

*THE INTERNATIONAL CRIMINAL COURT AND NATIONAL COURTS: A CONTENTIOUS RELATIONSHIP* BY NIDAL NABIL JURDI (FARNHAM, UK: ASHGATE, 2011) 303 PAGES. PRICE £65.00 (HARDCOVER) ISBN 9781409409168.

The ability to exercise criminal jurisdiction to try, and punish, those accused of serious crimes has long been considered an inherent element of the concept of the sovereignty of the state and, as such, has been zealously guarded by states. However, as notions of human rights and international criminal justice have developed, it is increasingly recognised that the sovereignty of states in this area is not absolute, particularly where the state concerned does not or cannot take steps to ensure accountability for those accused of committing international crimes. In such circumstances, states have accepted that sovereignty must be balanced against the community interest in ending impunity for such crimes and that accountability may be secured through the courts of other states (including jurisdiction based on the principle of universal jurisdiction) or before international criminal tribunals, including the International Criminal Court ('ICC'). Yet this does not mean that there is no role for national courts, in particular those of the territorial state, in prosecuting those accused of committing international crimes.

National legal systems continue to be important for several reasons. First, the tension between state sovereignty and accountability means that many states will object to the imposition of an international mechanism or the exercise of jurisdiction by a third state as an unwarranted interference with the state's sovereignty. In order to better resolve this tension, there is increased awareness that the role of other states and international organisations is to facilitate and support the development of national mechanisms wherever possible so that the majority of crimes are tried at the national level. In addition to accommodating the sovereignty of the state concerned, this may also achieve considerable practical benefits, including better access to evidence and witnesses, a greater connection to the victims of and societies affected by the crimes, as well as building the capacity of the national system to respond to complex and sensitive crimes. Secondly, the selectivity of international criminal justice and the limited jurisdiction of international criminal tribunals means that such tribunals are only able to prosecute individuals accused of committing international crimes in a small number of situations around the world.<sup>1</sup> Many other situations remain unaddressed, in part due to a lack of political will to respond to such situations with an international mechanism or to confer jurisdiction on an existing tribunal. Thirdly, even where an international mechanism may be able to exercise jurisdiction, due to finite resources, such institutions are unable to try all individuals and all crimes committed within a given situation. Instead, the tribunals will concentrate on crimes of sufficient gravity or the senior leaders or individuals considered most responsible for the crimes. For crimes and individuals falling outside this category, national mechanisms may be the only means of ensuring accountability.

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<sup>1</sup> Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005).

The relationship between national courts and international criminal courts has long been a potentially contentious one. When the Security Council established the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR') it adopted a model of primacy, whereby national courts could be compelled to defer proceedings in favour of proceedings at the international level.<sup>2</sup> It was only as the ICTY and ICTR moved to implement their 'completion strategies'<sup>3</sup> that real attention was focused on how to build the capacity of national courts so as to receive some cases from the overburdened international courts.<sup>4</sup> When states negotiated the *Rome Statute of the International Criminal Court* ('*Rome Statute*'),<sup>5</sup> the role of national courts and the relationship between those courts and the ICC was viewed as one of the key aspects of the negotiations. States adopted a different approach to this relationship than the ICTY and the ICTR. Instead of relying on a relationship of primacy, the *Rome Statute* rests on the principle of complementarity.<sup>6</sup> It recognises that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' and that the ICC 'shall be complementary to national criminal jurisdictions'.<sup>7</sup> Thus the ICC is not intended to be a court of 'first resort'; rather, the ICC is only to exercise its jurisdiction where states have failed to exercise jurisdiction at all, or have not exercised jurisdiction in an appropriate manner. Relying on the principle of complementarity, it was argued, better resolves the tension between the sovereignty of states and the need for accountability for international crimes by allowing the state the first opportunity to respond to crimes committed within its territory or by its nationals. Given this tension and the limited resources and mandate of the ICC, the principle of complementarity and how it operates in practice is vital to the ultimate success of the ICC and to the development of an effective system for the enforcement of international criminal justice. Dr Nidal Nabil Jurdi's analysis is directed at this important and potentially contentious relationship between national courts and the ICC, and the nature and operation of the principle of complementarity.

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<sup>2</sup> SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64<sup>th</sup> sess, 6155<sup>th</sup> mtg, UN Doc S/RES/1877 (7 July 2009) art 9 ('*ICTY Statute*'); SC Res 955, UN SCOR, 49<sup>th</sup> sess, 3453<sup>rd</sup> mtg, UN Doc S/RES/955 (8 November 1994) annex ('*Statute of the International Tribunal for Rwanda*') art 8. See also International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, UN Doc IT/32/Rev.44 (adopted 8 December 2010) rr 8–13 ('*ICTY Rules*'); International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda*, UN Doc ITR/3/Rev.19 (adopted 1 October 2009) rr 8–13 ('*ICTR Rules*').

<sup>3</sup> SC Res 1503, UN SCOR, 58<sup>th</sup> sess, 4817<sup>th</sup> mtg, UN Doc S/RES/1503 (28 August 2003) para 7.

<sup>4</sup> *ICTY Rules* r 11bis; *ICTR Rules* r 11bis.

<sup>5</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

<sup>6</sup> See Bartram S Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Criminal Tribunals' (1998) 23 *Yale Journal of International Law* 383; Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 *Max Planck Yearbook of United Nations Law* 591; Frederica Gioia, 'State Sovereignty, Jurisdiction, and "Modern" International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 *Leiden Journal of International Law* 1095.

<sup>7</sup> *Rome Statute* Preamble, art 1.

In Chapter One, Jurdi briefly outlines the development of a system of international criminal justice over the last 50 years, including the efforts to establish a permanent international criminal court, which culminated in the adoption of the *Rome Statute* in 1998. While recognising the development of an obligation on states to exercise criminal jurisdiction in respect of core international crimes, both as a matter of treaty obligations and under customary international law, Jurdi notes that this obligation has not been uniformly respected, with many international crimes remaining unpunished at the national level. This lack of an effective enforcement mechanism is a significant weakness in international criminal law, and one which is inherently linked to the application of the complementarity principle by the ICC. Jurdi raises an important question: to what extent can the complementarity principle establish the ICC ‘as an effective “checking body” vis-à-vis national judicial systems’.<sup>8</sup> This provides the focus for the study of the ICC in subsequent chapters.

Chapter Two details the history and legal background of the principle of complementarity. The origin of the concept of complementarity is traced to the work of the International Law Commission on the *Draft Statute of the International Criminal Court* in 1994.<sup>9</sup> Jurdi then follows its subsequent development and refinement through various preparatory committees for the negotiations in Rome and during the negotiations themselves, including its eventual incorporation into the *Rome Statute*. He outlines the compromise that was reached at Rome between state sovereignty, the independence of the court and the need for accountability for international crimes. In terms of the legal background to the principle of complementarity, the second part of this chapter discusses the reasons leading to the selection of complementarity, and not primacy, in the *Rome Statute*. Given the absence of a definition of complementarity in the *Rome Statute*, Jurdi then outlines possible legal sources for the principle of complementarity, including the notion of subsidiarity in the legal framework of the European Union or the obligation to extradite or prosecute found in many international conventions. After examining the nature of the *aut dedere aut judicare* concept and its status as a norm of customary international law, Jurdi concludes that this concept and the principle of complementarity rest on a common basis, in that both aim to fill impunity gaps by requiring trials before national or international courts. However, in respect of the ICC, it is the *Rome Statute*, and not the legal roots of the notion, that is the legal basis for the principle of complementarity.

Accordingly, Jurdi then turns in Chapter Three to an extensive legal analysis of the principle of complementarity as it is reflected in various provisions of the *Rome Statute*, in particular arts 17 and 20. Article 17 is the main provision in the *Rome Statute* that gives practical effect to the principle of complementarity by providing that a case will only be admissible before the ICC where the national courts of the affected state have failed to take any action in respect of international crimes or are ‘unwilling or unable genuinely to carry out the

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<sup>8</sup> Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate, 2011) 6.

<sup>9</sup> *Draft Statute for an International Criminal Court*, in International Law Commission, *Report of the International Law Commission on the Work of Its 46<sup>th</sup> Session*, UN Doc A/49/10 (1 September 1994).

investigation or prosecution'.<sup>10</sup> The provision thus reinforces the primary role of national courts under the ICC system. Jurdi analyses key terms found in art 17, an accurate understanding of which is vital to correct application of the principle of complementarity. These terms include: the nature of the 'case being investigated or prosecuted'; the meaning of 'inaction' by state authorities; what constitutes 'unwilling genuinely to investigate or prosecute', in particular the notion of genuineness, the use of proceedings to shield an individual and the significance of proceedings not being conducted independently or impartially; the meaning of 'inability', the relevance of the total or partial collapse of the national judicial system, and the ability of the state concerned to secure the necessary evidence or custody of the accused; and the significance of the gravity requirement, which mandates that the ICC should only consider the most serious violations of international criminal law.<sup>11</sup> The chapter then analyses art 20, which incorporates the *ne bis in idem* principle (or the rule against double jeopardy) into the *Rome Statute* and is closely linked to the application of the complementarity principle.

However, a legal analysis of the key provisions in the *Rome Statute* reflecting the principle of complementarity is insufficient to address fully the practical application of the principle. Recognising this, Jurdi examines the prosecutorial policy of the Office of the Prosecutor ('OTP'), both through a study of how the principle has been interpreted and applied by the prosecutor in two case studies (analysed in Chapters 5 and 6) and through assessing a significant policy paper issued by the OTP.<sup>12</sup> The policy paper identifies some interesting dimensions to the complementarity issue. First, it highlights how the OTP's decision to focus on serious offenders and crimes (as required by the gravity criterion) will result in an impunity gap where national systems are not willing or able to conduct trials of other offenders.<sup>13</sup> This very real prospect demonstrates the limits to the complementarity system — a state that has not taken action so as to justify the intervention of the ICC in respect of senior offenders will be unlikely to have adequate measures in place to prosecute lower level offenders. A second significant innovation is the development by the OTP of the notion of 'positive complementarity', whereby the OTP views its role as facilitating an international system of justice, by encouraging and supporting states to conduct genuine proceedings at the national level and by participating in a system of international cooperation for the prosecution of international crimes.<sup>14</sup> This approach, which

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<sup>10</sup> *Rome Statute* art 17(1)(a).

<sup>11</sup> The *Rome Statute* requires the ICC to assess the gravity of the case (art 17(1)(d)) and of the crime (art 53). See also Mohamed M El Zeidy, 'The Gravity Threshold under the *Statute of the International Criminal Court*' (2007) 19 *Criminal Law Forum* 35.

<sup>12</sup> ICC-OTP, *Paper on Some Policy Issues before the Office of the Prosecutor* (Policy Paper, September 2003) <[http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf)>.

<sup>13</sup> *Ibid* 3, 7.

<sup>14</sup> *Ibid* 5.

has attracted debate in the literature,<sup>15</sup> views the ICC as a partner with states to develop appropriate national laws and procedures and also as a supervisory mechanism, with the responsibility to monitor those national mechanisms and to intervene where necessary. Jurdi also outlines other constraints on the operation of the OTP, not least the political context within which the Prosecutor must operate, in particular the need for state cooperation to execute ICC arrest warrants and for the support of the Security Council and Assembly of States Parties in securing such cooperation, as well as the financial limits imposed by the ICC's limited resources. As is explored by Jurdi in more detail in subsequent chapters, these are significant limits to the operation of the complementarity principle.

After having set out the legal and practical context within which the principle of complementarity must operate, in Chapter Four Jurdi addresses a number of other aspects of the *Rome Statute* and the relationship of the ICC with national judicial systems that, although not directly part of the complementarity principle, may be an obstacle to the operation of that principle. These possible legal and factual hurdles include: amnesties from prosecution granted by the government of the affected to those accused of having committed international crimes, generally in the interest of facilitating peace and reconciliation; pardons granted to individuals tried and convicted of crimes under national law (including international crimes), again often justified by a need for reconciliation; and the relationship between the Security Council and the ICC, in particular the power of the Security Council to request a deferral of ICC proceedings under art 16 of the *Rome Statute*.<sup>16</sup> The legality or otherwise under international law of granting amnesties for international crimes is not settled, as state practice has in the past demonstrated a willingness to grant amnesties in order to secure peace and reconciliation. In the absence of an obligation to prosecute a particular crime, there did not appear to be a rule of customary international law to preclude a state from doing so. However, it is now possible that a rule of customary international law prohibiting the grant of amnesties for international crimes, at

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<sup>15</sup> See, eg, William A Schabas, Carsten Stahn and Mohamed M El Zeidy, 'The International Criminal Court and Complementarity: Five Years On' (2008) 19 *Criminal Law Forum* 1; William W Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Forum* 59; Markus Benzing and Morten Bergsmo, 'Some Tentative Remarks on the Relationship between Internationalized Criminal Jurisdictions and the International Criminal Court' in Cesare P R Romano, André Nollkaemper and Jann K Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford University Press, 2004) 409.

<sup>16</sup> *Rome Statute* art 16 provides:

No investigation or prosecution may be commenced or proceeded with under this *Statute* for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the *Charter of the United Nations*, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

least in relation to senior leaders, may be emerging.<sup>17</sup> Like the validity of amnesties themselves, the applicability of national amnesties before the ICC is not clear, with the *Rome Statute* remaining deliberately silent on this issue, as delegates were unable to agree on a common approach to the question.<sup>18</sup> After analysing the issue of amnesties in the context of art 17 of the *Rome Statute*, Jurdi concludes that an amnesty will hardly ever fall to be considered under this provision, as an amnesty provision will probably result in the case being admissible before the ICC, either because the state has not prosecuted, or is unable or unwilling to prosecute, as the amnesty is intended to shield the accused from prosecution. Instead, the applicability of the amnesty will be considered under art 53 of the *Rome Statute*, which allows the Prosecutor — subject to review by the Pre-Trial Chamber — to consider factors such as the interests of justice and the interests of the victims when deciding whether to defer proceedings to national mechanisms.

Similarly, international law does not seem to prohibit the grant of pardons for international crimes, and state practice supporting a power to grant such pardons is widespread. Neither is it clear that treaties prohibit the grant of pardons for specific crimes. The *Rome Statute* is also silent on the applicability of pardons granted under national law before the ICC, reflecting the desire of many states to retain this administrative power free from interference by the Court. Jurdi concludes that pardons will largely fall outside the scope of art 17 and the complementarity principle as art 17 is concerned with the prosecution process, while a pardon is granted *after* that process has completed. It is only where the pardon is part of a process that is developed as part of the state's unwillingness to prosecute offenders that a pardon will engage art 17. Similarly, while art 20 may be another possibility, it too is unlikely to address pardons other than where the grant of the pardon demonstrates an intention to shield the individual from trial. Jurdi correctly surmises that a restrictive approach to these provisions is appropriate in the case of pardons, and is more consistent with the intentions of the delegates in Rome. However, the failure of the *Rome Statute* to address amnesties and pardons potentially limits the situations in which the ICC may act to address impunity at the national level.

Article 16 of the *Rome Statute* may also impact upon the effectiveness of the complementarity principle. The relationship between the ICC and the Security

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<sup>17</sup> See Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart, 2008); Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2003); Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 *Human Rights Quarterly* 843. The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia have also considered the issue: see, eg, *Prosecutor v Kallon (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-04-15-PT-060, 13 March 2004); *Decision on Ieng Sary's Rule 89 Preliminary Objections (Ne bis in idem and Amnesty and Pardon)* (Extraordinary Chambers in the Court of Cambodia, Trial Chamber, Case No 002/19-09-2007/ECCC/TC, 3 November 2011).

<sup>18</sup> For further discussion of the ICC and amnesties, see Darryl Robinson, 'Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *European Journal of International Law* 481; Jessica Gavron, 'Amnesties in the light of Developments in International Law and the Establishment of the International Criminal Court' (2002) 51 *International and Comparative Law Quarterly* 91.

Council remains one of the most contentious aspects of the *Rome Statute*, reflecting a need to accommodate the Council's primary role under the United Nations system for matters of international peace and security with the need for an independent and impartial judicial institution. As Jurdi notes, this compromise is reflected in the conditions that must be satisfied before art 16 can be invoked, including the limited temporal duration of the deferral<sup>19</sup> and the need for a link to international peace and security.<sup>20</sup> However, in practice the Security Council has adopted resolutions exempting various classes of individuals (mainly peacekeepers from states not party to the *Rome Statute*) from ICC jurisdiction.<sup>21</sup> While these resolutions have been rightly criticised as falling outside the scope of art 16, given the nature of the powers of the Council under the *Charter of the United Nations* ('*UN Charter*') and the superiority of the *UN Charter* to other instruments,<sup>22</sup> it is unlikely that this would result in the resolutions being void, the ICC exercising a form of judicial review of such resolutions,<sup>23</sup> or UN member states failing to honour the provisions of the resolutions.<sup>24</sup> Instead, Jurdi's study of this practice rightly demonstrates the significant potential of the Security Council to interfere with the operation of the complementarity principle by causing the ICC to defer proceedings in situations and to an extent not necessarily contemplated by the *Rome Statute* itself. This chapter is thus a timely reminder of the important political limits within which the principle of complementarity must operate.

The study then turns from the abstract to a detailed study of how complementarity has been applied in two situations currently before the ICC. The first situation (Chapter Five), concerning the crimes committed in northern Uganda, was referred to the ICC by Uganda (a state party to the *Rome Statute*) in December 2003.<sup>25</sup> It was the first instance of a so-called 'self-referral' by a state to the ICC<sup>26</sup> and provides an interesting opportunity to assess how the principle

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<sup>19</sup> Deferrals may only be for a 12 month period.

<sup>20</sup> The resolution must be adopted by the Council acting under Chapter VII of the *Charter of the United Nations* ('*UN Charter*'), which requires the Council to be acting to restore or maintain international peace and security: *UN Charter* art 39.

<sup>21</sup> SC Res 1422, UN SCOR, 57<sup>th</sup> sess, 4572<sup>nd</sup> mtg, UN Doc S/RES/1422 (12 July 2002); SC Res 1487, UN SCOR, 58<sup>th</sup> sess, 4772<sup>nd</sup> mtg, UN Doc S/RES/1487 (12 June 2003); SC Res 1497, UN SCOR, 58<sup>th</sup> sess, 4803<sup>rd</sup> mtg, UN Doc S/RES/1497 (1 August 2003).

<sup>22</sup> Article 103 of the *UN Charter* provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present *Charter* and their obligations under any other international agreement, their obligations under the present *Charter* shall prevail'. Member states would give priority to any obligation under the *UN Charter* where there is a conflict with an obligation under the *Rome Statute*.

<sup>23</sup> As Jurdi notes, other courts, including the International Court of Justice, have been reluctant to exercise any form of judicial review in respect of Security Council resolutions: Jurdi, above n 8, 120. See also *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Provisional Measures)* [1992] ICJ Rep 3.

<sup>24</sup> *UN Charter* arts 25, 103.

<sup>25</sup> ICC-OTP, 'President of Uganda Refers Situation concerning the Lord's Resistance Army (LRA) to the ICC' (Media Release, ICC-20040129-44, 29 January 2004) <<http://www.icc-cpi.int>>. Uganda ratified the *Rome Statute* in 2002.

<sup>26</sup> Two other situations have subsequently been referred to the ICC by the affected state: the Democratic Republic of the Congo and the Central African Republic. The idea that a state would 'self-refer' a situation to the ICC was not contemplated during the negotiation of the *Rome Statute*. See Claus Kress, "'Self-Referrals" and "Waivers" of Complementarity: Some Considerations in Law and Policy' (2004) 2 *Journal of International Criminal Justice* 944.

of complementarity operates where the state itself has requested the ICC to consider a situation within its territory. Chapter Six sets out the second case study, which is the situation in Darfur. This situation was referred to the ICC by the Security Council in March 2005 by *Resolution 1593*.<sup>27</sup> It was the first instance of a referral of a situation concerning a state not a party to the *Rome Statute* to the ICC by the Security Council using its coercive powers under Chapter VII of the *UN Charter* for international peace and security and in accordance with art 13(b) of the *Rome Statute*.<sup>28</sup> The two situations selected thus rely on different jurisdictional bases and, presumably, differing levels of likely cooperation from the states concerned, one state (Uganda) having agreed to the Court's exercise of jurisdiction and the other (Sudan) having the exercise of jurisdiction imposed upon it by the Security Council. It would have been interesting to see a third case study included, that of the situation in the Republic of Kenya following election-related violence in 2007. This situation is the first instance in which jurisdiction is based on the power of the prosecutor to initiate an investigation *proprio motu*,<sup>29</sup> and also the first occasion on which a state has challenged the admissibility of a case on the basis of the complementarity principle.<sup>30</sup> The dialogue between the OTP and the Kenyan Government in the lead up to the Prosecutor's decision to initiate an investigation provides useful insight into how the complementarity principle may operate in future, as do the judgments of the ICC in response to the government's challenge to admissibility.<sup>31</sup> However, these events presumably postdated or occurred concurrently to the finalisation of Jurdi's analysis, which is unfortunate, although this aspect may be addressed in further studies.

Jurdi draws a number of important conclusions from his study. First, that the ICC and the system of complementarity it is based upon suffers from the same

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<sup>27</sup> SC Res 1593, UN SCOR, 60<sup>th</sup> sess, 5158<sup>th</sup> mtg, UN Doc S/RES/1593 (31 March 2005).

<sup>28</sup> The Security Council has subsequently referred a second situation to the ICC, that concerning Libya: SC Res 1970, UN SCOR, 66<sup>th</sup> sess, 6491<sup>st</sup> mtg, UN Doc S/RES/1970 (26 February 2011).

<sup>29</sup> Article 15 of the *Rome Statute* authorises the Prosecutor to initiate an investigation *proprio motu*, subject to review by the Pre-Trial Chamber: see *Situation in the Republic of Kenya (Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09, 31 March 2010).

<sup>30</sup> *Prosecutor v Muthaura (Application on Behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-02/11-26, 31 March 2011). Article 18 enables a state to provide information requesting a deferral of an investigation where the state can demonstrate that 'it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5', while art 19 allows a state to challenge the admissibility of a particular case where it is exercising its own jurisdiction in respect of the same case. Libya has subsequently filed an application under art 19: see *Prosecutor v Gaddafi (Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11-130, 1 May 2012).

<sup>31</sup> *Prosecutor v Rutu (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-01/11-101, 30 May 2011); *Prosecutor v Rutu (Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute')* (International Criminal Court, Appeals Chamber, Case No ICC-01/09-01/11 OA, 20 September 2011).

inherent problem as international criminal justice itself, namely weak or absent enforcement mechanisms. As an international criminal tribunal with no enforcement capacity of its own, the ICC is dependent on states for cooperation, in particular for the apprehension of suspects.<sup>32</sup> If the ICC cannot gain custody of the accused, its significance as a court of last resort and its influence on the national systems of states through the complementarity principle is weakened.<sup>33</sup> Yet, even where a state has self-referred a situation to the ICC, as in Uganda, such cooperation cannot be assumed. In the face of noncooperation the ICC must rely on the support of the Security Council<sup>34</sup> and the Assembly of States Parties<sup>35</sup> to compel or persuade states to cooperate. However, as shown by the continued refusal of Sudan to cooperate with the ICC, despite the obligation in *Resolution 1593* requiring it to do so,<sup>36</sup> even a mandate for the ICC from the Security Council may not suffice to ensure cooperation. Both the Security Council and the Assembly of States Parties operate within the political, rather than the legal, realm. Jurdi recognises that the ICC must continue to operate within this political context and that the ICC cannot achieve its full potential unless it enjoys the support of the affected state, major international actors and the affected population. The compromise reached between sovereignty and accountability in the cooperation mechanisms under the *Rome Statute* is actually the biggest threat to the success of the complementarity regime.

Secondly, Jurdi observes the worrying trend in both the practice of the OTP and in the jurisprudence of the ICC to consider all cases of ‘inaction’, that is where the affected state takes no steps to secure accountability for the commission of ICC crimes, as automatically admissible. In the case of self-referrals, this approach effectively allows the territorial state to defer proceedings in favour of the ICC, as has happened in relation to the Ugandan referral. Yet, the premise upon which the *Rome Statute* is based is that it is the state, and not the ICC, that bears the primary responsibility to prosecute international crimes. Considering all cases of inaction as automatically admissible allows the territorial state to avoid this obligation in favour of proceedings before the ICC and, as Jurdi notes, may encourage laziness on the part of some states towards their own obligations.<sup>37</sup> While the Court has described such arrangements as ‘burden sharing’ between the state and the ICC,<sup>38</sup> this does appear inconsistent with the notion of states having the primary responsibility. Moreover, as the ICC’s case load expands, it simply may not have

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<sup>32</sup> *Rome Statute* pt IX, art 89.

<sup>33</sup> Unlike some national systems and certain international tribunals (for example, the Special Tribunal for Lebanon), the ICC does not permit trials in absentia, therefore gaining custody of the accused is required before a trial can commence: *ibid* art 63(1).

<sup>34</sup> *Ibid* arts 87(5), 87(7).

<sup>35</sup> *Ibid* arts 112(f), 87(5), 87(7).

<sup>36</sup> SC Res 1593, UN SCOR, 60<sup>th</sup> sess, 5158<sup>th</sup> mtg, UN Doc S/RES/1593 (31 March 2005) para 2.

<sup>37</sup> Jurdi, above n 8, 263.

<sup>38</sup> *Prosecutor v Katanga (Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA 8, 25 September 2009). See also Matthew E Cross and Sarah Williams, ‘Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui — A Boost for “Co-Operative Complementarity”?’ (2010) 10 *Human Rights Law Review* 336.

the resources to accommodate all situations concerning inaction of the state. Instead, applying positive complementarity should enable the ICC to work with the affected state to develop appropriate national mechanisms, rather than an abandonment of responsibility to the ICC.

Thirdly, as the case studies of northern Uganda and Sudan demonstrate, the ICC can have a positive impact on national legal systems and lead to changes in national laws and the creation of new institutions to try international crimes. This is particularly so where there is widespread support, internationally, regionally and locally, for the role of the ICC in a given situation. However, as Jurdi emphasises, it is not the role of the ICC when assessing whether a state is unable or unwilling genuinely to investigate or prosecute to review the performance of an entire national judicial system to ensure it meets international standards in all respects. The supervisory role of the ICC is more limited.

In summary, Jurdi's study is a timely reminder of the political and legal constraints within which the ICC must operate. The ICC faces significant legal, political and practical obstacles in its quest to end impunity for serious international crimes. The relationship between the ICC and the national judicial systems embodied in the *Rome Statute* in the form of the complementarity principle is a reflection of the compromise between state sovereignty and accountability. Managing this relationship and securing cooperation from states is vital to the effectiveness of the ICC. In examining this relationship, both in the abstract and by reference to case studies of two situations currently before the ICC, Jurdi highlights the significance of this relationship, while flagging the limitations within the *Rome Statute* itself as well as the political context, and the challenges that will continue to face the ICC. It is an interesting study, and a meaningful contribution to the emerging literature on the complementarity principle.

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