more catalytic role as coordinators of assistance by states and NGOs.[[391]](#footnote-391) The presumption is that if crimes are committed in a state over which the ICC has jurisdiction, the Court could draw attention to the need for trials and convene actors interested in progressing the state towards trial.[[392]](#footnote-392) The ICC has functioned at times as a focal point for rule of law reform action by development practitioners and peace-builders.[[393]](#footnote-393)

 On the basis of the foregoing, it would appear that the ICC is set fair to replicate the successes of the ad hoc tribunals in catalysing international and supranational action to secure domestic accountability. However, the law-in-action of the Court demonstrates a very different outcome. Capacity-building in states where the ICC is active has been more ad hoc than the type of strategic, target-driven assistance seen in Bosnia and Rwanda.[[394]](#footnote-394) The assistance projects undertaken in the likes of Uganda, Kenya and DR Congo focus more on the interests of the ICC than the national justice sector as a whole. The Registry’s capacity-building is premised on helping states co-operate with ICC prosecutions as opposed to undertaking their own.[[395]](#footnote-395) For example, in the DRC:[[396]](#footnote-396)

One military justice official complained that cooperation with the ICC’s Office of the Prosecutor was only working in one direction. According to this official, while the DRC military has always provided immediate assistance to the ICC-OTP, the latter has never responded to requests for information regarding domestic cases.

Any more holistic scheme of training, oversight or presence by international personnel is explicitly rejected.[[397]](#footnote-397) In accordance with a restrictive reading of Article 93(10), most assistance is based on the finding of evidence for use in The Hague, and not necessarily related to improving evidence management, case management, formulation of indictments and so forth that would allow this evidence to be employed fruitfully in domestic trials. Two significant differences between the ICC and the ad hoc tribunals are: (a) that there are less visits from domestic judicial actors relating to skills development to the former than there were to the latter; and (b) fewer nationals of the relevant states have been employed to carry out research or investigative tasks.[[398]](#footnote-398) The Jurisdiction, Complementarity and Cooperation Division (‘JCCD’) was established in 2005 within the OTP to implement the complementarity regime but was fashioned more to promote cooperation with The Hague than to press states to fulfil their responsibilities to prosecute.[[399]](#footnote-399)

 On a more positive note, the OTP’s 2009–2012 Strategy envisages an extremely limited form of “positive complementarity” prioritising the provision of information collected by the Office to national judiciaries upon their request pursuant to Article 93(10) and sharing databases of non‐confidential materials and crime patterns.[[400]](#footnote-400) The OTP’s much-trumpeted Law Enforcement Network’s has a threefold mandate to share information and evidence, facilitate legal and technical assistance for investigations and prosecutions and to support knowledge transfer, but will leave domestic judiciaries, administration and defence structures largely untouched. The Registry has been more ambitious than the OTP in this area. Recognising that basic skills need to be developed and explicitly wishing to “harness itself within, not duplicate” existing rule of law initiatives, it has been active in building local capacity.[[401]](#footnote-401) Projects pursued such as witness protection programs, public information and outreach, extradition, witness/victim protection and implementing substantive criminal legislation mimic the better elements of post-Completion Strategy assistance to Rwanda and Bosnia.[[402]](#footnote-402) However, these disparate activities are unlikely to coalesce into concerted action to ensure the state can undertake credible, competent and fair trials like those that flowed from Rule 11*bis*. Activities like those undertaken in DRC (for example, the US Defence Security Agency provides legal texts for military tribunals, the UN MONUSCO mission builds prosecution support cells and the NGO Women’s Initiative for Gender Justice),[[403]](#footnote-403) Uganda (separate prosecutorial training by five different NGOs, forums for discussion between domestic prosecutors and international experts)[[404]](#footnote-404) and Côte d’Ivoire (the EU is revising the domestic Code of Criminal Procedure but lending no specific assistance to the actual operation of trials)[[405]](#footnote-405) have generated no overall framework for complementarity-related assistance, perhaps stemming from the lack of an overall teleology. Consequently, the types of uncoordinated training, overlaps, underlaps and failure to conduct needs assessments that stymie all justice sector reform appear to recur as normal in the ICC context. Transfer of knowledge or skills by the wider supranational or multilateral communities absent the types of organic links fostered by the relationships that developed as an institutional necessity between the ad hoc tribunal actors and the domestic courts will reap very finite rewards.

 As Harhoff argues, genuine division of labour where both an international tribunal and the state fulfil the duty to punish can only exist “so long as both parties had a true common interest in the exercise.”[[406]](#footnote-406) Rule 11*bis* had a common interest in transfer due to the Tribunal’s Completion Strategy, on the one hand, and the recovery of national judicial sovereignty, on the other. No such common interest in domestic trials exists in the complementarity regime as currently practised. While this replicates international criminal justice’s historical neglect of domestic justice, there is also a concern that any involvement in domestic capacity-building could compromise admissibility litigation in future if it did not succeed. As Seils puts it:[[407]](#footnote-407)

There are very good reasons for the OTP not to be involved in anything to do with national prosecution efforts. Their role is to assess the willingness and ability of efforts, not to make states willing and able. The responsibility of the OTP requires that it maintain an arm’s length relationship with the state authorities. Anything that compromises that relationship can give rise to very complicated arguments should admissibility ever become the subject of litigation.

Furthermore, in an era where even the strongest supporters of the Court support a “zero-growth” position in relation to the Court’s annual budget even where its prosecution and trial activities increase, the ICC “focuss[es] both its activities and budget requests primarily on its own investigations and prosecutions. Little [is] allocated to measures promoting national justice.”[[408]](#footnote-408) Capacity-building at the national level (which has the effect of undermining the need for international criminal justice) has never become a core activity of the ICC like outreach at the national level (which has the effect reaffirming the need for international criminal justice).[[409]](#footnote-409) Court observers furthermore note that in these straitened financial circumstances the Court would be “loathe to divert resources from its own investigations and prosecutions to make in-depth assessments of willingness.”[[410]](#footnote-410) Without a strong steer from the ICC, the international community is unlikely to pick up the slack as it did in Rwanda and the Balkans: an OSJI report notes that donor countries want to avoid the risk that strengthening flawed criminal justice systems will make them complicit in one-sided justice.[[411]](#footnote-411)

 As a result of these imperatives, the ICC’s unbending focus on its high-profile cases may result in the neglect of perpetrators that in theory have been left to the state.[[412]](#footnote-412) The OTP in particular appears to have embraced a policy of “exemplary trial” for the most senior perpetrators of the worst crimes which is largely unconcerned with whether or how the remaining perpetrators are tried.[[413]](#footnote-413) Though presented as collaboration, burden-sharing in effect often means the Court assumes almost all responsibility for prosecution. In the DRC, Uganda, Central African Republic and Mali, the states concerned have been very reluctant to assume their putative share of the burden, even in a time when the strengthening and institutionalization of international criminal justice appear to make non-compliance with obligations to prosecute even more difficult to justify than it would have been in the early years of the ad hoc tribunals. This state of affairs can in turn be explained by their incentives, which are also distinctly different from those of the former Yugoslav states and Rwanda. Because self-referral is a voluntary accession to the activities of a Court the state is already voluntarily a member of and not the involuntary product of a Chapter VII resolution as in the Balkans and Rwanda (excepting of course Article 13 referrals), the issue of offended sovereignty which proved such a potent motivator for national governments in Rule 11*bis* proceedings does not raise the same concerns. As Subotic points out, in international criminal justice, what trials signify may be more important than who they try or what conviction they achieve.[[414]](#footnote-414) For Rwanda, Bosnia, Croatia and Serbia, adjudicating war crimes in a domestic legal setting was key to demonstrating before the international community that the state enjoyed stability, had a robust and independent judicial system and was ready to join the society of democracies.[[415]](#footnote-415) The ICC has changed, or at least modified, this international reputational calculus. As noted in Section 5 above, self-referral is justified by its advocates as a fulfilment of the state’s *aut dedere aut judicare* duties. Furthermore, self-referrals enhance the state’s reputation for international co-operation and shifts the financial and political costs of criminal proceedings to the international community.[[416]](#footnote-416) To the extent that the state can be seen to have conformed to its international obligations, the international community may allow it to “get away” with generalized impunity domestically:[[417]](#footnote-417)

The most serious outcome of this strategy — and one that domestic elites may purposefully undertake — is to use transitional justice as a legitimating tool for inaction at home. Once transitional justice project is instituted and gets on its course, it may be very difficult for the same process to be restarted anew, under conditions that may be more desirable from the vantage point of victims, civil society, and international justice community.

The self-referral in Uganda, for example, allowed the Musaveni regime to “garner international commendation and to respond to critics without having to face the costs of domestic prosecution.”[[418]](#footnote-418) While the ICC ostensibly believes that its intervention should “trigger more, not less” efforts to address issues of judicial capacity and independence,[[419]](#footnote-419) the greater likelihood in practice is that uncontested admissibility might “shrink” domestic willingness to pursue other cases.[[420]](#footnote-420)

6.4 Fair trial promotion

One final point worth noting is that the ICC is unlikely to catalyse fairer standards of trial for Rome Statute crimes as it did in the Balkans and Rwanda for war crimes, crimes against humanity and genocide. The complementarity regime, in contrast to the ad hoc tribunals, is far more tolerant of unfair or biased domestic proceedings lacking in due process as long as they meet the transitional imperative of prosecuting and convicting. While in the Rule 11*bis* process, the Tribunals’ custody of the accused created a particular relationship of responsibility to that individual to ensure he was not being handed over to a trial process that would breach his human rights, no such dilemma arises in relation to any domestic proceedings that occur in states where the ICC is active as their effect (or, indeed, their purpose) to keep that accused from having any such relationship with the ICC. Though scholars point to Article’s 17’s reference to “due process” as a guide to interpreting the meaning of unwillingness and inability (i.e. contending that a state who cannot provide a fair trial is either unable or unwilling under the terms of the admissibility requirements) and Article 21(3)’s mandate to the Court to interpret and apply the law consistently with international human rights,[[421]](#footnote-421) the majority consensus rejects this “due process thesis” on the basis that the plain wording of the Article and the surrounding punitive context of the admissibility regime only make domestic proceedings qualify as unwilling or unable if they make a defendant more difficult to convict.[[422]](#footnote-422) On such a view, defects in terms of the fairness of trial are irrelevant provided the attempt to secure accountability is genuine.[[423]](#footnote-423) Procedural fairness as a ground for defining complementarity was explicitly rejected at the Rome Conference.[[424]](#footnote-424) The Office of the Prosecutor’s 2003 Informal Expert Paper has rejected lack of international trial standards domestically as a ground for finding inability or unwillingness,[[425]](#footnote-425) a matter reiterated by the then-ICC Prosecutor in 2011 who argued “[w]e are not a human rights Court. We are not checking the fairness of the proceedings. We are checking the genuineness of the proceedings.”[[426]](#footnote-426) Most notably, in the admissibility proceedings for Saif Gaddafi (detained incommunicado by rebels in Libya in inhumane conditions without adequate access to legal counsel), the OTP has made clear that it does not believe the Court could or should make a finding of unwillingness on the sole basis of due process violations.[[427]](#footnote-427) The Pre-Trial Chamber departed from this position somewhat in holding that Libya was “otherwise unable to carry out is proceedings” because the state could not provide him with defence counsel, in contradiction of domestic law.[[428]](#footnote-428) This failure to attain domestic due process standards (as opposed to international fair trial standards) called into question Libya’s willingness to conduct genuine proceedings because it could ultimately undermine the tenability of the prosecution’s case by providing grounds for a finding of mistrial.[[429]](#footnote-429) Though welcome insofar as it would force the state to abide by domestic legal obligations, such an approach would do little to remedy practices like trial *in absentia* in the former Yugoslavia or detention with “special conditions” in Rwanda that were legal under national law. As Heller points out, the general toleration of unfair proceedings in the interests of conviction undermines any standard-setting function the Court might wish to set for domestic post-conflict criminal proceedings.[[430]](#footnote-430)

7 Conclusion

The widespread belief that Rule 11*bis* offers lessons for the complementarity regime is a product of the initial belief that the ICC would depart from the primacy of the ICTY, that its best institutional interests required domestic trials, and that the mechanics of the complementarity regime would foster domestic willingness and ability.[[431]](#footnote-431) However, the fact that the ICC is superficially so great a departure from the primacy model of the ad hoc tribunals obscures the commonality of institutional interest between the current Court and the ad hocs before the Completion Strategy. Though a plausible supposition at the time of the Rome Conference, constant re-iterations that Rule 11*bis* offers a tenable model for a domestic legacy ignore how complementarity differs in practice from theory (as one work puts it, “[o]ne of the remarkable things about the International Criminal Court’s complementarity regime is how many of the things that the field thought it knew about it have turned out to be untrue”).[[432]](#footnote-432) The division of labour between the ICC and states in burden-sharing is consensual and uncontested, while in the ad hoc tribunals’ Completion Strategies it was intrusive and subject to judicial review. While with Rule 11*bis* the ad hoc tribunals could dangle the carrot of transfer before the state to spur reform in criminal justice, the practice of burden-sharing means that the Court can offer the radically different incentive of harmonious relations to spur the referral cases by the state to The Hague. While the Rule 11*bis* system operated as “a very useful vehicle for feedback to states on the conditions of their judicial systems in relation to international norms,”[[433]](#footnote-433) the process of self-referrals implicitly concedes such standards are unobtainable in the short-to-medium term and that self-referral satisfies the state’s *aut dedere aut judicare* obligations.

 Though both the ad hoc tribunals and the ICC are largely dependent on third parties to engage in the type of capacity-building that would allow the state’s devastated criminal justice system to undertake prosecutions, the former was successful because development activities were undertaken by supranational, multilateral and bilateral agents which fitted within, and were conditioned by, the institutional and structural dynamics of the Completion Strategies. As Chehtman and Mackenzie note:[[434]](#footnote-434)

Capacity development can hardly be constrained to the transfer of knowledge and skills and the provision of supplies and infrastructure. It needs to look also at the structural conditions that shape the normative and institutional environment in which these skills, knowledge and goods are meant to be used.

By contrast, ICC relationships with states subject to investigation or prosecution lack these types of dynamics: multilateral or bilateral assistance to the state is as likely to be for the ultimate end of assisting state co-operation with a prosecution in The Hague as it is for the end of a trial in Kampala, Abidjan or Kinshasa.

 The initial assumption that the ICC would welcome its own redundancy gave way to the traditional international criminal law preference for international prosecution on the basis that domestic processes cannot be trusted and that international justice can be fairer, more efficient, better for victims and less likely to fragment the emerging international criminal jurisprudence. This metajuridical culture of international superiority interacted with a pressing desire on the part of a struggling Court for activity and relevance. The institutional imperatives of the ICC operate on the model of what some suspect is “an inwardly focused court whose primary concern is not the well-being of societies recovering from mass atrocities, but instead the maintenance of a docket that will maximize the Court’s own visibility and prestige.”[[435]](#footnote-435)

 As practice up to 2003 demonstrates, there was nothing inherent in international criminal justice that allows it to leave a legacy of domestic capacity to continue prosecutions. Institutional incentives had to change. The changed imperatives at the ad hoc tribunals were less principled than logistical: because of over-zealous early investigations and the Rules of the Road Programme, the ad hoc tribunals found themselves in a situation where it needed to develop a strategy to process lower- and middle-ranking accused, whereas the tighter jurisdictional and seniority boundaries of the ICC (no doubt inspired by the travails of its predecessors) have no such requirement. Rule 11*bis* did not mark a radical re-evaluation of the value of domestic prosecutions vis-à-vis international criminal courts. It was simply a reaction to the exorbitant expense of the ad hoc tribunals. It did nothing to alter the presumption shared by many, if not a majority, in the international criminal law community that an international court will always be the most appropriate forum for prosecution.[[436]](#footnote-436) This presumption still animates much of the operation of the ICC. What Rule 11*bis* did was revise the jurisdictional calculus of the tribunals in a way the ICC never has, and probably never will. Notwithstanding the language of burden-sharing, the ICC has nothing like the stake the ad hoc tribunals had in fostering domestic willingness and competence to prosecute. If burden-sharing in its present, lop-sided form continues to form an organising principle of the ICC, it is likely the Court will have no greater an impact domestically than its ad hoc and hybridized predecessors. As such, the ICC in practice replicates the pre-Completion Strategy culture of detachment in the ICTY wherein “to be impartial it helped to be ignorant, to be remote, to be removed” as far as the domestic judiciary was concerned.[[437]](#footnote-437)

 On this view, two of the much-heralded advantages the ICC was deemed to have over the ad hoc tribunals, namely universality and lack of artificial limits on its temporal jurisdiction, do not conduce to the sort of targeted engagement with the relevant states that the ICTR and ICTY were forced reluctantly, but successfully, to engage in. The tendency Palmer notes of international courts and tribunals being more concerned with developing a body of legally consistent case law in the interests of their own institutional expansion than with the development of domestic judicial capacity to achieve accountability on a national basis will remain.[[438]](#footnote-438) Whereas the institutional imperatives of the ICTY and ICTR means that ultimately Rwanda and the former Yugoslavia were carrying out the ad hoc tribunal’s mandate, the institutional imperatives of the ICC mean that ultimately it is assuming the state’s mandate, and with that state’s support. If Rule 11*bis* involved the ad hoc tribunals redefining their role from litigating purely criminal cases to evaluating domestic jurisdictions,[[439]](#footnote-439) the ICC has moved in the opposite direction by preferring litigation of cases to the critical, constructive evaluation of domestic proceedings.

1. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, 28 May 1947, International Court of Justice, Advisory Opinion [1948] ICJ Reports p. 57, Individual Opinion of Judge Alvarez, at p. 68. [↑](#footnote-ref-1)
2. In Uganda, the ICC has issued five requests for a warrant of request, while the figures for the other states are as follows: Democratic Republic of the Congo (6), Central African Republic (5), Sudan (6), Kenya (4), Libya (3, including the deceased Colonel Gaddafi) and Côte d’Ivoire (3). At the time of writing, arrest warrants have yet to be issued in the Mali situation. [↑](#footnote-ref-2)
3. A. Slaughter & WW. Burke-White, ‘The Future of International Law is Domestic (or, The European Way of Law)’ (2006) 47 *Harvard International Law Journal* p. 327, at p. 350. [↑](#footnote-ref-3)
4. B. Broomhall, International Justice & the International Criminal Court: Between Sovereignty and the Rule of Law (New York, Oxford University Press, 2003), pp. 61 and 43. [↑](#footnote-ref-4)
5. *Ibid.*, p. 54. [↑](#footnote-ref-5)
6. E. Kristjansdottir, A. Nollkaemper & C. Ryngaert, ‘Concluding Observations’ in E. Kristjansdottir, A. Nollkaemper & C. Ryngaert (eds.), *International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States* (Cambridge, Intersentia, 2012) pp. 315–316. [↑](#footnote-ref-6)
7. These three-part strategies envisioned completion of investigations by the end of 2004, completion of all first instance trials by the end of 2008, and completion of all work in 2010. The latter two stages were of course extended, as the Tribunals are continuing their work. The Mechanism for International Criminal Tribunals was established by the Security Council on 22 December 2010 (*see* UNSC Resolution 1966 (2010)) to carry out a number of essential functions of both tribunals after the completion of their respective mandates. On the cost, inefficiency and bureaucracy of the ad hoc tribunals, *see* R. Zacklin, ‘The Failings of Ad Hoc International Tribunals’ (2002) 2 *Journal of International Criminal Justice* p. 541, at p. 545. [↑](#footnote-ref-7)
8. Rules of procedure and Evidence, UN Doc. IT/32/Rev.44, 10 December 2009, Rule 11bis, paragraph A. [↑](#footnote-ref-8)
9. UNSC Resolution 1503, UN Doc. S/RES/1503 of 28 August 2003, Preamble and UNSC Resolution 1534, UN Doc. S/RES/1534, UN Doc. S/RES/1534 of 26 March 2004, paras. 5 and 6. [↑](#footnote-ref-9)
10. Rule 11*bis*, paragraph C. [↑](#footnote-ref-10)
11. ICTY Rule 11*bis* (B), ICTR Rule 11bis (C). [↑](#footnote-ref-11)
12. International Criminal Tribunal for Rwanda, *Completion Strategy of the ICTR*, paras. 7 and 39, available at: <www.unictr.org/AboutICTR/ICTRCompletionStrategy/tabid/118/Default.aspx>, last visited 1 June 2014. [↑](#footnote-ref-12)
13. President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Letter addressed to the President of the Security Council*, 21 May 2004, UN Doc. S/2004/420, pp. 7-8. [↑](#footnote-ref-13)
14. *See* Section 3 of this article. [↑](#footnote-ref-14)
15. D. Mundis, ‘Completing the Mandates of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremberg Process?’ (2005) 28 *Fordham International Law Journal* p. 591, at p. 613. [↑](#footnote-ref-15)
16. D. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (New York, Open Society Justice Initiative, 2008) p. 55. [↑](#footnote-ref-16)
17. D. Tolbert & A. Kontic, ‘The International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and the Transfer of Cases and Materials to National Judicial Authorities: Lessons in Complementarity’ in C. Stahn & M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge, Cambridge University Press, 2011) p. 910. [↑](#footnote-ref-17)
18. B. Ivanisevic, *Against the Current: War Crimes Prosecutions in Serbia* (New York, International Center for Transitional Justice, 2007) pp. 30–31. [↑](#footnote-ref-18)
19. Amnesty International, Bosnia-Herzegovina: *Shelving justice- war crimes prosecutions in paralysis* (2003) p. 10, available at: <www.amnesty.org/en/library/asset/EUR63/018/2003/en/8abd5c01-d67b-11dd-ab95-a13b602c0642/eur630182003en.pdf>, last visited 1 June 2014. [↑](#footnote-ref-19)
20. Eg D. Tolbert, ‘The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings’ (2002) 26 *Fletcher Forum of World Affairs* p. 5. [↑](#footnote-ref-20)
21. C. Stahn, ‘How is the Water? Light and Shadow in the First Years of the ICC’ (2011) 22 *Criminal Law Forum* p. 175, at p. 194. [↑](#footnote-ref-21)
22. ICC Office of the Prosecutor, *Paper on Some Policy Issues before the Office of the Prosecutor* (2003), p.3, available at: <www.amicc.org/docs/OcampoPolicyPaper9\_03.pdf>, last visited 1 June 2014. [↑](#footnote-ref-22)
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39. J. Easterday, ‘Deciding the Fate of Complementarity: A Colombian Case Study’ (2009) 26 Arizona Journal of International and Comparative Law p. 50, at p. 106; ICC Office of the Prosecutor, Informal Expert Paper: The Principle of Complementarity in Practice (2003), pp. 5–7, available at: <www.icc-cpi.int/iccdocs/doc/doc654724.PDF>>, last visited 1 June 2014. [↑](#footnote-ref-39)
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41. W. Schabas, ‘Anti-Complementarity: Referral to National Jurisdictions by the UN International Criminal Tribunal for Rwanda’ (2009) 13 *Max Planck Yearbook of United Nations Law* p. 29, at p. 31. [↑](#footnote-ref-41)
42. Schabas (*ibid.*, pp. 59-60) sees the extremely exacting application of Rule 11*bis* as something which might affect state willingness to ratify the Rome Statute if a similar approach were to be adopted in admissibility proceedings. Waldorf sees the ICTR’s deference to the Rwandan government’s pledge to try RPF indictees as an abandonment of primacy for an ICC model of complementarity: *supra* note 30, p. 1263. [↑](#footnote-ref-42)
43. C. Aptel, ‘Closing the UN Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues’ (2008) 14 *New England Journal of International and Comparative Law* p. 169, at p. 183. [↑](#footnote-ref-43)
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46. Pocar, *supra* note 34, p. 659. [↑](#footnote-ref-46)
47. ICTY Rules of Evidence and Procedure, Rule 11*bis* (F). [↑](#footnote-ref-47)
48. Though the ICTR had a more tightly defined temporal jurisdiction than the ICTY, being limited to crimes committed between 1 January and 31 December 1994, while the latter was limited to crimes committed in the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council. [↑](#footnote-ref-48)
49. D. Caron, ‘Towards a Political Theory of Courts and Tribunals’ (2006) 24 *Berkeley Journal of International Law* p. 401, at pp. 403–404. [↑](#footnote-ref-49)
50. *Ibid.*, p. 404. [↑](#footnote-ref-50)
51. *Ibid*. [↑](#footnote-ref-51)
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53. The existence of this pyramidal strategy was admitted in an article by the former president: A. Cassese, ‘The ICTY: A Living and Vital Reality’ (2004) 2 *Journal of International Criminal Justice* p. 585, at p. 586. [↑](#footnote-ref-53)
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55. L. Bingham, ‘Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda’ (2006) 24 *Berkeley Journal of International Law* p. 687, at p. 702. [↑](#footnote-ref-55)
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59. *Prosecutor* v. *Ademi and Norac*, 14 September 2005, ICTY Referral Bench, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, Case No. IT-04-78-PT, para. 46. [↑](#footnote-ref-59)
60. See Sections 4, 5 and 6 below. [↑](#footnote-ref-60)
61. J. Wren Morris, ‘The Trouble With Transfers: An Analysis of the Referral of Uwinkindi to the Republic of Rwanda for Trial’ (2012) 90 *Washington University Law Review* p. 505. [↑](#footnote-ref-61)
62. J. Holmes, ‘Complementarity: National Courts versus the ICC’ in A. Cassese, P. Gaeta & J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002) pp. 674–677. [↑](#footnote-ref-62)
63. The ICTY Appeal Chamber found that in Rule 11*bis* does not require consideration of willingness because “unquestionably a jurisdiction’s willingness and capacity to accept a case is an explicit prerequisite for any referral to a domestic jurisdiction, as the Tribunal has no power to order to accept a transferred case”: *Prosecutor* v. *Stankovic*, 1 September 2005, ICTY Appeals Chamber, Decision on Rule 11bis Referral, Case No. IT-96-23/2-AR11bis.1, para. 40. [↑](#footnote-ref-63)
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65. M. McAuliffe de Guzman, ‘The International Criminal Court’s Gravity Jurisprudence at Ten’ (2013) 12 *Global Studies Law Review* p. 475, at p. 476. [↑](#footnote-ref-65)
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69. A. Chehtman & R. Mackenzie, *Capacity Development in International Criminal Justice: A Mapping Exercise of Existing Practice* (London, DOMAC, 2009) p. 39. [↑](#footnote-ref-69)
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322. Amnesty International, *supra* note 316, p. 7. [↑](#footnote-ref-322)
323. *Ibid*. [↑](#footnote-ref-323)
324. A. Marong, C.C. Jalloh & D. Kinnecombe, ‘Concurrent Jurisdiction and the ICTR: Should the Tribunal Refer Cases to Rwanda?’ in E. Decaux, A. Dieng & Malick Sow (eds.), *From Human Rights to International Criminal Law* (Leiden, Martinus Nijhoff Publishers, 2007) p. 195. [↑](#footnote-ref-324)
325. *Kanyarukiga Trial Decision*, *supra* note 315, paras. 10–19. [↑](#footnote-ref-325)
326. *Prosecutor* v*. Michel Bagaragaza*, 30 August 2006, ICTR Appeals Chamber, Decision on Rule 11bis Appeal, Case No. ICTR-05-86-AR11bis, para. 7. [↑](#footnote-ref-326)
327. Marong, Jalloh & Kinnecombe, *supra* note 324, pp. 161 and 198. [↑](#footnote-ref-327)
328. H. Jallow, *The ICTR and the Challenge of Completion*, Guest Lecture at the TMC Asser Institute in The Hague (4 October 2006) p. 6, available at: <www.unictr.org/Portals/0/English%5CNews%5Cevents%5COct2006%5Cictr\_completion.pdf>, last visited 1 June 2014. [↑](#footnote-ref-328)
329. Drumbl, *supra* note 145, p. 202. [↑](#footnote-ref-329)
330. Article 21. [↑](#footnote-ref-330)
331. Organic Law No. 31/2007 of 25 July 2007 relating to the Abolition of the Death Penalty. [↑](#footnote-ref-331)
332. *Prosecutor* v. *Munyakazi*, 3 May 2008, ICTR, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, Case No. ICTR-97-36-R11bis, para. 8. [↑](#footnote-ref-332)
333. Aptel, *supra* note 43, p. 180; Canter, *supra* note 28, p. 1632. The Prosecutor also transferred the case files of 25 suspects (later increased to 55) who had been investigated but not indicted by the ICTR (and thus did not qualify for the Rule 11*bis* referrals) to Rwanda in 2010 in keeping with his wide latitude in dealing with non-indicted suspects. [↑](#footnote-ref-333)
334. Melman, *supra* note 37, p. 1308–1309. [↑](#footnote-ref-334)
335. Statement by Hassan B. Jallow, Prosecutor of the ICTR to UN Security Council (21 November 2008). [↑](#footnote-ref-335)
336. UN Security Council 6134th Meeting, UN Doc. S/PV.6134 (4 June 2009), p. 12. [↑](#footnote-ref-336)
337. Aptel, *supra* note 43, p.182. [↑](#footnote-ref-337)
338. A. Dieng, ‘Capacity-Building Efforts of the ICTR: A Different Kind of Legacy’ (2011) 9 *Northwestern Journal of International Human Rights* p. 403, at p. 409. [↑](#footnote-ref-338)
339. Organic Law No. 6bis/2004 of 14 April 2004 on the Statutes for Judges and Other Judicial Personnel and Organic Law No. 22/2004 of 13 August 2004 on the Statute of Public Prosecutors and Personnel of the Public Prosecutions. See generally Human Rights Watch, *supra* note 212, p. 23. [↑](#footnote-ref-339)
340. Palmer, *supra* note 73, p. 169. [↑](#footnote-ref-340)
341. *Prosecutor* v. *Kayishema*, 1 October 2007, ICTR Trial Chamber, Amicus Curiae Brief of the Republic of Rwanda in the Matter of a Referral of the Above Case to Rwanda Pursuant to Rule 11bis, Case No. ICTR 2001-67-I, para. 27. [↑](#footnote-ref-341)
342. Organic Law modifying and complementing the Organic law No. 11/2007 of 16/03/2007 concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other States, Official Gazette of the Republic of Rwanda, Year 48, no. special of 26 May 2009, Article 1. [↑](#footnote-ref-342)
343. *Kanyarukiga Trial Decision*, *supra* note 315, para. 42; and *Prosecutor* v*. Munyakazi*, 8 October 2008, ICTR Appeals Chamber, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis , Case No. ICTR-97-36-R11bis, para. 29, reasoning that “based on the record before it, no reasonable Trial Chamber would have concluded that there was sufficient risk of government interference with the judiciary” to warrant a denial of the Prosecutor’s application. [↑](#footnote-ref-343)
344. *Prosecutor* v. *Gatete*, , 17 November 2008, ICTR Trial Chamber, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, Case No. ICTR-2000-61-R11bis, paras. 52 and 46. [↑](#footnote-ref-344)
345. Article 4 clarifies that ‘life imprisonment with special provisions’ means:

‘(i) a convicted person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he/she has served at least 20 years of imprisonment; and

 (ii) a convicted person is kept in isolation.’ [↑](#footnote-ref-345)
346. *Munyakazi Referral Appeal Decision*, *supra* note 343, paras. 11 and 20. [↑](#footnote-ref-346)
347. J. D. Mujuzi, ‘Steps Taken in Rwanda’s Efforts to Qualify for the Transfer of Accused from the ICTR” (2010) 8 *Journal of International Criminal Justice* p. 237, at p. 245. [↑](#footnote-ref-347)
348. Organic Law No. 66/2008 of 21/11/2008 Modifying and Complementing Organic Law No. 31/2007 of 25/07/2007 Relating to the Abolition of the Death Penalty. [↑](#footnote-ref-348)
349. *Kanyarukiga Trial Decision*, *supra* note 315, paras. 72–78. [↑](#footnote-ref-349)
350. *Ibid*.*,* para. 80. [↑](#footnote-ref-350)
351. *Prosecutor* v. *Ildefonse Hategekimana*, 4 December 2008, ICTR Appeal Chamber, Decision on the Prosecutor’s Appeal against Decision on Referral under Rule 11bis, Case No. ICTR-00-55B-R11bis, paras. 27–29. [↑](#footnote-ref-351)
352. *Kanyarukiga Trial Decision*, *supra* note 315, para. 81. [↑](#footnote-ref-352)
353. Article 2. [↑](#footnote-ref-353)
354. Schabas, *supra* note 41, pp. 55–56. [↑](#footnote-ref-354)
355. *Prosecutor* v. *Jean-Bosco Unwinkindi*, 28 June 2011, ICTR Trial Chamber, Decision on the Prosecutor’s Request for Referral to the Republic of Rwanda, Case No. ICTR-2001-75-R11bis. [↑](#footnote-ref-355)
356. *Ibid*., paras. 90 and 103. [↑](#footnote-ref-356)
357. *Ibid*., para. 101. [↑](#footnote-ref-357)
358. *Ibid*., paras. 208–216. [↑](#footnote-ref-358)
359. Wren Morris, *supra* note 61, p. 539. [↑](#footnote-ref-359)
360. 27 October 2011, Judgment, Application No. 37075/09, paras. 95 and 129. [↑](#footnote-ref-360)
361. C. Ryngaert, ‘State Cooperation with the International Criminal Tribunal for Rwanda’ (2013) 13 *International Criminal Law Review* p. 125, at p. 141. [↑](#footnote-ref-361)
362. *Uwinkindi Referral Decision*, *supra* note 355, para. 217. [↑](#footnote-ref-362)
363. Ryngaert, *supra* note 361, p. 141. [↑](#footnote-ref-363)
364. *Kanyarukiga Trial Decision*, *supra* note 315, para. 104. [↑](#footnote-ref-364)
365. *Munyakazi Trial Decision*, *supra* note 322, para. 67. [↑](#footnote-ref-365)
366. Canter, *supra* note 28, p. 1631. [↑](#footnote-ref-366)
367. Human Rights Watch, *supra* note 212, p. 4. [↑](#footnote-ref-367)
368. UNDP, Human Development Index 2011 (2011), available at: <<http://hdr.undp.org/en/reports/global/hdr2011>>, last visited 1 June 2014. [↑](#footnote-ref-368)
369. Ryngaert, *supra* note 361, p. 141. [↑](#footnote-ref-369)
370. Chehtman, *supra* note 24, p. 315. [↑](#footnote-ref-370)
371. Unavailability, by contrast, refers to a situation where the administration of justice generally exists and would ordinarily be able to prosecute genuinely were it not for specific legal and factual impediments such as having too many trials to conduct, absence of jurisdiction under domestic law, the existence of an amnesty, lack of security, and so forth. [↑](#footnote-ref-371)
372. *Agreed minutes,* *supra* note 228. [↑](#footnote-ref-372)
373. C. C. Jalloh, ‘Situation in the Republic of Kenya’ (2012) 106 *American Journal of International Law* p. 118, at p. 124. [↑](#footnote-ref-373)
374. Situation in the Republic of Kenya, 30 August 2011, ICC Appeals Chamber, Judgment on Kenya’s Appeal of Decision Denying Admissibility, Case No. ICC-01/09-02/11-274. [↑](#footnote-ref-374)
375. *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 1 May 2012, ICC Pre-Trial Chamber I, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, Case No. ICC-01/11-01/11, para. 97. [↑](#footnote-ref-375)
376. *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 31 May 2013, ICC Pre-Trial Chamber I, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, Case No. ICC-01/11-01/11, paras. 219–220. The same pre-trial chamber later found the case against Abdullah Al-Senussi inadmissible on the basis that Libya was conducting proceedings for the same conduct: *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 11 October 2013, ICC Pre-Trial Chamber I, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Case No. ICC-01/11-01/11. [↑](#footnote-ref-376)
377. Hans-Peter Kaul, quoted at ‘Round Table’, *supra* note 56, p. 150. [↑](#footnote-ref-377)
378. Permanent Representative of Liechtenstein to the United Nations in 2003, quoted in Kleffner, *supra* note 110, p. 309. [↑](#footnote-ref-378)
379. Tolbert & A. Kontic *supra* note 17, p. 899, M. Newton, ‘The Quest for Constructive Complementarity’ in Stahn & El Zeidy (eds.), *supra* note 17, p. 340. [↑](#footnote-ref-379)
380. Gioia, *supra* note 178, pp. 827–828. [↑](#footnote-ref-380)
381. *Katanga Appeal, supra* note 143, paras. 78–80, 82 and 85. [↑](#footnote-ref-381)
382. Office of the Prosecutor, *supra* note 39, p. 3. This paper later argues there should be ‘caution to avoid being exploited in efforts to legitimize or shield inadequate national efforts from criticism’: *ibid*., p. 7. [↑](#footnote-ref-382)
383. Newton, *supra* note 379, p. 319. [↑](#footnote-ref-383)
384. Glasius, *supra* note 243, p. 1218. [↑](#footnote-ref-384)
385. First Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno-Ocampo, to the Security Council Pursuant to UNSCR 1593 (29 June 2005) p. 10, available at: [www.icc-cpi.int/NR/rdonlyres/CC6D24F9-473F-4A4F-896B-01A2B5A8A59A/0/ICC\_Darfur\_UNSC\_Report\_290605 \_ EN.pdf](http://www.icc-cpi.int/NR/rdonlyres/CC6D24F9-473F-4A4F-896B-01A2B5A8A59A/0/ICC_Darfur_UNSC_Report_290605_%20EN.pdf), last visited 1 June 2014. [↑](#footnote-ref-385)
386. Kleffner, *supra* note 110, p. 330. [↑](#footnote-ref-386)
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