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COMPLEMENTARITY: A TALE OF TWO NOTIONS

Charles Dickens' famous novel 'A tale of two cities' opens with the words: 'It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness'. The same might be said with respect to the understanding of complementarity under the Rome Statute.

The notion of complementarity has attracted quite some attention in legal scholarship in the past years.[1] However, relatively few

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[1] See e.g. John T. Holmes, *Complementarity: National Courts versus the ICC*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, Vol. I, 667–685 (Antonio Cassese et al., eds. 2002); Jann Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. J. (2003), 86; Jann K. Kleffner & Gerben Kor, Complementary views on Complementarity (2006); Mohamed El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, MICH. J. INT'L L., 869 (2002); *id.*, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW, Ph.D. Thesis, National University of Ireland (2007); William Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557 (2005); Federica Gioia, '*State Sovereignty, Jurisdiction and* '*Modern' International Law: The Principle of Complementarity in the International Criminal Court*, 19 LEIDEN J. INT'L L. 1095 (2006); Kevin J. Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L. FORUM 255 (2006); Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 591 (2003); Héctor Olásolo, *The Triggering Procedure of the*

scholars have analyzed the broader conceptual schemes in which complementarity has been theorized in the first practice of the Court.[2] One of the shortcomings of the current debate is that complementarity has been primarily viewed as an instrument to overcome sovereignty fears against the exercise of jurisdiction by the Court and as a tool to remedy shortcomings or failures of domestic jurisdiction through application of the criteria listed in article 17. This classical vision of complementarity, however, does not suffice to explain the relationship between the Court and domestic jurisdictions. The first practice of the Court has shown that complementarity is not only an instrument to monitor state action, but also a forum for managerial interaction between the Court and States.

This 'positive' approach towards complementarity introduces an element of flexibility and a managerial division of labour into the relationship between the Court and domestic jurisdictions. The Court might, in certain circumstances encourage genuine national proceedings rather than placing the onus on ICC proceedings.[3] In other circumstances, complementarity may work in the opposite way. It may mean that the choice of the proper forum of justice is actually informed by the comparative advantages of the Court over domestic jurisdictions.[4]

Footnote 1 continued
International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of the Prosecutor, 5 INT'L CRIM. L. REV. 121 (2005); Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. INT'L CRIM. JUSTICE 695 (2005).

[2] See however, Office the Prosecutor, *Informal Expert paper: The principle of complementarity in practice* (2003), at http://www.icc-cpi.int/otp/complementarity.html; William Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice*, University of Pennsylvania Law School, Public Law and Legal Theory Research Paper No. 07-08, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=964201#PaperDownload; *id. Implementing a Policy of Positive Complementarity in the Rome System of Justice*, 18 CRIM. L. FORUM (2007); El Zeidy, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW, *supra* note 1, at 336–345.

[3] See Office the Prosecutor, *Informal Expert paper: The principle of complementarity in practice*, 14 September 2006, para. 3, at http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf

[4] Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003–June 2006)*, 12 September 2006, p. 7, at http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf

It has been convincingly argued in legal doctrine that a 'positive' approach to complementarity has a basis in the Statute.[5] This understanding is reflected in a number of statutory provisions, including the preamble of the Statute, the powers and duties of the Prosecutor and the cooperation regime of the Court. However, many of the nuances and limits of a 'positive' reading of complementarity are still unclear. The very notion of 'positive' complementarity is in flux and used differently in different contexts. Some of its elements are open to criticism.[6]

This article seeks to put the concept of 'positive' complementarity into a broader perspective. It argues that the drafters of the Statute opted for a systemic vision of complementarity which encompasses two dimensions: a classical 'threat-based' side of complementarity which is designed to foster compliance through a sophisticated system of carrots and sticks ('classical' complementarity), and a more gentle side, which defines the relationship between the Court and domestic jurisdictions in a positive fashion (e.g. burden-sharing on the basis of the comparative advantages and assistance from the Court to states).

This latter dimension is less clearly articulated in the Statute and also more controversial in substance. It encompasses a spectrum of normative propositions which enjoy different levels of support and acceptance. For instance, it is broadly accepted that the Court may provide benefits and assistance to domestic jurisdictions. Other aspects of 'positive complementarity', by contrast, such as a consent-based division of labour or a deferral of responsibility from the Court to domestic jurisdictions are less well accepted. Such policies are, to some extent, backed by prosecutorial discretion and decision-making power. But they may raise concerns regarding the impartiality and independence of the Court as well as the prerogative of expeditious justice.

I. THE FRAMEWORK OF COMPLEMENTARITY

The articulation of the principle of complementarity itself marks one of the greatest achievements of the Rome Statute. One of the merits

[5] See Burke-White, *Implementing a Policy of Positive Complementarity, supra* note 2; El Zeidy, The Principle of Complementarity in International Criminal Law, *supra* note 1, at 336–345.

[6] For a general assessment of the Court's first practice, see William Schabas, *First Prosecutions at the International Criminal Court*, 27 Human Rights L. J. 25 (2006); Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 Am. J. Int'l L. 385 (2005).

of the drafters is that they conceived complementarity as a multi-faceted concept. The concept has, at least, two broader dimensions under the Rome Statute: an institutional dimension and a systemic dimension.

1.1. *The Institutional Dimension*

The concept of complementarity was partly codified to settle disputes about overlapping competencies and competing claims of (concurrent) jurisdiction. This objective is rooted in the general dispute settlement tradition of international law[7] and may be traced back to the 1994 Draft Statute of the ICC.[8] The ILC viewed complementarity primarily as a concept to regulate potential conflicts as between the (primary) jurisdiction of national courts and the residual jurisdiction of the ICC.[9] This vision was reflected in the preamble of ILC Draft Statute. The ILC conceived the Court as an institution that would be 'complementary to national justice systems in cases where such trial procedures may not be available or may be ineffective'.[10] The assumption of concurrent jurisdiction of States and the Court made it necessary to regulate the settlement of disputes over the exercise of jurisdiction. The ILC Draft provided only limited guidance in this respect. Article 35 of the Draft Statute contained a mix of admissibility criteria which were visibly modelled after the jurisdictional limitations of highest Courts in domestic jurisdictions (e.g. Constitutional Courts). It stipulated that the ICC could ('may') rule a case inadmissible in three cases: where 'the crime in question … [h]as been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to prosecution is apparently well-founded'; where 'there is no reason for the Court to take further action for the time being with respect to the crime'; and where the crime in question is 'not of such gravity to justify further action by the Court'.[11]

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[7] See generally Francisco Orrego Vicuña, International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization (2004).

[8] See International Law Commission, *Draft Statute for an International Criminal Court* (1994), at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf

[9] See also Holmes, *supra* note 1, at 670–671.

[10] See para. 3 of the preamble of the 1994 Draft Statute.

[11] *Ibid.*, Article 35.

The Rome Statute refined this framework. It contains not only a more clear-cut articulation of the complementarity criteria (unwillingness and inability), but institutes a forum to litigate and adjudicate disputes over jurisdiction and admissibility. The Statute makes it clear that the Court must defer to the primacy of domestic jurisdiction in cases where a 'case is inadmissible' under Article 17 ('shall').[12] Moreover, it sets out procedures that allow states and parties to proceedings (e.g. the defence or the Prosecutor) to challenge or seek rulings on jurisdiction and admissibility at various stages of the proceedings (Articles 18, 19 and 82 (1) (a)). The Court is vested with role of a final arbiter over these disputes. It is mandated to determine questions of jurisdiction and admissibility on the basis of express challenges or even *proprio motu* (Article 19 (1)). Complementarity is thus no longer a discretionary admissibility principle, but an institutional framework to determine the allocation of competencies and to settle disputes over the exercise of jurisdiction by the Court, States parties and third states.

1.2. *The Systemic Dimension*

Dispute settlement, however, is not the only side of complementarity. The concept has a broader systemic meaning. It organizes of the relationship between and the interaction of domestic and international justice.[13] Complementarity institutes a legal system under which the Court and domestic jurisdictions are meant to complement and reinforce each other in their mutual efforts to institutionalize accountability for mass crimes.

This objective is reflected in several paragraphs of the preamble of the Rome Statute. One indication is the characterization of the nature of the crimes. Both, the preamble and the Statute emphasize that the crimes under the jurisdiction of the Court are of 'concern to the international community as a whole'.[14] This qualification suggests that domestic jurisdictions and the ICC bear a shared responsibility in combating the crimes within the jurisdiction of the Court. This idea is reaffirmed by paragraphs 4 and 5 of the preamble. These passages

[12] See Article 17 (1) of the Rome Statute ('The Court shall'). See also Article 18 (2) (the 'Prosecutor shall').

[13] See generally Mireille Delmas-Marty, *The ICC and the Interaction of International and National Legal Systems*, in The Rome Statute of the International Criminal Court: A Commentary, Vol. II, 1915 (Antonio Cassese et al., eds. 2002).

[14] See para. 4 of the preamble and Article 1 of the Rome Statute.

indicate that States Parties commit themselves expressly to 'put an end to impunity' and to 'contribute to the prevention of such crimes'.[15] Paragraph 4 of the preamble recognizes that the realization of this objective requires both 'measures at the national level' and 'international cooperation'.[16] Finally, the last two paragraphs of the preamble associate the very idea of complementarity expressly with the combat of impunity gaps. The complementary nature of the Court is linked here to the goal of guaranteeing 'lasting respect for and the enforcement of international justice'.[17]

These references indicate that complementarity has a dynamic component. It is not only meant to protect or maintain domestic jurisdiction, but designed to enhance the prospects and conditions for the effective investigation and prosecution of crimes.

This vision is reflected in other provisions of the Statute. The Statute does not contain an express obligation to Statute to implement the substantives crimes of the Statute into domestic law. However, complementarity serves as a catalyst for compliance by virtue of the construction of articles 17 and 19 of the Rome Statute.[18] The complementarity test under Article 17 provides an incentive for States to enact implementing legislation which allows effective investigations and prosecutions at the domestic level. The very existence of complementarity has thus an impact on the repression of crimes under domestic criminal jurisdiction.

The dynamic features of complementarity are further evidenced by the conception of the powers of the Prosecutor under articles 53 and 54 of the Statute. Complementarity works in two ways in this context: It limits the scope of prosecutorial discretion[19]; and it serves as a framework to facilitate certain managerial choices.

The first idea is enshrined in Article 53(1)(a)–(c) and Rule 48. These provisions oblige the Prosecutor to take into account admissibility considerations under article 17 when selecting situations and cases within situations. Complementarity serves at the same time as

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[15] See para. 5 of the preamble.

[16] See para. 4 of the preamble.

[17] See paras. 10 and 11 of the preamble.

[18] See Jann Kleffner, *Complementarity as a Catalyst for Compliance*, in Kleffner & Kor, *supra* note 1, at 81.

[19] See generally Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. Int'l Crim. Justice 162 (2005); Matthew R. Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. Int'l Crim. Justice 71 (2004).

an instrument to guide prosecutorial discretion. The Statute leaves the choice and timing of investigations and prosecutions largely in the hands of the Prosecutor. Factors such as unwillingness or inability may influence the basis of action (e.g. referral or exercise of *proprio motu* powers) or the timing of the initiation of investigations or prosecutions. Moreover, criteria such as the 'gravity of the case' (article 17(1)(d)) or the 'gravity of the crime' (article 53) provide guidance for the exercise of prosecutorial discretion in the selection of cases.[20] Article 17 has a managerial dimension in such instances. It steers choices and decision-making concerning the 'effective investigation and prosecution of crimes' under article 54(1)(b) of the Statute.

Finally, the cooperation regime under Part 9 of the Statute confirms the assumption that the ICC and domestic jurisdictions form mutually supportive forums of justice. Traditionally, cooperation regimes with international tribunals have been construed in a one-sided fashion, namely as entailing assistance and support from states to an international tribunal.[21] The Statute corrects with this tradition. It foresees the option of 'reverse' cooperation, namely the provision of assistance and support from the Court to domestic jurisdictions for the purpose of investigation and prosecutions under article 93 (10).[22] This option reinforces the view that the Court and domestic jurisdictions are meant to act as partners, rather than competitors in the enforcement of justice.

II. COMPLEMENTARITY MODELS

Until the present, this dual foundation of complementarity ('institutional' and 'systemic') has received relatively little attention. Since the Rome process, the discussion about complementarity has been dominated by a dispute-settlement based, rather than a systemic vision of the relationship between the Court and domestic jurisdictions. Complementarity has mostly been presented in a one-sided fashion, namely as a competition- and threat-based concept which is

[20] For an assessment of gravity under the Rome Statute, see Ray Murphy, *Gravity Issues and the International Criminal Court*, 17 Crim. L. Forum 281 (2006).

[21] The Statutes of the *ad hoc* tribunals are silent on the question of assistance to States. See Göran Sluiter, International Criminal Adjudication and the Collection of Evidence: Obligation of States 85–86 (2002).

[22] See also Office the Prosecutor, *Informal Expert paper: The principle of complementarity in practice*, para. 10.

necessary to protect states against undue interference by the Court in their sovereignty and internal affairs.[23] The systemic function of complementarity was partly sidelined in this discourse.

The first practice of the Court makes it necessary to revisit this assumption. It shows that complementarity has two sides: a classical 'vertical' dimension which is indeed based on the role of the Court as a Court of last resort and the idea of compliance through threat, and a 'friendly' side, which is guided by the objective to foster for effective investigations and prosecutions through mutual interaction with domestic jurisdictions.

The first side has been advocated in the outreach activity of the Court. Complementarity was used in this context as a response to temper fears about the ICC.[24] Strategically, the emphasis was placed on the primacy of domestic jurisdiction. The role and powers of the Court were only mentioned in the second place, in order to attract widest possible ratification.

The 'positive' dimension of complementarity materialized mainly in the context of the first investigation and prosecutions. The Prosecutor sought to win support for the first ICC investigations and prosecutions through 'partnership'.[25] The Prosecutor adopted a formal 'policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court'.[26] Moreover, decisions about the proper forum of justice and the selection of cases were shaped by normative criteria, such as the comparative advantage of the respective forum, rather than domestic failure. In 2006, this approach was officially formulated as a policy

[23] See e.g. Holmes, *supra* note 1, at 671–678; Gioia, *supra* note 1, at 1095–1105.

[24] President Kirsch noted in a keynote address in 1999: 'If a national system functions properly, there is no reason for the ICC to assume'. See Cornell International Law Journal Symposium, 32 CORNELL INT'L L. J. 438 (1999). A similar image was used by the Prosecutor in his statement at the 7th diplomatic briefing in Salzburg (2006): '[I]ntervention by the ICC must be *exceptional* – it will only step in when states fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings […]'. See Prosecutor's Statement at the 7th Diplomatic Briefing, Salzburg (2006), at http://www.icc-cpi.int/library/about/DB7-St_English.pdf. See also Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003-June 2006)*, para. 58.

[25] See Office the Prosecutor, *Informal Expert paper: The principle of complementarity in practice*, para. 3.

[26] See Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003–June 2006)*, para. 2.

principle in the report of the Office of the Prosecutor (OTP) on Prosecutorial Strategy. The report stated that the OTP has adopted 'a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible, relies on national and international networks and participates in a system of international cooperation'.[27] This statement received general support, but also some criticism.[28]

This essay analyses both dimensions of complementarity, as well as their criticisms. The classical concept of complementarity is addressed first. This assessment is followed by an analysis of the foundations and elements of 'positive' complementarity.

2.1. *Classical Complementarity*

In order to understand the contemporary features of complementarity, it is necessary to revisit the genesis of the Rome Statute. The classical image of complementarity is rooted in conceptual thinking of the 1990s.

2.1.1. *Background*

At that time, domestic and international jurisdictions were regarded as opposing concepts.[29] The *ad hoc* tribunals placed great emphasis on the idea of the primacy of international jurisdiction in their jurisprudence. This thinking is particularly well captured in the ICTY's famous Appeals Chamber decision on jurisdiction in the *Tadic* case, in which the Chamber found that '[i]ndeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts'.[30] International jurisdiction and domestic jurisdiction were thus presented as competing forums of justice.

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[27] See Office of the Prosecutor, *Report on Prosecutorial Strategy*, para. 2. See also Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003–June 2006)*, para. 58.

[28] See the various statements of NGO representatives (Human Rights Watch, International Federation for Human Rights, No Peace Without Justice) at the Second Public Hearing of the Office of the Prosecutor, at http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph2.html

[29] See generally Gioia, *supra* note 1, at 1100.

[30] See ICTY, Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-I-AR72, 2 October 1995, para. 97.

This conception prevailed in the context of the negotiation of the Rome Statute, this time, however, in reversed form. In the aftermath of the 1994 ILC Draft, States insisted on the primacy of domestic jurisdiction, in order to preserve their autonomous and sovereign powers of jurisdiction. Complementarity became the major legal device to overcome these concerns. It addressed two types of concerns.

Complementarity provided, first of all, a solution to the 'primacy dilemma'. It offered a convenient way to reconcile the priority of domestic jurisdiction with the necessity of international justice. States were ready to consent to the idea of a permanent international jurisdiction on the basis of the assumption that this institution would act as a 'Court of last resort', which intervenes on an exceptional basis.

Secondly, complementarity tempered fears about the independence of the Court, and in particular, the *proprio motu* powers of the Prosecutor, which were opposed by some states and remained controversial until the end of the Rome Conference.[31] The Court was thus essentially regarded and presented as a fallback option that may act as a substitute of a domestic sovereign in case of the unwillingness or inability of domestic jurisdiction.[32]

2.1.2. *Normative Assumptions*

These considerations have shaped the conception of the relationship between the Court and domestic jurisdictions under the Statute. Complementarity was partially construed as a threat-based concept. This classical image of complementarity is centred on three key ideas.

Assumption # 1 Complementarity preserves domestic jurisdiction

Classical complementarity is focused on the assumption that states maintain primary jurisdiction over the crimes covered by the Statute, which is *inter alia* enshrined in the 6th preambular paragraph of the Statute ('it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'). This focus on the responsibility of states has repercussions for the relationship between the Court and states. Under this conception, complementarity is primarily meant to preserve and protect domestic jurisdiction

[31] See generally Philippe Kirsch & Darryl Robinson, *Initiation of Proceedings by the Prosecutor*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, Vol. I, 660 (Antonio Cassese et al., eds. 2002).

[32] See the statements above, *supra* note 24.

against the threat of ICC proceedings, i.e. through challenges of jurisdiction and admissibility. Moreover, it serves as a tool to ensure that states comply with their own duty to investigate and prosecute in accordance with the statutory instruments of the Court and customary international law.

Assumption # 2 The role of the Court is tied to the failure of domestic jurisdiction

Secondly, classical complementarity assumes that the Court has a residual role under Article 17, which is triggered by domestic failure. Domestic jurisdictions remain the first port of entry for investigations and prosecutions. The Court is only entitled to step in where a domestic system does not function properly. Article 17 defines the relevant benchmarks. It rules out a race in time (e.g. a 'first come, first serve' principle). Moreover, it specifies certain substantive parameters that must be observed in domestic investigations and prosecutions. Article 17 clarifies, in particular, that 'sham' proceedings are not sufficient to bar Court action.[33] Domestic proceedings must be conducted in line with the 'principles of due process recognized by international law', as articulated by Article 17 (2) of Article 17 (2). The Court acts as a 'watchdog' over these guarantees. It serves thus an entity to remedy shortcomings or failures of domestic jurisdictions.

Assumption # 3 Complementarity enhances compliance through threat

Finally, classical complementarity incorporates the idea of threat-based incentives for compliance. These incentives flow from the vertical relationship between the Court and domestic jurisdictions. The Statute vests the Court with the power to monitor and assess choices of justice adopted at the domestic context under the umbrella of complementarity, irrespective of a referral by a state or other entity. This *droit de regard* and communication follows, *inter alia*, from the power of the Court to assess its jurisdiction and admissibility (Articles 17 and 19) and the *proprio motu* powers of the Prosecutor (e.g. under Article 15). These powers are reinforced by the Court's authority to decide in last resort whether a case is admissible.[34] The combination of three powers (i.e. monitoring by the Court, the right to request information,

[33] See Article 17 (2).

[34] See Article 17 (1) and Article 82 (1) (a) which provides for a direct appeal to the Appeals Chamber.

and the possibility to exercise of criminal jurisdiction) produces a deterrent effect and incentives for compliance. States are induced to comply with their obligations under the Statute and to carry out genuine domestic investigations and prosecutions through threat and potential embarrassment resulting from public ICC scrutiny.

2.1.3. *Operation*

This 'carrots and sticks' approach is a key feature of the architecture of the Statute and the Rules. It is reflected in a broad number of provisions, ranging from the admissibility rules and the powers of the Prosecutor to the cooperation regime under Part 9 of the Statute.

It is, first, of all, important to note that the admissibility system as such encourages enhanced substantive and procedural standards for accountability standard at the domestic level. This follows from the interplay of Article 17 (1) and Article 17 (3). Article 17 (3) makes it clear that a State may be deemed to be 'unable' to carry proceedings within the meaning of Article 17, both in case of a 'total' or a 'substantial' collapse or in case of the 'unavailability of its national judicial system'. The first two terms capture essentially a 'failed state' scenario that may arise as a result of circumstances that are difficult to predict or even beyond the control the control of state (e.g. foreign intervention, natural disasters, loss of control over territory).[35] The second component ('unavailability'), however, provides a broader incentive to judicial reform and capacity building in functioning states. States will feel inclined to enact implementing legislation (e.g. in respect of crimes, substantive criminal law and sentencing) in order to make their own judicial system 'available' for and capable of investigating and prosecuting the crimes outlawed by the Rome Statute.

This idea is even developed further in the area of cooperation under Part 9 of the Statute. Article 88 contains a positive duty of States Parties to 'ensure that there are procedures available under their national law for all the form of cooperation which are specified under [Part 9]'. This obliges States Parties to create procedures and institutions necessary to execute requests for cooperation and assistance. Article 57 (3) (d) foresees a remedy in case where a domestic jurisdiction does not meet this requirement. It allows the Prosecutor 'to take specific investigations' on the respective territory 'without having secured the cooperation of State under Part 9', if the Pre-Trial Chamber determines that the territorial state 'is clearly unable to

[35] See Sharon A. Williams, *On Article 17*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 394 (Otto Triffteer ed., 1999).

execute a request of cooperation due to the unavailability of any authority or any component of its judicial system'.

The checks and balances driven approach towards accountability is further reflected in the powers of the Prosecutor. The conduct of the investigation and prosecution by the Prosecutor is subject to various forms of control and interaction between the Prosecutor and domestic jurisdictions. The Prosecutor is required to examine issues of admissibility before deciding to initiate an investigation.[36] Following this decision, States may interfere at various stages of ICC investigations and prosecutions, invoke bars to jurisdiction and admissibility or request the Prosecutor to defer investigations.

However, in such cases, domestic jurisdictions remain under the scrutiny of the Court: The Prosecutor may continue to exercise scrutiny over a given situation or case and even enter into dialogue and communication with relevant entities, in order to verify whether domestic investigations or prosecutions are genuine.

This principle is reflected in Articles 18 (5) and 19 (11). Article 18 provides an early opportunity for states to inform the Prosecutor of domestic investigations or prosecutions, once the Prosecutor has taken a decision to initiate an investigation. In this case, the Prosecutor is in principle obliged ('shall') to defer to the 'State's investigation' (unless the Pre-Trial Chamber authorizes ICC investigations). However, the deferral is open to review.[37] Moreover, the State concerned is obliged to inform the Prosecutor periodically 'of the progress of its investigations and any subsequent prosecutions'. This allows the Prosecutor to keep track of domestic proceedings.

A similar principle applies in the context of a deferral of an investigation following a challenge to admissibility under article 17. Article 19 (9) clarifies that such a challenge does not 'affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court'. If the Prosecutor decides to defer the investigation after an admissibility challenge, he may 'request that the relevant State make available […] information on the proceedings'.[38]

These provisions indicate that the operation of the classical complementarity principle is based on a sophisticated system of checks and balances between the Court and domestic jurisdictions. States are expected to create conditions for the effective investigations and prosecution of crimes at the domestic level. The Prosecutor is

[36] See Article 53 (1) and Rule 48.

[37] See Article 18 (3).

[38] See Article 19 (11).

mandated to monitor the progress of domestic proceedings in various situations: in the context of analysis in the framework of *proprio motu* proceedings under Article 15, and when proceeding on the basis of a referral.

Supervision itself is an ongoing process. The Prosecutor is supposed to exercise this power even in cases in which the Court deferred its proceedings to domestic jurisdictions. Moreover, his powers encompass active elements, such as dialogue and the exchange of information concerning ongoing domestic proceedings.[39]

2.2. *A 'Positive' Approach Toward Complementarity*

This classical vision of complementarity is only one side of the coin. The Court and domestic jurisdictions may complement each other not only in a negative sense, i.e. through the delineation and adjudication of mutual competencies, but also in a positive fashion, i.e. through mutual assistance and interaction.[40]

[39] Classical complementarity has come into play in several forms in the course of the past years. The most visible impact of the complementarity scheme has been its effect on domestic legislation. States have begun to amend their domestic judicial systems even before entry into force of the Rome Statute. By 2007, 41 states have notified the Court of their implementing legislation. This practice provides evidence that complementarity serves a catalyst for compliance. The threat-based side of complementarity has further become apparent, on at least two occasions, in the first practice of the Court, namely in the situations of Darfur and Uganda. In the context of the Darfur situation, the complementarity regime has partly served as a catalyst for the creation of domestic courts. The decision of the Prosecutor to initiate an investigation on 31 March 2005 was accompanied by the establishment of the Darfur Special Court in June 2005 and the creation of two additional Sudanese Courts in November 2005. In the situation in Uganda, the threat emerging from the execution of the warrants of arrest influenced the dialogue over the appropriate forms of justice in the peace process. LRA leaders sought advice from lawyers to educate and instruct them about the Rome Statute. Moreover, there are signs that the criteria under article 17 encourage domestic leaders to channel justice through domestic Court proceedings, rather than traditional mechanisms of confession and apology ('*mato oput*', i.e. the 'drinking of the bitter root from a common cup'). See Mansuli Ssenyonjo, *The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty*, Netherlands International Law Review, Vol. LIV (2007), 51, at 64–65.

[40] See also Burke-White, *Proactive Complementarity, supra* note 2, at 4–5.

This 'positive' dimension is not fully captured by a threat-based reading of complementarity. It builds on features which are partly rooted in Article 17 and partly in other provisions of the Statute.

2.2.1. *Foundations*

'Positive' complementarity is based on partially different foundations than classical complementarity. Some of them stand in contrast to the core assumptions of classical complementarity.

Assumption # 1 The ICC and domestic jurisdiction share a common burden

The two concepts have different points of departure. Classical complementarity is focused on the preservation of domestic jurisdiction. 'Positive' complementarity is founded on the conception that the Court and domestic jurisdictions share a common responsibility.[41] It has therefore a different focus. It is designed to organize this responsibility through mutual interaction (e.g. a division of labour among the Court and domestic jurisdictions).

Assumption # 2 The desirability of Court action is not exclusively determined by state failure, but influenced by comparative advantages

Secondly, 'positive' complementarity shares a different vision of the relationship between the Court and domestic jurisdictions. Under a 'positive' approach towards complementarity, the decision about the proper forum of justice is not exclusively made on the basis of domestic failure, but tied to comparative advantages of the respective forum. This methodology offers greater flexibility and may lead to certain deviations from classical thinking. The Prosecutor might, for instance, question the desirability of Court intervention at a point in time where the Court is technically entitled to act, and decide to encourage genuine investigations and prosecutions. In other cases, a state might wish to benefit from the comparative advantages of the Court and prefer ICC investigations and prosecutions over domestic proceedings. Both types of decisions are guided by utilitarian considerations regarding the proper forum of justice which are not necessarily contemplated by the classical complementarity test.

[41] See also Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice, supra* note 2.

Assumption # 3 Complementarity is not only built on threat-based compliance by states, but leaves room for cooperation and assistance from the Court to domestic jurisdictions

Finally, 'positive' complementarity is based on a constructive vision of the role of the Court. The Court is not viewed as an institution that acts *versus* domestic jurisdictions, but as entity that acts in conjunction *with* them.[42] The relationship between the Court and domestic jurisdictions is therefore not vertical and threat-based, but flexible enough to accommodate mutually agreed forms of cooperation which are aimed at strengthening domestic capacity.

2.2.2. *Meaning*

What does positive complementarity mean, and how does it operate? These questions continue to divide writers and policy-makers. The notion has been used in several policy documents. However, it continues to mean different things to different audiences.

2.2.2.1. *Existing Conceptual Approaches*. The 2003 OTP Informal Expert on Complementarity introduced positive complementarity as a policy concept. The paper shifted the emphasis from a competition-based to a cooperation-based vision of complementarity.[43] It underlined that 'the relationship with States that are genuinely investigating and prosecuting can and should be a positive, constructive one'.[44] Positive complementarity was essentially understood as a constructive relationship, based on 'partnership' and dialogue with States. The ICC was no longer viewed as an institution of last resort, but as an entity that acts in conjunction with and in support of domestic jurisdictions through 'dialogue' and 'assistance'. The paper clarified that the ICC could provide guidance and advice that 'may resolve potential shortcomings in the national proceedings and thus avoid any need to consider ICC exercise of jurisdiction'.[45] Moreover,

[42] The most compelling example is the option of reverse cooperation which allows the Court to provide assistance to states in order to enable them to exercise jurisdiction.

[43] See Office the Prosecutor, *Informal Expert paper: The principle of complementarity in practice*, para. 2 ('[T]he Prosecutor's objective is not to 'compete' with States for jurisdiction, but to help ensure that the most serious international crimes do not go unpunished and thereby to put an end to impunity').

[44] *Ibid*, para. 3.

[45] *Ibid*, para. 4.

it was acknowledged that the Prosecutor could 'encourage the State concerned to initiate national proceedings' and 'provide advice and certain forms of assistance to facilitate national efforts'.[46]

At the same, doubts were raised as to how this approach could be reconciled with the independence of the Prosecutor and the principle of objectivity. 'Partnership' was thus tied to the 'converse' imperative of 'vigilance' which forces the ICC 'to diligently carry out its responsibilities under the Statute'.[47] The commitment to a 'positive, cooperative approach to assisting national efforts' was placed under a dual *caveat*: the 'genuine' nature of national proceedings (e.g. the *bona fides* character of domestic efforts)[48] and the need for the maintenance of impartiality (e.g. the exercise of caution by the OTP 'to avoid being exploited in efforts to legitimize or shield inadequate national efforts from criticism'[49]). These *caveats* reflect continuing divisions over the potential scope and risks of positive complementarity.

The approaches and policies underlying 'positive complementarity' were developed in legal doctrine.[50] *Burke-White*, for instance, defined 'positive complementarity' as the opposite of 'passive' complementarity, namely as a concept, which 'welcome[s] and encourage[s] efforts by States to investigate and prosecute international crimes and recognize[s] that such national proceedings may be an effective and efficient means of ending impunity' ('proactive complementarity').[51] This definition places the emphasis on the promotion and furtherance of domestic justice.

The label of 'proactive complementarity' is helpful to the extent that it highlights some of the features and policy implications of 'positive complementarity', such as a cost-benefit analysis of the choice of the forum for investigation or prosecution and the possibility of shifting responsibility 'back' to the domestic level. However, it masks at the same time some of the other dimensions. Following the line of reasoning used in this contribution, 'positive complementarity' must mean

[46] *Ibid*, para. 3.

[47] *Ibid*, para. 3.

[48] *Ibid*, para. 3.

[49] *Ibid*, para. 14.

[50] See the authors listed in note 2.

[51] See Burke-White, *Proactive Complementarity, supra* note 2, at 19.

something more than 'proactive' action and the ability to engage in dialogue. The Court may take on a (pro-)active role in the supervision of investigations and prosecutions and enter into communication and cooperation with States in the exercise of its classical complementarity powers (e.g. monitoring). The notion of 'positive complementarity' must therefore have a wider scope of application if it is meant to have a separate and distinct meaning.

2.2.2.2. *A (Re-)definition*. The essential feature of 'positive' complementarity appears to be its managerial approach towards the allocation of the forum of justice. The Statute is based on the general assumption that the Court and domestic jurisdictions share a common responsibility. 'Positive' complementarity organizes this relationship. It serves as a device to ensure effective investigations and prosecutions. It delineates strategies for the management and timing of investigations and prosecutions. Moreover, it allocates responsibilities on the basis of certain organizing principles (comparative advantages, reverse cooperation). It is ultimately designed to create a higher level of accountability through interaction between the Court and domestic jurisdictions.

2.2.3. *Normative Basis*
This understanding of complementarity emerged essentially through practice.[52] Its general features may be based on a number of statutory provisions, including the construction of article 17, the powers and powers of the Prosecutor, and Part 9 of the Statute.

2.2.3.1. *A 'Shared Burden'*. The Statute was framed on the basis of the assumption that the investigation and prosecution of core crimes is a common responsibility. This idea is reflected in the characterization of crimes as 'crimes of concern to the international community as a whole'[53] and the formulation of respective responsibilities of

[52] Chief Prosecutor Luis Moreno-Ocampo stated at the ceremony for solemn undertaking on 16 June 2003 that 'the absence of trials before [the ICC], as a consequence of the regular functioning of national institutions, would be a major success'. Later, the concept was backed by legal considerations. See Office the Prosecutor, *Informal Expert paper: The principle of complementarity in practice*, paras. 59–66.

[53] See para. 4 of the preamble of the Rome Statute.

domestic jurisdictions and the Court. The responsibilities of domestic jurisdictions are recalled in paragraph 6 of the preamble which emphasizes the 'duty' of states to exercise criminal jurisdiction with respect to the crimes in question. The ICC Prosecutor, in turn, is expressly mandated by Article 54 (1) of the Statute ('shall') to 'take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court'. The Statute makes it clear that the Prosecutor is obliged to initiate an investigation ('shall') if he or she has concluded that there is reasonable basis to proceed in light of the criteria listed in Article 54 (1) (a)–(c).[54] Article 54 (1) extends this burden to 'all facts and evidence relevant to [the] assessment of whether there is criminal responsibility'. These provisions impose significant restrictions on the freedom of choice of the Prosecutor whether or not to investigate.

2.2.3.2. *Prosecutorial Management and Discretion*. The drafters of the Statute recognized at the same time that the initiation and conduct of effective investigations and prosecutions requires various forms of managerial decision-making. The Statute foresees various tools and techniques to realize these objectives, including prosecutorial discretion and interaction with domestic jurisdictions. These instruments provide the basis of a 'positive' approach towards complementarity.

(1) The construction of article 17: The very construction of article 17 offers a normative space for choice. The Court is not only competent to act in cases of a failure by a domestic jurisdiction, but in case of mere inaction by a domestic jurisdiction. This follows from the wording and structure of article 17. Article 17 regulates exceptions to the principle of admissibility ('the Court shall determine that a case is inadmissible where'), and exceptions to the exception (unwillingness and inability to investigate or prosecute). A case is generally admissible before the Court, unless the conditions of a ground of inadmissibility are fulfilled. This structure leaves considerable leeway for managerial decision-making. The Prosecutor is automatically entitled to initiate cases in an inaction scenario,

[54] See Article 15 (3) and Rule 48 as well as Article 53 (1) ('shall').

namely where there has not been any national investigation or prosecution of the case.[55]

(2) Platforms for dialogue: The Statute grants the Prosecutor numerous powers to interact with domestic jurisdictions for the purpose of the investigation and prosecution of crimes. Article 54 (3) (d), for example, allows the Prosecutor to 'enter into such arrangements or agreements […] as may be necessary to facilitate cooperation by a State'. This broad wording of this provision enables the Prosecutor to build a network of cooperation and a forum for dialogue for the investigation and prosecution of crimes. Rule 44 goes even a step further. It allows the Prosecutor to contact a State non-Party to the Statute *via* the Registrar, in order to inquire whether that state 'intends to make' a declaration accepting the jurisdiction of the Court under 'article 12, paragraph 3'. This leaves room for the initiation of a 'self-declaration' through dialogue with a non-State Party.[56]

(3) Prosecutorial discretion: The most important statutory instrument to manage effective investigations and prosecutions is prosecutorial discretion. The Statute gives the Prosecutor considerable control over temporal scope of Court engagement and the selection of situations and cases.

The Prosecutor must, first of all, determine whether there is a need to become engaged. This decision implies difficult inquiries and choices, which require a certain degree of flexibility and discretion. The Prosecutor must assess admissibility criteria not only at the stage of a case, but also at the stage of the situation.[57] This assessment forces the Prosecutor to inquire, *inter alia*, whether national

[55] See Office the Prosecutor, *Informal Expert paper: The principle of complementarity in practice*, paras. 18 and 19: 'Where no State has initiated any investigation (the inaction scenario) […], none of the alternatives of Articles 17(1)(a)–(c) are satisfied and there is no impediment to admissibility. Thus, there is no need to examine the factors of unwillingness or inability; the case is simply admissible under the clear terms of Article 17 […]. [I]t is only where a State is investigating or prosecuting, or has already completed such a proceeding, that Articles 17(1) (a)–(c) are engaged. In such circumstances, the case will be inadmissible, unless the exceptions in those provisions are established.' See also Pre-Trial Chamber I, *Decision on the Prosecutor's Application for a warrant of arrest*, 10 February 2006, para. 29 ('A case is 'admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable, within the meaning of article 17 (1) (a)–(c), 2 and 3 of the Statute').

[56] See Carsten Stahn, Mohamed El Zeidy & Héctor Olásolo, *The International Criminal Court's Ad Hoc Jurisdiction Revisited*, 99 *A*merican Journal of International Law 421, 423 (2005).

[57] See Olásolo, *supra* note 1, at 133–134.

proceedings extend to *all parties* that might have been involved in the committal of the alleged crimes and whether national proceedings cover *those incidents* that may result in cases where the Court might likely be interested in investigating and prosecuting.

The Prosecutor has further discretion in the choice of cases. He must decide which individuals should be investigated or prosecuted internationally.

Finally, the Prosecutor may determine the timing and length (e.g. exit strategies) of Court engagement in a given situation He is entitled to decide at what moment the Court should become engaged, and for how it should remain engaged (Article 53 (1) (c), (2) (c) and (4)).[58]

All of these decisions require choices regarding the appropriate forum for investigation and prosecution which cannot be made without managerial decision-making and interaction with domestic jurisdictions.

2.2.3.3. *Reverse Cooperation.* The idea of 'positive' complementarity is further exemplified by the option of reverse cooperation under the Statute. Part 9 recognizes that the Court may support and assist domestic jurisdiction *via* cooperation. This power is enshrined in Article 93 (10) of the Statute. This provision allows the Court to cooperate with and provide assistance to a State Party conducting an investigation or trial. This form of cooperation may help a State overcome shortcomings in its domestic proceedings (e.g. unavailability due to lack of access to evidence or testimony).

Article 93 (10) is drafted in a broad fashion. It contains a non-exhaustive list of forms of cooperation. This may cover the transmission of statements, documents or other types of evidence obtained by the Court (93 (1) (b)); the questioning of persons detained by order of the Court (93 (10) (b)) as well as other forms of assistance ('*inter alia*'), such as the protection of victims and witnesses, training, technical assistance.

2.2.4. *Limits and Constraints*

Although the individual elements of a 'positive' approach towards complementarity have a legal basis in the Statute, their interplay and application may raise certain dilemmas.

[58] Note however that a disengagement may be subject to judicial review under Article 53 (3). On definition of interests of justice, see OTP, policy paper on the interests of justice, September 2007.

Problems arise at three levels. Firstly, dialogue and partnership with states may compromise the independence and appearance of impartiality of the Prosecutor. There is a risk that negotiating the venue of justice and providing training, advice and assistance to national proceedings may influence the capacity of the Prosecutor to 'credibly criticize and question the process if it subsequently proves to be a non-genuine proceeding […]'.[59]

Secondly, an uncritical policy towards referrals by territorial states which are able, but unwilling to investigate and prosecute may distort local ownership. A deliberate shifting of responsibility to the ICC and the corresponding externalization of justice may create dependencies and run counter to the objective of fostering sustainability at the domestic level.

Finally, the adverse approach, namely the shifting of responsibility from the ICC to domestic jurisdictions in cases in which the Court is entitled to act, may pose equally serious risks. One of the dangers is that it may substantially delay justice ('justice delayed, justice delayed').

A 'positive' approach to complementarity must therefore be viewed with a critical eye.

2.2.5. '*Positive' Complementarity Revisited*

'Positive' complementarity may be theorized best as a multi-dimensional concept whose individual normative propositions enjoy different levels of support. Some of the core propositions as well as their respective problems shall be briefly revisited here.

2.2.5.1. *Encouragement of Domestic Proceedings in an Inaction Scenario*. The first proposition of 'positive' complementarity' which requires further scrutiny is the proclaimed primacy of domestic justice. The very construction of Article 17 offers the Court a wide spectrum of action in cases where no State has initiated an investigation ('inaction scenario'). An encouragement of 'national proceedings' may be useful tool to manage the exercise of prosecutorial discretion in such cases. A turn to domestic jurisdiction is compelling in light of the objective to target the 'most serious crimes' and to foster sustainable justice in fragile societies. Complementarity may, in particular, be usefully invoked to 'actively remind States of their responsibility to adopt and implement effective legislation and to encourage them to carry out

[59] See Office the Prosecutor, *Informal Expert paper: The principle of complementarity in practice*, para. 14.

effective investigations and prosecutions'.[60] However, encouraging domestic justice should not be understood in the sense of a strict prioritization of domestic jurisdiction (i.e. as a policy to be applied 'where possible'[61]).

A categorical preference for domestic proceedings may blur the line between the sphere of responsibility of States and the Court in cases where the ICC is entitled to act. The Court and domestic jurisdictions bear a 'shared burden' under the Statute which is based on a mutual allocation of responsibility. A systematic deference to domestic proceedings may defeat this balance. It may, in particular, be used a justification or excuse for inaction by the Court.

Such a shifting of responsibility must be viewed with great caution. Prolonged inaction by the Court may run counter the general duties of the Prosecutor under articles 15 (3) ('shall submit … a request for authorization') and 53 (1) (shall initiate an investigation, unless'). A referral by an 'unable' territorial state may be deemed create a special bond between the Court and the referring State, which is akin to a mandate. Shifting the burden back to the domestic level may negate this responsibility. Moreover, it may ultimately compromise access to evidence and delay justice in a manner which is incompatible with the overall objective of effective investigation and prosecution set out in paragraph 4 of the preamble and article 54 (1) (b) of the Statute.

Encouraging domestic proceedings should therefore not be seen as an absolute goal of 'positive' complementarity. It should be used primarily as a policy tool to maximise the impact of the Court and remain subject to the overarching imperative of effective and expeditious justice.

2.2.5.2. *Consensual Sharing of Labour Despite Domestic Ability*. The second element of 'positive' complementarity which merits additional reflection is the scope and limit of consensual labour sharing. Article 17 does not prohibit a consent-based sharing a labour in cases where a domestic jurisdiction is able to conduct genuine investigations and prosecutions. The Court is technically allowed to proceed without any

[60] See Office the Prosecutor, *Informal Expert paper: The principle of complementarity in practice*, para. 7.

[61] See, however, Office of the Prosecutor, *Report on Prosecutorial Strategy*, para. 2; Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003–June 2006)*, para. 58.

finding on inability of a state, if there are no domestic investigations.[62] Moreover, considerations of fairness and effectiveness as well as comparative advantages of ICC proceedings may weigh in favour of ICC action.

It does not come as a surprise that the 2003 OTP Informal Expert Paper on Complementarity took a liberal stance towards voluntary acceptance of ICC admissibility and appropriate circumstances for dialogue and burden-sharing. It acknowledged that '[t]here may be situations where the appropriate course of action is for a State concerned not to exercise jurisdiction, in order to facilitate admissibility before the ICC'.[63] It defended the option of a 'voluntary acceptance of ICC admissibility' on the ground that the exercise of jurisdiction by the ICC may 'enhance the delivery of effective justice, and [would] thus [be] consistent with the letter and spirit of the Rome Statute and other international obligations with respect to core crimes'.[64]

In its Three Years report, the OTP went even a step further. The Office welcomed voluntary referrals by territorial states and granted consent-based initiations of investigations priority over article 15 referrals. It justified this policy on the ground that voluntary referrals 'increase the likelihood of important cooperation and on-the-ground support'.[65]

Such an approach has several advantages. Techniques such as the promotion of self-referrals and the voluntary acceptance of ICC proceedings may facilitate findings on admissibility and issues of cooperation. Moreover, they may raise issues of impunity from the grass root level to the highest political spheres of a State. However, they create at the same time novel antinomies.[66]

One objection against the policy of invited self-referrals is that this option was not expressly contemplated, when the provisions on the

[62] See Office the Prosecutor, *Informal Expert paper: The principle of complementarity in practice*, para. 61 (Article 17 does not require any branding of the State as 'unable').

[63] *Ibid.*

[64] *Ibid.* para. 61 and note 24.

[65] See Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003–June 2006)*, para. 2.

[66] See generally Claus Kress, '*Self-Referrals' and* '*Waivers of Complementarity'*, 2 Journal of International Criminal Justice 944 (2004); Mohamed El Zeidy, *The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC*, 5 International Criminal Law Review 83 (2005).

triggering mechanism were drafted.[67] This objection is complemented by some deeper policy dilemmas. A systematic prioritization of self-referrals over *proprio motu* proceedings poses a conceptual problem. It introduces a hierarchy among the trigger mechanisms available to the Prosecutor, which is not foreseen in the Statute. Such a prioritization may further have negative implications on expeditiousness. The prospect of a self-referral may, in particular, induce the Prosecutor to await a referral before taking action, instead of using its *proprio motu* powers under article 15. This methodology may ultimately delay justice.

Moreover, a policy of welcoming and inviting self-referral must be managed in compliance with the principle of objectivity under article 54 of the Statute. Action on the basis of a negotiated referral creates a risk of (mis-)perception. The OTP – and as a result the court as a whole – may easily be viewed as a prolonged arm of the government which made the referral. In such circumstances, it is particularly important for the OTP to demonstrate objectivity in the investigation and selection of cases, in order to avoid the impression that ICC prosecutions appear politically motivated. This may be achieved through the use of objective standards in the assessment of criminal accountability, rather than quantitative assessments of the crime scale or comparisons between groups or individual perpetrators.[68]

Similarly, the use of dialogue and negotiation in the initiation of referrals may require certain deviations in the timing and sequencing of cases. In its report on Prosecutorial Strategy, the OTP made it clear that it uses a 'sequenced' approach to investigations according to which the Office investigates cases and groups in a conflict 'in sequence', that is one at a time and one after each other (e.g. case after case and group after group).[69] This approach should be revisited in the context of

[67] See Schabas, *supra* note 6, at 32.

[68] The OTP applied a quantitative assessment in its response to the communication concerning Iraq. See Office of the Prosecutor, *Communication on Iraq*, p. 9, at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf ('It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes. Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute').

[69] See Office of the Prosecutor, *Report on Prosecutorial Strategy*, para. 2.

negotiated referrals. In such contexts, it may be more appropriate to spread the focus of investigations and to investigate and prosecute several groups and sides of the conflict simultaneously in order to counter doubts as to the appearance of impartiality.

A policy of positive complementarity may therefore encompass techniques such as the promotion of self-referrals and the voluntary acceptance of ICC proceedings. However, in such circumstances, special efforts should be made to demonstrate independence and impartiality and to preserve the effectiveness of justice.

2.2.5.3. *The Scope of Reverse Cooperation*. The option of reverse cooperation is the least disputed proposition of 'positive' complementarity. The power of the ICC to provide assistance to national investigations and prosecutions is expressly acknowledged in Article 93 (10). This provision allows the Court to cooperate with states in order to enable them to carry out genuine investigations and prosecutions. The Prosecutor might use this provision, for instance, to share evidence and information with a domestic jurisdiction in relation to persons not investigated or prosecuted by the ICC. The Court may further provide technical assistance and advice in various areas, such as the crimes under the jurisdiction of the Court (e.g. via the matrix system[70]), the management of the protection of victims and witnesses or post-testimony treatment of persons who have appeared before the Court. Measures of this type will enhance the perception that the Court may provide benefits to domestic jurisdictions.

Nevertheless, reverse cooperation should at the same time remain subject to certain limits. Assistance from the Court to domestic jurisdiction must be provided in a way which does not prejudice the security of information or the protection of persons. Moreover, such assistance should not be granted in a systematic fashion, but rather with the aim of providing incentives to states.[71] A continuing reliance of a state on assistance by the Court may ultimately run counter to the objective of fostering sustainable justice efforts. The provision of reverse cooperation was thus rightly left in the discretion of the Court ('may').[72]

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[70] Four legal research and reference tools have been developed by the Court: the *Case Matrix*, the *Elements Commentary*, the *Proceedings Commentary* and the *Means of Proof documen*t. See ICC, Legal Tools, at http://www.icc-cpi.int/legal_tools.html

[71] See also Office the Prosecutor, *Informal Expert paper: The principle of complementarity in practice*, para. 10.

[72] See Article 93 (10).

III. CONCLUSION

This article has sought to demonstrate that complementarity has two dimensions: a classical one and a positive one.

Classical complementarity is the more traditional concept. It is based on a vertical vision of the relationship between the Court and domestic jurisdictions, i.e. the idea that the Rome Statute defines rules and standards for human behaviour and checks and balances to remedy shortcomings or failures of domestic jurisdictions. Complementarity serves in this context as a tool to foster compliance through a sophisticated system of carrots and sticks.

This approach contrasts with a 'positive' understanding of complementarity, which is equally rooted in the Statute. 'Positive' complementarity has some horizontal features. It may be defined as a managerial concept that organizes the relationship between the Court and domestic jurisdictions on the basis of three cardinal principles: the idea of shared burden of responsibility, the management of effective investigations and prosecutions, and the two-pronged nature of the cooperation regime.

Classical and 'positive' complementarity differ in their content and features. They are based on different premises in various respects: their vision of responsibility, their conception regarding the determination of the forum of justice and their approach towards interaction between the Court and domestic jurisdictions. However, both concepts form part of a common whole under the Rome Statute. They are ultimately geared to pursue three common objectives:

– to ensure that 'the most serious crimes of concern to the international community as a whole must not go unpunished';
– to encourage effective measures at the national level',
– and ultimately, to 'put an end to impunity'.