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Fair and Effective Investigation and Prosecution of International Crimes

**Inventory and State-of-the-Art:
Context, Cluster 1 and Cluster 2**

by Carsten Stahn

FAIR AND EFFECTIVE INVESTIGATION AND PROSECUTION OF INTERNATIONAL CRIMES

INVENTORY AND STATE-OF-THE-ART: CONTEXT, CLUSTER 1 AND CLUSTER 2

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Chapter 1. Context

The interaction between domestic and international institutions in the investigation and prosecution of international crimes is one of the most dynamic developments in international criminal justice (International Criminal Court 2003; Burke-White 2008a; Kleffner 2008a; El Zeidy, 2008; Stahn and El Zeidy 2011; Nouwen 2013; ICTJ 2016). While early experiments in international criminal justice were traditionally centred on the exercise of international jurisdiction, there has been a trend in recent decades to relate investigation and prosecution of international crimes to a broader 'system of justice' (International Criminal Court 2013a, §22), in which different levels of jurisdiction complement each other. This process is founded on the recognition in international treaty law and practice that certain crimes, including genocide, crimes against humanity, war crimes, and aggression, are so grave that they concern not only domestic societies but the international community as a whole. The system relies on interaction and cooperation between states, international institutional structures, civil society and local actors.

1.1 A taxonomy: the four layers of international justice

The multi-layered accountability architecture of international justice encompasses four layers: (i) *international justice*, i.e. courts and tribunals deriving their powers and authority from universal legal instruments, such as international treaties or Security Council resolutions; (ii) *regional mechanisms*, i.e. bodies created by international legal instruments whose membership is limited to a specific region; (iii) *hybrid mechanisms*, i.e. bodies that combine elements of domestic and international jurisdiction; and (iv) *classic domestic courts and tribunals*.

1.1.1 Domestic

National courts have traditionally been the main forum for justice. They are often the primary entry point for investigations and prosecutions, and ultimately the guardians of accountability in the long term. Recent studies acknowledge that the quality of national investigations and prosecutions is key for the success of international criminal justice (Bergsmo, Harlem and Hayashi 2010; ICTJ 2016). In past years, more and more states have adopted specialised laws or special prosecution units to investigate and prosecute international crimes (e.g., Guatemala, Colombia, Uganda), to accommodate specificities and complexities of norms and procedures relating to international crimes.

1.1.2 International

International institutions have been seen as a necessary complement to domestic jurisdiction in specific circumstances. Their creation is particularly supported in contexts where domestic authorities were unable to try perpetrators due, for example, to security conditions, lack of legal or institutional capacity, or enforcement constraints, or not deemed sufficiently legitimate and independent to conduct trials and prosecutions.

1.1.3 *Hybrids*

In addition, there has been a need for tailor-made mechanisms and situation-specific responses. This has led to the emergence of 'hybrid' or 'mixed' models since the 1990s (Romano, Nollkaemper and Kleffner 2004; Williams 2012). They are partly a result of concerns relating to the efficiency and cost-effectiveness of international justice, and the ambition to make justice more visible to the populations affected.

Broadly speaking, there are two types of hybrids. The first are hybrid courts which have an international legal basis and operate typically as independent criminal institutions outside the traditional realm of domestic jurisdiction. Excellent examples are the Special Court for Sierra Leone and the Special Tribunal for Lebanon.

The second type of hybrids are mixed domestic/international courts that form part of the domestic system, but with adjustments in relation to the composition of staff or the applicable law. Prominent examples are the Special Panels for Serious Crimes in East Timor, the former UNMIK Panels in Kosovo, the War Crimes Chamber in the State Court of Bosnia and Herzegovina, and the Extraordinary Chambers in the Courts of Cambodia.

In recent years, the turn to hybridity has seen a revival. For instance, the Central African Republic adopted a law which foresees the creation of a special Criminal Court. It is the first special court that complements ICC action in a situation country. Senegal and the African Union created the Extraordinary African Chambers in Senegal, which prosecuted former President Hissène Habré (Ankumah 2016). This was the first universal jurisdiction case to proceed to trial in Africa.

The Kosovo Specialist Chambers are a blend between regional and domestic approaches. They are formally part of the legal order of Kosovo. But the power to appoint staff has been delegated to the EU as 'appointing authority' (Article 28 of Law No.05/L-53).

1.1.4 *Regional*

The fourth, and as yet most underdeveloped model, is to turn to regional courts (Burke White 2003; Sirleaf 2016). Regional approaches present a number of advantages: a geographical proximity to crimes, and the ability to reflect specific regional interests or priorities. The most prominent example is the Malabo Protocol on the African Court of Justice and Human and Peoples' Rights (Ambos 2016). It combines jurisdiction over core crimes with certain transnational offences.

Regional human rights courts may influence domestic approaches towards investigation and prosecution of crimes. For instance, the Inter-American Court of Human Rights has monitored domestic prosecutions in over fifty cases and developed rich case law in relation to the right to truth, forced disappearances, amnesties and reparations. This type of human rights adjudication has been branded as 'quasi-criminal jurisdiction' (Huneeus 2013).

1.2 Complementarity

The growing decentralisation of investigations and prosecution makes it necessary to coordinate responses, avoid conflicts and facilitate cooperation among different layers of jurisdiction. The principle of complementarity is a structural principle of the international order which seeks to address this challenge. It reflects the idea that 'domestic justice systems should be the first resort in the pursuit of accountability' – a concept reflected in the formulation of the 'responsibility to protect' doctrine of the World Summit Outcome Document (United Nations 2005a, §138). However, where these systems 'are unwilling or unable to prosecute violators at home', the international community should be ready to step in (United Nations 2004, §40).

1.2.1 *Meaning(s) of complementarity*

The literature includes references to different notions, such as 'classical complementarity' (Stahn 2008), 'positive complementarity' (International Criminal Court 2003), 'negative complementarity' (Stahn 2011), 'proactive complementarity' (Burke-White 2008b), 'constructive complementarity' (Newton 2011), 'radical complementarity' (Heller 2016), 'regional complementarity' (Jackson 2016) or 'horizontal complementarity' (Van den Ryngaert 2008). But complementarity is in essence an organising principle which, as the Appeals Chamber of the ICC put it in *Katanga*, strikes 'a balance between [...] the primacy of domestic proceedings' and the goal to 'put an end to impunity' (International Criminal Court 2009, §85).

Complementarity has at least four functions. It:

- Protects sovereignty, by reaffirming the primary role of States in exercising criminal jurisdiction over international crimes;
- Promotes effective investigation and prosecution, by encouraging states to make genuine efforts to hold perpetrators accountable in line with their duty to investigate and prosecute crimes;
- Facilitates a certain division of labor between different layers of jurisdiction, i.e. by resolving conflicts of jurisdiction and limiting cases that come before the ICC; and
- Stimulates cooperation and sharing of good practices between international and domestic justice actors.

This basic idea has come into play in different variations in relation to each layer of justice

1.2.1.1 *Complementarity in the ICC context*

The notion of complementarity has its origins in the negotiation of the Statute of the ICC. It has different meanings. It was originally conceived in a technical-legal sense as a tool to sort out conflicts of jurisdiction between the ICC and domestic jurisdictions under Article 17. This first meaning – its role as an admissibility criterion – is often discussed in jurisprudence and academic works (Kleffner 2008; El Zeidy 2008a; Stigen 2008).

In practice, the term has been used in a second sense, namely as an operational principle of the Rome Statute as a system of justice. This broader understanding is reflected in the 2010 *Kampala Resolution on Complementarity of the Assembly of States Parties* (Assembly of States Parties 2010a). It recalls ‘the primary responsibility of States to investigate and prosecute the most serious crimes of international concern’ (ibid, §1). It stresses the rationale to encourage investigations and prosecutions, and the nexus of complementarity to capacity building (ibid, §5; Bekou 2015) and effective implementation of the Statute (Assembly of States Parties 2010a, §4).

This understanding is often referred to as positive complementarity. It is grounded in certain legal aspects including: cooperation of the ICC with domestic jurisdictions under Article 93(10); managerial duties of the Office of the Prosecutor under Article 54 of the Rome Statute including its mandate ‘to ensure the effective investigation and prosecution of crimes’; as well as policy considerations (Stahn 2011). The *Report of the Bureau on Complementarity* defines positive complementarity as ‘all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute’ (Assembly of States Parties 2010b, §16).

1.2.1.2 *Quasi-complementarity in the ad hoc tribunals*

In the *ad hoc* tribunals, complementarity was not directly contemplated but judges created a mechanism to refer mid or low level cases back to domestic jurisdictions under Rule 11bis of the Rules of Procedure and Evidence. This mechanism was created as part of the completion strategy to facilitate burden-sharing. The elements are not identical (El Zeidy 2008b), but similar to the complementarity test. In making referrals, the tribunals considered criteria such as the gravity of the crimes, the level of responsibility of the accused, the fairness of domestic proceedings, and certain human rights criteria including the non-application of the death penalty. They retained the authority to monitor proceedings in the national courts.

The concurrent relationship between international and domestic jurisdiction has been subject to critique. Morris coined the term ‘stratified-concurrent jurisdiction’ (Morris 1997, 367), according to which international tribunals prosecuted (or strived to prosecute) the leaders, while national governments had to deal with the rest of the defendants. This has led to ‘anomalies of inversion’ (Morris 1997, 371) in contexts such as Rwanda where some of the most responsible defendants received arguably the most lenient treatment.

1.2.1.3 **Complementarity and hybrid courts**

The notion of complementarity is formally limited to the relations between international courts and states under Article 17 of the Rome Statute, but the idea to organise concurrent jurisdiction based on certain organising principles also comes into play in the relationship between hybrid courts and the ICC. Some argue that states can discharge their responsibilities through internationalised courts (Benzing and Bergsmo 2004, 411). Technically, the ICC and hybrid or regional courts are independent entities, which means that they are in a horizontal, rather than a vertical relationship (Murungu 2011, 1075; Abass 2013, 48; Musila 2016).

Conflicts are in principle determined by the principle of the rule against double jeopardy, or *ne bis in idem*, but statutory instruments can regulate the complementary nature of such entities.

For instance, the Special Court in the Central African Republic is designed to complement the ICC, rather than to replace it. The Special Court has primacy over other domestic courts, but concurrent jurisdiction with the ICC. Article 37 of the Law provides that the ICC enjoys priority over the Special Criminal Court when the ICC Prosecutor 'is seized of a case entering concurrently in the jurisdiction of the ICC and the Special Criminal Court'.¹ This has been referred to as a system of reverse complementarity between the ICC and the Special Criminal Court (Arnould 2015, 5). The modalities of cooperation or burden-sharing are not regulated.

1.2.1.4 Complementarity in the regional context

The Malabo Protocol on the African Court of Justice and Human and Peoples' Rights has taken a different approach. It embraces the idea of complementarity at the regional level ('regional complementarity'). It regulates complementarity in the relationship between the African court and domestic and certain other jurisdictions. Article 46H envisages 'complementary jurisdiction' between the African Court and 'national courts', as well as 'the Courts of the Regional Economic Communities' where provided for. The provision is modelled after Article 17 of the ICC Statute. But it does not contain any reference to the relationship to the ICC. This has been criticised (Du Plessis 2012).

1.2.1.5 Complementarity in the relationship between states

Finally, the concept of complementarity comes into play in the relationship between states. In this context, it is used as a concept to determine limits to the exercise of universal jurisdiction. Many states tend to defer the exercise of such jurisdiction to another state which has a closer nexus to the crime, unless that state is unable or unwilling. Subsidiarity is required by law in countries such as Belgium, Spain or Switzerland, or applied in judicial doctrine (e.g. Austria) or prosecutorial discretion (e.g. Denmark, Norway, Sweden, United Kingdom). For instance, in 2005, the German Federal Prosecutor declined to open an investigation against former US Secretary of Defence Donald Rumsfeld relating to torture in Iraq on the ground that US authorities were investigating the situation.

The purpose of introducing complementarity in inter-state relations is to encourage genuine domestic proceedings in the state best suited to address crimes, and to avoid overly broad assertions of universal jurisdiction. There is not yet a commonly agreed definition of horizontal complementarity criteria, and its feasibility remains contested (Hall 2010). But certain authors suggest that the concept should be formulated by the Assembly of States Parties of the ICC. For instance, Burens proposes the following approach (2016, 79-80):

'A case before the national authorities prosecuting under universal jurisdiction is admissible if the case is not being investigated or prosecuted by another state which has a closer link to the crime such as territoriality, active or passive nationality. A case is furthermore admissible if the state carrying out the investigations or prosecutions is unwilling or unable to genuinely carry out the

¹ The original French text reads: 'Lorsqu'en application du Traité de Rome de la Cour Pénale Internationale ou des accords particuliers liant l'Etat centrafricain à cette juridiction internationale, il est établi que le Procureur de la Cour Pénale Internationale s'est saisi d'un cas entrant concurremment dans la compétence de la Cour Pénale Internationale et de la Coup Pénale Spéciale, la seconde se dessaisit au profit de la première'.

investigations or prosecutions, or if reasons exist that would bar a future extradition of the accused to the nexus-state or if proceedings in the nexus-state are violating internationally recognised human rights.’

1.2.2 *No one size fits all model*

Complementarity is meant to preserve the diversity of domestic traditions. Current international law does not explicitly compel states to copy ICC standards. The Genocide and Geneva Conventions expressly require that state parties enact necessary legislation. Under the Rome Statute, the only direct obligation for implementing legislation exists under Article 88, which obliges states parties to ensure ‘that there are procedures available under their national law for all of the forms of cooperation which are specified under [...] Part [9]’.

Several NGOs have developed comprehensive checklists and manuals for the implementation of the ICC Statute. Main references are: (i) the *Handbook for Implementing the Rome Statute* (Human Rights Watch 2001); (ii) the *Manual for the Ratification and Implementation of the Rome Statute* (International Centre for Criminal Law Reform and Criminal Justice Policy 2008); and (iii) the *Updated Checklist for Effective Implementation* (Amnesty International 2010).

These instruments suggest that domestication of core crimes is an obligation, but reality is more nuanced (Mégret 2011); the Statute contains no direct obligation to domesticate core crimes. The Rome Statute poses, at most, a minimum standard of international criminalisation vis-à-vis pre-existing norms. This is evidenced by paragraph 6 of the Preamble, which recalls ‘that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.’

Complementarity serves mostly as an incentive for States to approximate substantive criminal law in the area of core crimes (Van der Wilt 2008). It encourages processes of approximation indirectly through norm expression, articulation of practices, and policy incentives for states to avoid the exercise of ICC jurisdiction (Kleffner 2003). There is, at best, an ‘obligation of result’ in relation to criminalisation. As noted by David Donat Cattin, ‘states can do more, but shall do no less, than what the Rome Statute prescribes, so to ensure that crimes against humanity, war crimes and acts of genocide be duly incorporated in the relevant legal order and not left unpunished’ (2012, 12).

The means whereby this is achieved can vary. This was reaffirmed by the jurisprudence of the ICC Appeals Chamber in the Libyan cases. It held in the *Al Senussi* Appeal that ‘there is no requirement in the Statute for a crime to be prosecuted as an international crime domestically’ (International Criminal Court 2014a, §119). The only direct requirement of implementation arises under Article 88 which provides an instrument to harmonise cooperation of states with the ICC.

This flexibility is in line with lessons from UN practice. As noted in the 2004 Report of the Secretary General on *The rule of law and transitional justice in conflict and post-conflict societies*:

‘[N]o rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable [...] Countless

pre-designed or imported projects, however meticulously well-reasoned and elegantly packaged, have failed the test of justice sector reform [...] The most important role we can play is to facilitate the processes through which various stakeholders debate and outline the elements of their country's plan to address the injustices of the past and to secure sustainable justice for the future, in accordance with international standards, domestic legal traditions and national aspirations' (United Nations 2004, §17).

The main challenge is to clarify how justice can best be tailored to the specific context (see also the context elements of Clusters 3 and 4). The principle of complementarity plays an important function in this regard. It may provide guidance to domestic jurisdictions and identify gaps or tensions in accountability approaches. But, as stated in the 2003 *Expert Report on Complementarity*, 'its role is not to ensure perfect procedures and compliance with all international standards' (International Criminal Court 2003, 17).

1.3 Effectiveness and fairness

Complementarity focuses in essence on justice as a *process*. As Darryl Robinson (2012, 173) put it, '[p]rocess is the master theory.' Key reference points are fairness and effectiveness of accountability procedures. Both concepts are broader than complementarity in the formal legal sense.

1.3.1 Effectiveness

The commitment to effective justice is framed as a duty of domestic jurisdictions in paragraph 4 of the Preamble to the Statute. In the context of the complementarity regime, it is mentioned as an element of the unwillingness test under Article 17(2). Effective justice is also part of the express duty of the Prosecutor (Article 54(1)(b)) and linked the rights of the accused under Article 67(1)(c).

There is a rich literature on the effectiveness of justice proceedings (Freeland 2008; Galbraith 2009; Ryngaert 2009). Effectiveness must be seen in context. It is widely acknowledged that the investigation and prosecution of international crimes cannot be simply compared to ordinary criminal proceedings. There are a number of factors that make such proceedings particular, including highly contentious political environments, difficulties in obtaining evidence, the scope and complexity of the charges, the level of responsibility of defendants, the number of suspects, and the need to protect witnesses and victims. These factors make it difficult to compare the length of investigations with traditional domestic cases. A mere numerical assessment (i.e. of the number of defendants or cases, or the defendant-cost ratio) is too simplistic. A more appropriate comparative may be transnational crime cases.

Effectiveness must be distinguished from efficiency. Efficiency is linked to the management of proceedings, most notably the objective to optimise productivity and make best use of resources. It includes judicial and administrative considerations. Effectiveness is inherently connected to the underlying aims and goals of the justice process (Shany 2012). These goals vary between institutions. Many justice institutions pursue multiple explicit and implicit goals.

Effectiveness needs to be placed in perspective in relation to the distinct goals of international criminal justice. In the report on the *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (United Nations 2004, §38), the UN Secretary-General outlined a list of broadly defined goals. These include: retribution (i.e. bringing responsible perpetrators to justice); ending violations and preventing their recurrence; securing justice and dignity for victims; establishing a record of past events; promoting national reconciliation; re-establishing the rule of law; and contributing to the restoration of peace. The first two goals are common to domestic legal systems, while the others (i.e. fact-finding and social transformation) are more particular to international criminal justice as a discipline. Assessments of effectiveness largely depend on how entities are able to balance the pursuit of their multiple goals, and on the perceptions of different stakeholders.

In the ICC context, these goals include fair, effective and expeditious public proceedings and ensuring full exercise of the rights of all participants. The defendant has the right to be tried without undue delay pursuant to Article 67(1)(c) of the Statute. Chambers are required to ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused (Article 64(2)). Public confidence, as well as the rights of the accused and of victims, is affected by the Court's performance. Some of these considerations are relevant to domestic proceedings, although their precise articulation and framing may differ according to the domestic legal tradition and procedure.

There is an old truism that 'justice delayed is justice denied'. But the desire for expediency may need to be balanced against the need for time. Justice delayed may also be justice delivered (Whiting 2009). For instance, in some contexts, it may be wise to postpone charges and proceedings from an effectiveness point of view, to gradually build lines of responsibility or to improve the accuracy of charges or the completeness of justice. The passage of time may thus, in some circumstances, represent an asset and result in a better pursuit of justice.

1.3.2 *Fairness*

Fairness of proceedings is the cardinal principle of the Rome system of justice. It is at the heart of the unwillingness assessment under Article 17(2) ('having regard to the principles of due process recognised by international law'), and the *raison d'être* behind the creation and mandate of the Court. Like effectiveness and fairness require a context-related assessment. Some argue that demands relating to proceedings relating to core crimes may differ from classical domestic proceedings (Damaška 2012).

Fair trial rights of international human right documents apply to both national and international justice. In terms of codification and procedure, international criminal law has adopted and developed some of the most advanced and sophisticated due-process and fair-trial protections available to defendants.

The ICC statutory regime is a unique example. The ICC is not a forum or appellate body to remedy general human rights violations to the disadvantage of the person in domestic criminal proceedings like a human rights court is. It serves primarily as a forum to correct instances in which alleged violations (i.e. lack of independence or impartiality) have impeded investigation or prosecution, and those irregularities are preventing a person from being brought to justice.

But the ICC is mandated to uphold fair trial principles and human rights guarantees in all proceedings that come within its ambit. This is reflected in a wide range of provisions. Article 54(1) obliges the Prosecutor to investigate incriminating and exonerating circumstances equally (Article 54(1)(b)), and to ‘fully respect the rights of persons under t[he] Statute’ (Article 54(1)(c)). These rights are, inter alia, set out in Articles 55 (rights of persons during an investigation) and 67 (rights of the accused). Most fundamentally, Article 21(3) specifies that the ‘application and interpretation of law’ by the Court ‘must be consistent with internationally recognised human rights.’

The Appeals Chamber underlined the ramifications of this interpretation in *Lubanga* in 2006. It noted:

‘Human rights underpin the Statute; every aspect of it *including the exercise of jurisdiction of the Court*. Its provisions must be interpreted and more importantly applied in accordance with internationally recognised human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety’ (emphasis added) (International Criminal Court 2006, §37):

Human rights treaties are relevant for criminal justice at the national level because they state ‘meta-principles of fairness’ (Swart 2008, 96). As Bert Swart noted, they generally ‘create obligations of results and leave states free to determine how these results can be reached’ (Swart 2008, 96). They do not force states to adopt a particular procedural system, either adversarial or non-adversarial.

Fairness is not only a right of the defendant, but an overarching requirement of criminal proceedings. It involves certain procedural dimensions, such as the right to a fair trial, equality of arms, the presumption of innocence, the safety of witnesses and victims, and the ability to present one’s case. But it also implies normative considerations, such as coherence and equal and unbiased application of norms and standards to all participants in the process. Key principles of fairness are transparency, consistency, equality and impartiality (McDermott 2015, 6).

How fairness of proceedings as a whole is assessed depends in part on the underlying conception of justice, namely the balance between a more retributive conception of justice which emphasises the vindication of social norms and rules, procedural fairness, and punishment, and a more restorative vision which devotes broader attention to the needs of victims, offenders, and affected communities. Whether fairness to defendants should be balanced against fairness to victims remains contested (Zappala 2010).

Guidance may be derived from several works, including those of Trechsel (2006), McDermott (2016) and Zeegers (2016). An account of relevant jurisprudence is contained in the *Report of the International Bar Association on Fairness at the International Criminal Court* (IBA 2011). A comprehensive survey of international rights is contained in the OSCE *Legal Digest of International Fair Trial Rights* (OSCE 2012), which aims at building the capacity of legal practitioners to conduct professional trial monitoring.

Chapter 2. Cluster 1: Effective domestication of the Rome Statute and related instruments

Domestic courts traditionally bear a heavy burden in investigating and prosecuting offences (Rikhof 2009). The number of domestic proceedings has increased over past decades, something which Kathryn Sikkink (2012) called the 'Justice Cascade', but overall the number of domestic criminal cases relating to international core crimes remains low and direct application of international criminal norms remains an exception (Ferdinandusse 2006). Domestication of Rome Statute obligations is fragmented, and although the Rome Statute triggered a new wave of domestication of international crimes, the domestic application of core crimes continues to pose significant challenges (Bekou 2011; Weill 2014).

2.1 State-of-the-art

There is some evidence that complementarity serves as a mechanism to domesticate offences (Kress and Latanzi 2000; Neuner 2003), and domestic implementation of the crimes and principles of the Rome Statute carries certain benefits. It may strengthen domestic criminal justice systems, update offences and principles of criminal responsibility, allow explicit definitions of crimes and penalties rather than the simple reference to international conventions, and help to de-politicise domestic prosecutions. It has encouraged the direct application of statutory principles by domestic military courts in the DRC and constitutional courts in the Central African Republic, and the creation of specialised crime units. But national implementation has proven to be more difficult than initially anticipated (Terracino 2007; Carrasco 2010). Only roughly half of the state parties have enacted legislation.

Implementation may lead to norm diffusion. States have to make their internal laws compatible not only with the Statute but also with their sometimes complex national criminal justice systems. Certain norms and procedures need to be adjusted to domestic notions or contexts.

The reasons for domestication vary. As shown by Subotić (2009), states may appropriate international norms and standards for different motives: to gain international legitimacy, to influence domestic politics, to ease pressure, or out of uncertainty or the desire to replicate the behaviour of other states. Local political goals may differ from international goals, and this interaction may produce positive outcomes, but also tensions.

There are, at least three different ways in which states can reflect core crimes in national legislation (Bergsmo, Harlem and Hayashi 2010, 7-8). The minimalist approach is to simply apply domestic criminal law or military law. The disadvantage of this approach is that domestic crime labels may only partially correlate with offences, and that penalties may be inappropriate for the seriousness of the crimes. States must also take into account their other obligations concerning international crimes. A second approach is criminalisation through reference to international treaties or applicable international law, with specification of penalties. This approach may raise concerns from the perspective of the principle of legality. A third way is to define crimes recognised in treaty or customary law in domestic jurisdiction. This can occur in several ways. States may either rely on definitions under existing international law, or adjust the definitions to the domestic setting, or combine the two methods.

The approaches towards implementation may differ between monist systems, according to which international treaty provisions may become part of domestic law without implementing legislation, and dualist systems which require implementing legislation to give the treaty legal force. For instance, in monist systems, implementation may clarify or refine provisions in line with the principle of legality. In dualist systems, it may be necessary to render them applicable before domestic courts. States have the liberty to deviate from the Rome Statute, but this choice may affect their capacity to meet the complementarity test.

One challenging insight from practice in existing situations is that implementation of offences does not *per se* ensure a better application of the law. Complementarity has been traditionally associated with the idea of catalyst for compliance (Kleffner 2005), but in practice the effects of complementarity have been far more complex and diverse, reaching beyond cooperation and compliance. ICC interventions have produced multiple unforeseen effects. Studies from ICC situations suggest that domestic implementation does not necessarily correlate with proper internalisation of norms and procedures and there are criticisms that the focus on the ICC has led to a mimicking of international approaches, and the creation of parallel structures, rather than a true process of internalisation (Nouwen 2013, 187). For instance, the Government of Uganda has enacted the International Criminal Court Act, 2010 and created a Special Division within the High Court to prosecute international crimes. But the enactment of these laws and the establishment of justice administration institutions do not necessarily lead to more prosecutions of core crimes (Oola 2015). In some cases, domestic efforts have resulted in the replication of ICC justice models, rather than adaptation or internalisation (De Vos 2015). In other cases, specialised jurisdictions have detracted resources from domestic courts, or created a privileged focus on specific categories of crimes (e.g. sexual and gender based violence). There are open questions as to whether laws and institutions that mirror international standards do in fact lead to greater accountability at the domestic level. It is thus necessary to take a differentiated look at domestication, which differentiates between implementation (i.e. criminalisation) and internalisation (i.e. actual application in the domestic realm by legislative, executive or judicial bodies).

Field related research has been mostly done in relation to the situations in Uganda, Democratic Republic of Congo (Labuda 2015), Kenya and Sudan (Nouwen 2013) and Colombia (Ambos 2010). Works include the Open Society Justice Initiative study on *Putting Complementarity in Practice*, which deals with Democratic Republic of Congo, Uganda and Kenya (OSJI 2011); Nouwen 2013; Wegner 2015 (dealing with Uganda and Sudan) and De Vos, Kendall, Stahn 2015 (dealing with DRC, Uganda, Kenya, Colombia).

In contemporary practice, the focus of criminalisation is often on crimes, but whether a state is able to effectively respond to accountability gaps depends on a much broader range of factors than crime provisions. Cluster 1 thus takes a more holistic approach towards domestication, and goes beyond the hard obligations under the Rome Statute. It is based on a maximalist approach in terms of its scope of inquiry, covering a wide range of factors relevant to domestic investigation and prosecution of crimes. It also extends beyond regulation by focusing on internalisation and application in practice, rather than implementation *stricto sensu*.

2.2 Jurisdiction over crimes

There is a direct correlation between enforcement and jurisdictional capacity. Inherent differences between legal systems influence the way in which crimes are investigated and prosecuted. The Rome Statute does not proscribe states to adopt a specific model of jurisdiction over crimes, but in many cases the possibility to effectively investigate and prosecute crimes depends on jurisdictional reach. Classical international law contains four titles: territoriality, active nationality (acts committed by persons having the nationality of the forum State), passive nationality (acts committed against nationals of the forum State) and universal jurisdiction (assertion of jurisdiction over offences regardless of the place where they were committed and the nationalities of the perpetrator or of the victims). Domestic jurisdictions can take on multiple heads and identities when adjudicating international crimes. It is typically argued that states should, at a minimum, have legislation allowing them to exercise territorial jurisdiction over international crimes and extra-territorial jurisdiction over its nationals who commit crimes abroad. The Geneva Conventions of 1949 require states to establish universal jurisdiction over the grave breaches defined in these Conventions. Some confusion may arise from the fact that title to jurisdiction differs according to different categories of crimes.

One crucial factor is the scope of universal jurisdiction (O'Keefe 2004; Bergsmo 2010). States frequently attach conditions to universal jurisdiction, such as the presence of the alleged offenders on their territory or special prosecutorial discretion (Ryngaert 2008; Burens 2016). States may hesitate to start trials *in absentia*. Some guidance on effectiveness may be derived from soft law instruments, such as the *Princeton Principles on Universal Jurisdiction* (Princeton Project on Universal Jurisdiction 2001). A further reference point is the *Report of the AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction* (European Union 2009), as well the survey of legislation around the world (Amnesty International 2012).

2.3 Crime base

The crime base is a second indicator for effectiveness of domestication. Crime definitions vary significantly across jurisdictions. The ICC specified expressly that domestic jurisdiction needs to reflect the same crime labels as the ICC in admissibility assessments. It held in the *Al-Senussi* Admissibility Decision that 'domestic proceedings must focus on the alleged conduct and not on its legal characterisation' (International Criminal Court 2013b, §66).

This diversity is reflected in practice. There are at least four categories of states. A number of states define core crimes in their legislation in identical terms to the Rome Statute. Others use broader definitions than the ICC Statute, or more restrictive definitions. Finally, some have not taken any action with respect to definition or implementation (Terracino 2007). Such pluralism is not necessarily a weakness, but might be an asset (Burke White 2005; Van Sliedregt and Vasiliev 2014).

When assessing states' discretion to deviate from the Rome Statute, one may draw a distinction between crime definitions, modes of liability and procedural law. Crime definitions are constructions of international law. They might be adjusted to address specific political and social domestic contexts, but deviations may become critical when they undermine the rationale or the essence of the international crimes. Such a test was formulated by the European Court of Human

Rights in the case of *Jorgić v. Germany*. The Court noted that domestic jurisdiction may determine the concept of genocide under domestic law, provided that the domestic interpretation is consistent with the essence of the offence and could have been foreseen by the defendant (ECtHR 2007, §§101, 114). One key factor is the contextual element of international crimes (Doherty and McCormack 1999, 166-167). Modes of liability and procedural law, by contrast, are largely particular to a specific domestic system, which provides greater room to rely on equivalent domestic principles (Rastan 2011).

The precise degree to which there should be synergy with the Rome Statute depends on the individual crime provision. For instance, in some respects the Rome Statute may be narrower than general international law. In such cases, deviations are unproblematic, or might be desirable.

In ICC complementarity jurisprudence, it has become standard practice to assess the relevance of domestic action in admissibility proceedings, by virtue of a comparison of national measures with the case before the ICC, the so called 'same conduct' test. The Appeals Chamber introduced the image of the mirror to explain its approach. It stated in the *Gaddafi Admissibility Appeal* that: 'What is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating' (International Court 2014b, §2). It specified that a case is only inadmissible before the Court if the same suspects are being investigated for 'substantially the same conduct' (International Court 2014b, §63). It defended a 'strict mirror' approach, stressing the key role of incidents in the determination of the 'sameness' of conduct. This test has been criticised for its overly strict requirements (Stahn 2015). Heller has argued that a 'genuine effort to bring a suspect to justice [should suffice] regardless of the conduct the state investigates, and regardless of the crimes the state charges' (Heller 2016).

The project framework goes beyond the determination of admissibility in the sense of Article 17 and so it is possible to adopt a wider lens. Inspiration can be drawn from different models of synergy offered in scholarship. Heller has developed the image of a soft and a hard mirror thesis to determine what deviations should be permissible (Heller 2012). Borrowing from this methodology, the project framework uses a four-fold typology suggested here: (1) no mirror, and crimes are not covered; (2) a soft mirror, and crimes are captured but under a different label; (3) a hard mirror – domestic law captures ICC crime labels; and (4) domestic law goes beyond ICC. The project framework looks not only at statutory norms, but also domestic jurisprudence and application of crimes in practice.

Evidence suggests that the context of the commission of international crimes is fuelled by a range of contextual factors, including poverty, corruption, and other socio-economic factors. In its 2016 *Policy Paper on Case Selection and Prioritisation*, the ICC pointed to the nexus between core crimes and 'the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land' (International Court 2016, §41). The project framework therefore provides attention to crimes other than genocide, war crimes and crimes against humanity.

The project includes the crime of aggression. Aggression differs from other core crimes in its nexus to the law on the use of force (*jus ad bellum*); domestic legislation differs significantly

(Reisinger Coracini 2009). Many states criminalise aggression as a violation against national security interests, such as the use of armed force against the national sovereignty or territorial integrity of a state, but only a limited number of states have implemented the crime of aggression more broadly as a crime under international law. Sometimes, definitions are more restrictive than the Kampala definition, referring to a war of aggression rather than an act of aggression. Some argue that jurisdiction should be limited to the nationality and territoriality principle, whilst others claim that states have discretion to assert universal jurisdiction.

Information on the state of national legislation can be found in the database on National Implementing Legislation, hosted by the University of Nottingham. Useful resources on national decisions include the International Crimes Database (ICD) website, and the TMC Asser Institute, and the *Oxford Reports on International Law in Domestic Courts*.

2.4 Offences against the administration of justice

Offences against the administration of justice are often sidelined in the discourse on investigation and prosecution, but they play a key role in securing the protection of witnesses and victims and the integrity of proceedings, as highlighted in *Bemba et al.*, the first Article 70 trial of the ICC (International Criminal Court 2016b). Criminal interference with witnesses may impede the discovery of the truth in cases involving genocide, crimes against humanity and war crimes and impede justice for victims and ultimately hamper the Court's ability to fulfil its mandate. Article 70(4)(a) of the Rome Statute requires each:

'State Party to extend its criminal laws penalising offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in [article 70], committed on its territory, or by one of its nationals.'

Offences against their own administration of justice cover a wide range of offences, such as perjury, bribery, intimidation of witnesses or ignoring court orders. In every jurisdiction, such misconduct triggers sanctions, but approaches differ between accusatorial and inquisitorial systems. In adversarial systems, contempt powers are typically part of a law of contempt and subject to the contempt power of the judiciary, which may hold a person in contempt of Court and enjoys discretion as to the penalty. In civil law jurisdictions, there is often no distinction between the law of contempt and other criminal offences (Sluiter 2004, 632). Article 70(4) of the Rome Statute does not require states to criminalise conduct exactly in the same way as Article 70. States may extend existing provisions to violations committed against the ICC on their territory, or by their nationals, or adopt new offences (Piragoff 2016, 1758). The project seeks to identify how domestic jurisdictions deal with this challenge.

2.5 General principles of criminal law

The Rome Statute does not directly require the states parties to adopt the general principles defined therein nor does the principle of complementarity mandate that domestic jurisdictions investigate and prosecute cases in exactly the same manner as the ICC. The consideration of domestic practice requires conscious recognition of the differences between various modes of international criminal justice.

According to a comparative study, the majority of states maintain the application of national laws on general principles of criminal responsibility in particular modes of liability. Only a minority create a specialised regime (Sato 2012, 772). Modes of liability include the following: (i) individual commission; (ii) joint commission (co-perpetration); (iii) participation; (iv) participation in group activities; and (v) inchoate and preparatory acts such as incitement and command/superior responsibility (Article 28). The project framework does not seek to engage with the intricacies of the distinction between principal and accessorial liability (Van Sliedregt 2012). The main question is to determine to what extent existing domestic investigations and prosecutions capture the most responsible perpetrators, and how far the network of liability stretches in practice.

According to existing studies, certain legal gaps in domestic jurisdictions exist in relation to preparatory acts and command responsibility (Amnesty International 2010). Preparatory acts, such as incitement, are often overlooked or insufficiently addressed in ordinary domestic principles. The concept of superior responsibility does not exist for ordinary crimes under domestic law. It is a distinct mode of liability that combines elements of omission and imputed liability. National legislation that lacks superior responsibility, or treats it as a mere form of omission, may be less effective in addressing leadership responsibility

The project framework uses the same typology as used in the context of crimes: (i) no mirror, in which the concepts and principles are lacking; (ii) soft mirror in which the concepts and principles are captured but under a different label; (iii) hard mirror, in which domestic law captures ICC concepts and principles; and (iv) where domestic law goes beyond ICC definitions.

Some guidance on international application may be found in *International Criminal Law Practitioner Library, Volume 1: Forms of Responsibility in International Criminal Law (2010)*; *International Criminal Law & Practice Training Material on 'Modes of Liability: Commission & Participation', and 'Superior Responsibility'* (United Nations Interregional Crime and Justice Research Institute), and the *Women's Initiatives for Gender Justice Expert Paper on Modes of Liability* (Women's Initiatives for Gender 2013).

Many of the grounds for excluding criminal responsibility under the ICC Statute are recognised in domestic jurisdiction. The Statute does not require that states parties establish the same defences. For instance, the ICTY examined national laws on duress in the *Erdemović* case (International Criminal Tribunal for the Former Yugoslavia 1997). It found substantial differences between civil law jurisdictions which recognise it as a defence, at least conditionally, and common law jurisdictions which tend to deny it in the case of serious crimes such as murder. In some cases, defences under domestic law such as self-defence may be more permissive under domestic law, which may cause concerns.

2.6 Bars to investigation and prosecution

The absence of bars to investigation and prosecution is an important factor regarding the effectiveness of criminal justice. Such bars include amnesties, immunities, statutes of limitations, and restrictions to the temporal scope of jurisdiction (non-retroactivity). In practice, there is certain tension between facts and law. In particular, amnesties and immunities continue to be invoked as policy options in state discourse, while they are regarded with a great deal of

suspicion in legal practice. Non-retroactivity may cause problems. Another bone of contention is the concept of superior order (Article 33). Domestic jurisdictions vary in the extent to which they accept superior order as a defence for international crimes. One of the purposes of Cluster 1 is to identify how far such limitations reach, and whom they exclude.

2.6.1 *Amnesty*

Amnesties are frequent in conflict or post-conflict situations and to what extent they are prohibited under international law is complex (Mallinder 2008). The United Nations has adopted the policy that 'United Nations officials, including peace negotiators and field office staff, must never encourage or condone amnesties that prevent prosecution of those responsible for serious crimes under international law' (OHCHR 2009, 27). Several international courts have found that amnesties are inadmissible when they are intended to prevent the investigation and punishment of international crimes. It is widely recognised that amnesties conflict with the duty to investigate and prosecute specific international crimes, such as grave breaches of Geneva Conventions, genocide, torture or enforced disappearances, but there is no international treaty that explicitly prohibits the granting of amnesty.

The Grand Chamber of the European Court of Human Rights found in *Margus v. Croatia* that there is '[a] growing tendency in international law to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights' (ECtHR 2014, §139), but some concede that they may be a 'necessary evil' (Freeman 2009). Conditional amnesties may enjoy some legitimacy if they are accompanied by specific measures, such as a reconciliation process or compensation to the victims. The assessment may thus depend on a number of factors, including the context, form and scope of amnesties, the persons covered, their conditions and the link to criminal accountability. Some useful guidance on the state-of-the-art and practices can be found in the *Belfast Guidelines on Amnesty and Accountability* (Nuffield Foundation 2013).

2.6.2 *Immunity*

The availability of immunity in relation to international crimes is also heavily debated. It is clear that immunity does not apply in the relationship between states and international courts which exclude immunity, but the law on immunity in the relations between states is more difficult to determine. Two types of immunity must be distinguished: personal immunity protects the acts of persons essential to a state's administration, whether in their personal or official capacity, for the duration of their term in office; while functional immunity protects official acts of state representatives carrying out their functions for the state and continues to protect them acts after the end of their term in office. Overall, there is a tendency among states to diminish the scope of immunity in relation to grave human rights violations and international crimes.

The most comprehensive study of relevant practice is the Fifth Report of ILC Special Rapporteur Concepcion Escobar Hernandez on *Immunity of State officials from foreign criminal jurisdiction* (International Law Commission 2016). The report states that:

'The majority trend is to accept the existence of certain limitations and exceptions to such immunity, either in view of the gravity of the crimes, because they violate peremptory norms or undermine values of the international community as a whole, or because the crimes in question cannot be regarded as acts performed in an official capacity since they go beyond or do not correspond to the ordinary functions of the State' (International Law Commission 2016, §§114 & 121).

It concludes that a strong and undeniable trend, if not a customary rule, has emerged that functional immunity (or immunity *ratione materiae*) does not cover serious international crimes, including genocide, crimes against humanity, war crimes, torture, and enforced disappearances, regardless of whether they are committed in an official capacity or not. The report also recognises that immunity shall not apply to 'corruption-related crimes [and] crimes that cause harm to persons, including death and serious injury, or to property' (International Law Commission 2016a, §248), but it concedes that such exclusions of immunity 'shall not apply to persons who enjoy immunity *ratione personae* during their term of office' (ibid).

2.6.3 *Statutes of limitation*

Most domestic systems know statutory limitations, or time limits for prosecution. If applicable, they may lead to impunity for serious crimes. The ICC Statute precludes statutory limitations, but gaps may exist in national systems. A survey of legal systems shows that national provisions on the non-applicability of statutory limitations for international crimes remain 'quite divergent' (Kok 2007, 9). Time bars may apply in relation to prosecution or the application of sentences. Both the UN and the Council of Europe have adopted conventions which render statutory limitations inapplicable to genocide, crimes against humanity and war crimes.

2.6.4 *Non-retroactivity*

Further bars to investigation and prosecution may arise from non-retroactivity of domestic legislation. Approaches towards the strictness of the principle of legality in domestic jurisdictions differ (Gallant 2009). This may influence the choice of jurisdiction. For instance, in 2010, the Court of Justice of the Economic Community of West African States (ECOWAS) found that the international crimes legislation adopted by Senegal in 2007 to prosecute Hissène Habré for, among other things, crimes against humanity committed in Chad twenty years earlier, violated the principle of legality, specifically the principle against non-retroactivity of criminal law (ECOWAS 2010). The Court held that such crimes could be prosecuted only by a hybrid tribunal (Spiga 2011).

Non-retroactivity became a problem in relation to ICC implementation. It may create discrepancies between domestic statutory law, including crimes provisions, and applicable international law. For instance, both Kenya and Uganda limited their legislation on international crimes due to constitutional concerns relating to the principle of legality. Kenya's International Criminal Court Act was given prospective, rather than retrospective application. This created impediments to prosecution over the 2007 post-electoral violence. Similarly, Uganda failed to give the International Criminal Court Act retroactive application in 2010 which may make it necessary to rely on customary law. Such direct application of international criminal law may be

problematic; what is considered as permissible in some jurisdictions may be viewed as undesirable judicial activism in others (Ferdinandusse 2006, 272).

2.7 Cooperation and other

Cooperation is key to ensuring effective investigation and prosecution of crimes. The project framework looks at two dimensions: cooperation with the ICC (vertical cooperation), and cooperation with other states (horizontal cooperation). Both aspects are of fundamental importance for international criminal justice as a system (Sluiter 2002).

Vertical cooperation involves effective compliance with Part 9 of the Statute. It encompasses the arrest and surrender of persons at the request of the Court, and other forms of assistance with the Court's investigations and prosecutions. From a compliance perspective, it is important that states do not only have laws and procedures in place to enable them to comply with all ICC requests, but that they are effectively applied in practice.

The forms of cooperation are diverse. Cooperation encompasses logistical support, access to information, judicial cooperation, operational support, assistance with security, and access to places, sites and evidence. One key factor is the ability to trace, seize or freeze proceeds and instruments of crime. Another element is the provision of audio or video links to permit testimony and examination of witnesses who are unable to travel to the court. Further guidance may be found in the *Reports of the Court on Cooperation* (International Criminal Court 2015a), delivered to the Assembly of State Parties.

Cooperation relies on trust, transparency, confidence, visibility and predictability. In practice, it is often frustrated by a lack of political will. ICC situations, such as Kenya or Sudan, have shown it is difficult to receive cooperation if proceedings relate to individuals who are in control of the apparatus of power in a State (McGonigle-Leyh 2014), but insufficient cooperation may also stem from a lack of infrastructure and resources. There are a number of ways in which this can be addressed. It is helpful to designate focal points within state agencies and departments. Training may be an important way to facilitate cooperation. The ICC Office of the Prosecutor (OTP) has created a Law Enforcement Network to support such activities (Gallmetzer 2010). Another example is the EU Genocide Network which seeks to promote interaction between domestic investigators and prosecutors.

State cooperation in the broader sense also includes signing voluntary agreements for witness relocation, enforcement of sentences, interim release, and acquittal of suspects. These agreements are essential, but very few have been signed. Another aspect is ratification of the Agreement on Privileges and Immunities of the Court. It ensures that ICC officials can conduct their work safely and independently. The detention of ICC personnel in Libya has shown that it is key to safeguarding the rights of the defence.

The Rome Statute does not impose an obligation on states to cooperate with each other (horizontal cooperation), but such cooperation is critically important in cases where the forum state is not the place where the crime occurred.

The existing legal framework is underdeveloped. Treaties like the United Nations Convention against Transnational Organised Crime (2000), the Convention against Corruption (2003), and the Convention on Enforced Disappearance (2006) provide for a comprehensive legal regime for international cooperation in criminal matters, but it is lacking in relation to core crimes. Existing provisions for core crimes are rudimentary. The Genocide Convention requires States parties 'to grant extradition in accordance with their laws and treaties in force', but lacks more detailed provisions on mutual legal assistance. The obligation to prosecute or extradite under the Geneva Conventions only exists in relation to grave breaches. Gaps exist in relation to (i) crimes against humanity, which are not covered, (ii) war crimes other than grave breaches, and (iii) war crimes in non-international armed conflict. They are best covered by bilateral extradition and assistance treaties.

There are two current initiatives to fill that gap. The first one is a proposal for a treaty on mutual legal assistance for genocide, crimes against humanity, and war crimes, which would address areas, such as extradition, mutual legal assistance, taking of evidence, protection of witnesses, and searches and seizures (Ferdinandusse 2014). The second one is a proposed Convention on the Prevention and Punishment of Crimes against Humanity, under consideration by the International Law Commission (International Law Commission 2016b), which includes inter-State cooperation by the parties for the investigation, prosecution, and punishment of the offence, including through mutual legal assistance and extradition, and recognition of evidence (Tladi 2014).

Chapter 3. Cluster 2 – Procedure applicable to ICC related crimes under national law

3.1 State-of-the-art

Cluster 2 deals with the procedure applicable to ICC related crimes under national law. The purpose is not to provide an abstract legal assessment of the national framework, but to test whether and how law and procedures are applied in practice, *de jure* and *de facto*. This inquiry has synergies with the focus on institutional capacity in Cluster 3 (Chandra Sriram: Mapping the context for national responses to international crimes).² The focus of Cluster 2 is on the legal and procedural framework for investigation and prosecution, and its actual application.

In relation to procedure, context may be even more important than in relation to substantive law. Procedural frameworks for the investigation and prosecution of international crimes differ considerably in light of the diversity of national traditions. Additional challenges arise in conflict or post-conflict transitions. Pre-existing laws may lack the necessary legal provisions and tools required to investigate and prosecute serious crimes, or fail to meet human rights and fairness standards. Challenges arise in relation to capacity and security conditions, and perfection may be the enemy of the good.

² Such factors include the ability of the national authorities to exercise their powers in the territory concerned; conditions of security for witnesses, investigators, prosecutors and judges; resources for effective investigations and prosecutions; and guarantees for independence and impartiality of national proceedings.

In recent decades, significant efforts have been made to provide guidance and good practices on criminal procedures relating to international crimes and model codes have been established (O'Connor and Rausch 2008). Significant lessons can be learnt from international practices (Sluiter et al. 2013) and the International Criminal Tribunal for the former Yugoslavia (ICTY) has developed a *Manual on Developed Practices* which provides a comprehensive survey of procedural practices developed over time (ICTY 2009).

The project framework considers procedures through the lens of three broader principles: genuineness, fairness and inclusiveness. The requirement for genuine investigations and prosecutions is enshrined in Article 17 and was one of the key compromises of the Rome Statute. It was meant to give the ICC a certain margin to assess the objective quality of a national proceeding, without setting a too demanding threshold; 'a standard no higher (but no lower) than that the proceedings be carried out genuinely' (International Criminal Court 2003, §22).

The ICC only intervenes in 'the absence of genuine national proceedings' (International Criminal Court 2013a, §23). Complementarity involves a two prong test, according to the *Katanga* Appeal judgment. The first step in the assessment of complementarity is an empirical question: whether there are or have been any relevant national investigations or prosecutions (International Criminal Court 2009, §78). The second step is the evaluation of the state's willingness or ability to carry out genuine proceedings. This includes consideration of:

'Whether (a) the proceedings were or are being undertaken for the purpose of shielding the person concerned from criminal responsibility for crimes within the ICC jurisdiction, (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.'

The ICC OTP has identified a number of factors to examine domestic proceedings. Some of the criteria listed in the *OTP Policy Paper on Preliminary Examinations* are of particular use in relation to genuineness, fairness and inclusiveness. The Policy Paper makes reference to:

'Manifestly insufficient steps in the investigation or prosecution; deviations from established practices and procedures; ignoring evidence or giving it insufficient weight; intimidation of victims, witnesses or judicial personnel; irreconcilability of findings with evidence tendered; manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused; mistaken judicial findings arising from mistaken identification, flawed forensic examination, failures of disclosure, fabricated evidence, manipulated or coerced statements, and/or undue admission or non-admission of evidence; lack of resources allocated to the proceedings at hand as compared with overall capacities; and refusal to provide information or to cooperate with the ICC' (International Criminal Court 2013a, §51).

The perception of procedures matters. As Paul Seils has astutely noted, the more procedures are seen by a society:

'As a genuine means to establish and communicate responsibility for serious crimes, the more they will successfully meet their objectives. The more they are seen as a manoeuvre to subvert the exposure of crimes and those responsible for them, the more pointless and counterproductive they will become' (Seils 2015, 14).

3.2 Procedure applicable to core crimes

The project framework focuses on the procedure applicable at the domestic level, and in particular the approach to core crimes. International crimes often involve criminal activity on a large scale and inquiries focus on the crime base and on the leadership structure. This makes procedures important (Damaška 2008). International criminal justice has developed a partially new set of procedures, which draw on elements from national systems, both adversarial and inquisitorial, and contain certain features that are unique to international crimes. International criminal procedure is thus to a large extent a hybrid (Safferling 2012). This has certain advantages because it allows practitioners to tie procedures to the nature of crimes, but it may also have disadvantages, since it can result in an artificial 'mishmash of the two systems' (Burke White and Bibas 2010, 695).

The existing landscape is characterised by diversity, and there is no single set of rules applicable to all international criminal proceedings. Each international court or tribunal has its own rules of procedure and evidence, and international procedures are often characterised by a strong focus on transparency, advocacy, and certain restorative elements. Domestic codes are not necessarily adjusted to the needs of mass atrocity cases, the gathering of evidence is often difficult in a transnational setting, and translation and equality of arms may pose special challenges. Experiences such as the first trials under the German Code of International Crimes have shown that even well established legal systems may face challenges in holding domestic trials under universal jurisdiction (European Centre for Constitutional and Human Rights 2016). Protection of witnesses and the assessment of the credibility of witnesses are two areas where domestic criminal justice systems may benefit from the experience of international criminal courts and tribunals (Sluiter 2009, 484).

3.2.1 Principle of legality

One key aspect of the reach of procedures is the principle of legality. The degree of discretion of prosecutors differs from country to country and from legal system to legal system (Nsereko 2005). In some civil law jurisdictions, the prosecutor is duty bound to prosecute as long as there is sufficient evidence to justify the prosecution. In many common law jurisdictions, the Prosecutor has a greater degree of discretion on whether to prosecute or not to prosecute. It is important to determine whether and under what conditions there is a duty to act in relation to international crimes, and how it is applied.

3.2.2 Procedural tradition and adaptations

A second important element is the procedural embedding. Domestic cultures vary (Orie 2002; Delmas Marty and Spencer 2002), but there are certain archetypes. In adversarial systems, the legal process is conceived as a contest. In inquisitorial systems, it is an inquest. Each system sees

different roles for judges, prosecutors and defendants. In the adversarial system, the parties dominate the proceedings throughout, and the main aim of proceedings is to settle a conflict between two parties. The judge is an umpire or adjudicator who listens to the arguments and evidence of the parties. In inquisitorial systems, the collection of evidence is not entirely in the hands of the parties. Judges are more actively seeking the truth in cooperation with the parties. The judge controls the trial, may order evidence to be produced, may interrogate the accused and witnesses, or may become involved in the gathering of evidence (Langer 2005). The pursuit of the traditional goals of criminal justice does not 'provide compelling reasons to prefer either a contest model or an inquest model of the legal proceedings' (Swart 2008, 88) and many modern systems contain variations of the two archetypes or multiple hybrid features.

One key question in a domestic setting is whether national jurisdictions make any procedural adjustments to deal with international crimes. Such changes may occur on several levels. Sometimes specialised jurisdictions are entrusted with investigations and prosecutions, such as military jurisdiction. They may apply more lenient approaches, or foresee special proceedings. Judges or prosecutors may be selected in deviation from normal processes. Some states establish special units for international crimes, which may allow domestic authorities to structure their resources and cooperate with other national and international authorities. One potential risk is their dislocation from local structures, or their exceptional nature (see Section 2.1).

3.2.3 *Selectivity and prosecutorial choices*

A third factor of assessment is the approach towards selectivity. In the context of mass atrocity crimes, not all individuals who have allegedly committed crimes will face prosecution. A key question is how this selectivity is approached, and how choices are made about whom to investigate and prosecute. An important factor is the approach towards the principle of objectivity (Article 54 ICC Statute) in investigations and prosecutions, including the question of whether all sides to a conflict are covered. Proceedings may be suspect if there is a deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible, or if certain categories of perpetrators are excluded.

3.2.4 *Protection of special interests*

Finally, some interests may deserve special attention in procedures. A prime example is sexual and gender-based violence (Brammertz and Jarvis 2016). The investigation and prosecution of sexual and gender based crimes poses special challenges in relation to the accessibility of testimony, approaches to witnesses, witness trauma, and psychosocial support and it is important to clarify how gender sensitive aspects are addressed. Some guidance may be derived from instruments such as the *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (Foreign and Commonwealth Office 2014), *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions* (International Criminal Tribunal for Rwanda 2014), the *OTP Policy Paper on Sexual and Gender-Based Crimes* (International Criminal Court 2014c) and the *Guidelines for Investigating conflict-related sexual and gender-based violence against men and boys* (Institute for International Criminal Investigations 2016).

3.3 Procedural guarantees

The degree of fairness that domestic proceedings should observe needs to be determined in light of a broad range of factors. Respect for principles of due process may be assessed in light of the provision of Article 67 of the Statute, as well as of the principles of due process recognised by international law as elaborated in relevant international instruments and customary international law.

The ICC jurisprudence on complementarity is of limited guidance (Heller 2006). The ICC Appeals Chamber adopted a narrow reading of the protection of due process considerations in its complementarity assessment under Article 17(2)(c). It leaves considerable leeway for the toleration of 'flawed' domestic trials (Mégret and Samson 2013). In the *Al-Senussi* Appeal, the Appeals Chamber held that:

'The concept of proceedings 'being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice' should generally be understood as referring to proceedings which will lead to a suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility, in the equivalent of sham proceedings that are concerned with that person's protection' (International Criminal Court 2014a, §218).

This reading confined non-deference to domestic jurisdiction to a limited set of circumstances, namely situations:

'Where violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be 'inconsistent' with an intent to bring the person to justice' (International Criminal Court 2014a, §230).

It essentially captures proceedings, which 'are, in reality, little more than a predetermined prelude to an execution' (International Criminal Court 2014a, §230).

The jurisprudence of *ad hoc* tribunals under Rule 11*bis* is more helpful (Bekou 2010). The tribunals had to consider whether 'the accused will receive a fair trial' when referring cases to domestic jurisdictions under Rule 11*bis*. In *Lukić and Lukić*, the Referral Bench provided a list of requirements of a fair trial (International Criminal Tribunal for the Former Yugoslavia 2007, §71). It included a range of factors:

- a. The equality of all persons before the court;
- b. A fair and public hearing by a competent, independent, and impartial tribunal established by law;
- c. The presumption of innocence until guilt is proven according to the law;

- d.** The right of an accused to be informed promptly and in detail in a language he understands of the nature and cause of the charges against him;
- e.** The right of an accused to be tried without delay;
- f.** The right of an accused to have adequate time and facilities for the preparation of his defence and to communicate with a counsel of his choosing;
- g.** The right of an accused to be tried in his presence and to defend himself in person or through legal assistance of his own choosing;
- h.** The right of an accused to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- j.** The right of an accused to have the free assistance of an interpreter if he cannot understand or speak the language used in the proceedings; and
- k.** The right of an accused not to be compelled to testify against himself or to confess guilt.

Protection extends to the investigation. Guidance may be derived from Article 55 of the ICC Statute, which contains a mini-charter of human rights protection for the early stages of proceedings. Further relevant sources are listed above, under Section 1.3.2.

Finally, sentencing and fair trial considerations are connected. For instance, the Inter-American Commission on Human Rights has repeatedly found a human rights violation in cases where the death penalty was imposed after a trial with due process violations (Inter-American Commission 2012).

3.4 Sentencing

Punishment and sentencing is an area in which worldviews differ (D'Ascoli 2011) and in any case determining the appropriate sentence is as much of an art as it is a science. Sentencing and criminal justice are in constant tension. International law offers only vague guidance on the kinds of sentences that may be acceptable for serious international crimes. International human rights treaties and international human rights jurisprudence do not set penalties for serious human rights violations, while international treaties and other instruments including the Rome Statute provide indications, but they do not directly bind states in respect to sentencing.

Article 80 of the ICC Statute provides expressly that '[n]othing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Article.' This clause was inserted to accommodate conflicting views among states about the range of appropriate penalties, including the death penalty (Schabas 2010, 918-926). It allows states to pass sentences that they deem appropriate under their own legislations.

Domestic criminal codes typically define an appropriate penalty for an offence, including a minimum and a maximum term. International criminal justice lacks such a classification. Instead, judges are given broad discretion to determine the length of the sentence, and the weight given to individual factors. It is thus difficult to provide abstract benchmarks. There is a vivid debate on the sentencing length in international criminal law. Some argue that sentences by international criminal courts and tribunals are on average too short (Harmon and Gaynor 2007), while others claim that long-term sentences may violate human rights standards (Scalia 2011).

One key principle is that of proportionality (Hala 2012), which requires that the punishment must be proportionate to the gravity of the crime and the culpability of the offender. The function of proportionality is to avoid excessive sanctions and it requires that culpable defendants should receive higher sentences than less culpable defendants. The more serious the crime, the more serious the punishment. It also mandates a certain degree of coherence. The penalty should be comparable to penalties in similar cases. Administrative, disciplinary, or quasi-judicial measures might not meet the standards.

The project framework therefore includes a number of considerations:

- What are the bases for the sentences?
- Are the sentences considered appropriate and based on the law?
- Are the sentences pronounced publicly?
- To what extent is the accused present when the sentence is pronounced?

Problems may arise in relation to mitigated sentences, such as those offered in the context of Colombia where a 5 to 8 year sentence was offered for core crimes. This was analysed in a preliminary examination by the ICC Prosecutor (International Criminal Court 2012). Such sentences may not be 'genuinely or even relatively proportional' (Seils 2015, 6). The crucial question is whether they could nonetheless be accepted, in light of broader rationales of punishment, such as the degree of social condemnation associated with a trial, and restorative justice approaches, such as reparations funds, community service, or periods of political exclusion.

A further issue is the approach to revision of sentence and early release. Domestic pardons and commutations may mitigate the impact of the initial sentence, but they are often justified by purposes of rehabilitation and for fiscal reasons. Many states allow prisoners to apply for parole after serving a certain proportion of their sentence (Sieber 2004, 83) and international criminal courts and tribunals have been criticised for applying a lenient 'presumption of release' after two thirds of the sentence, without a developed theory of sentence reduction (Choi 2014).

3.5 Victims

Inclusiveness is an additional factor, which complements fairness. Modern justice institutions would be inconceivable without due regard to the rights of victims, and restorative approaches have become an increasingly important feature aspect of criminal procedures over recent decades, in light of the recognition of rights such as access to justice and the right to an effective remedy (McGonigle-Leyh 2011; Moffett 2014; Redress 2015). Longer term rationales such as civic dialogue may be more difficult without some form of co-operation between victims, perpetrators and the affected community, but the ways in which victims can participate in proceedings differ and there is no general consensus (Rauschenbach and Scalia 2008; Pena and Gaelle 2013), with experiences in ICC situation countries being mixed (Human Rights Centre 2015; Moffett 2015).

Many civil law jurisdictions allow victims to join criminal proceedings as a civil complainant (*partie civile*). A small number of jurisdictions (e.g. Spain) recognise the right of victims to participate in criminal proceedings as a prosecutor, allowing victims to participate with full prosecutorial rights. Other jurisdictions allow victims to serve as a 'subsidiary prosecutor' and submit evidence, suggest questions to be put to witnesses and the defendant, and comment on statements and evidence submitted in the proceedings. In many common law systems, victims can deliver impact statements at sentencing.

The project framework suggests the consideration of a number of factors:

- Does the criminal procedure/court regulation provide for victim participation concerning international crimes?
- How is the 'victim' defined in criminal procedure law?
- What is the status of the victim in criminal procedure: In what circumstances is participation allowed /mandatory?
- What are the stages in the proceedings where victims may intervene?
- What is the scope of participatory rights: Are victims party/participants? Can they submit evidence?

Guidance may be derived from a number of sources, including the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines)* (United Nations 2005), the *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (United Nations Office on Drugs and Crime 1999), and the excellent survey of domestic practice relating to *Victim Participation in Criminal Law Proceedings* (Redress 2015).

3.6 Reparations

Reparations are an additional key element of the process of justice (Ferstman, Goerz and Stephen 2009; Zegveld 2010; McCarthy 2012). They serve at least three important functions: they acknowledge the direct responsibility of the offender, they recognise victims as holders of rights and their individual harm suffered, and they provide a remedy for harm. This idea is enshrined in specific UN documents, such as the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims* which makes it clear that natural or legal persons are liable to provide reparation for harm caused to victims of ‘gross violations’ of international human rights law and ‘serious violations’ of international humanitarian law.

In the *Lubanga* case, the ICC set a new standard. The Appeals Chamber specified that the liability for reparations needs to be established separately in each ICC case following conviction (International Criminal Court 2015). This set in motion a new strand of practice relating to reparations (Stahn 2015), but this does not mean that domestic proceedings need to replicate this model. Reparations can be provided through civil or administrative procedures, and the project framework therefore contains a broader set of inquiries:

- Is there a procedure for the reparation of the victims of international crimes?
- Is it part of the main criminal proceeding or does it require a separate (e.g. administrative or civil) procedure?
- What is the role of the conviction of the accused in reparation proceedings?
- Do victims have the possibility to initiate proceedings and/or ask for judicial review?

The UN Basic Principles promote adequate, effective and prompt reparation, but it is virtually impossible to provide full reparation and restitution *in integrum*. There is a need to consider collective forms of reparation, that is reparations that benefit a larger collective of victims. Guidance on the modalities can be found in the *Handbook on Reparations* which provides a comprehensive study of reparation programmes (De Greiff 2008), the Guidance Note of the Secretary General on *Reparations for Conflict-Related Sexual Violence* (United Nations 2014) and the reports of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (OHCHR 2014).

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