# THE INTERNATIONAL CRIMINAL COURT AND POSITIVE COMPLEMENTARITY: LEGAL AND INSTITUTIONAL FRAMEWORK

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A thesis submitted in fulfilment of the requirements for the degree of

**DOCTOR OF LAWS (LLD)**

in

**International Criminal Law**

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December 2017

# Declaration

I declare that this doctoral thesis entitled "**The International Criminal Court and Positive Complementarity: Legal and Institutional framework"**, which I hereby submit for the degree of **Doctor of Laws (LLD)** at the **University of Pretoria**, is my own original work and has not previously been submitted by me for examination or the award of a degree at this or any other university. All the sources used or quoted have been duly acknowledged and referenced.

**Milton Odhiambo Owuor**

Signature: 

Dated at Sandton this 10th day of December 2017

# ABSTRACT

This study seeks to establish how the legal and institutional framework for positive complementarity may be effectively implemented. It is argued that the existing legal and institutional framework in respect of the effective combatting of impunity is largely unsatisfactory.

The evolution of the principle of complementarity, in the context of the Rome Statute, is explored with emphasis on the theoretical constraints on the principle which, in turn, raise practical challenges. The analysis provides a theoretical background to the conceptualisation of positive complementarity.

The study traces the evolution and development of the concept of positive complementarity, examining its characteristic features and attributes, and the possibilities and opportunities the concept presents for the effective combatting of impunity. It examines the various scholarly arguments and propositions advanced to explain the concept of positive complementarity, and analyses the attendant challenges and limitations. It is noted that there is no fixed and universally acceptable definition of positive complementarity. It is therefore argued that there is a need for the establishment of a coherent legal and institutional framework for positive complementarity.

In this light, appropriate policy alternatives and considerations both domestically and internationally, are considered. On the international level limitations characterising the current institutional framework of the Secretariat of the Assembly of States Parties (ASP Secretariat) are identified. It is argued that a fundamental restructuring of the ASP Secretariat is essential and measures to restructure the ASP Secretariat in order to reinforce its effectiveness in fulfilling its mandate on positive complementarity are

identified. At the domestic level, the various aspects of implementing legislation are discussed.

In conclusion, the establishment of an independent office to address positive complementarity and revitalise the institutional framework within the legal structures of the ASP Secretariat, is examined. The study envisages that the proposed institutional framework for the ASP Secretariat, if implemented, would effectively support the national jurisdictions of state parties in their implementation of the concept of positive complementarity. This, represents an unequivocally original contribution by this study to knowledge and research.

# KEY TERMS

complementarity – international criminal law – institutional – international – law – legal – positive complementarity – impunity – international criminal court

# DEDICATION

This thesis is dedicated to the mighty Major Prophets of God Almighty who have walked this earth: my spiritual father, Major1 Prophet Dr Shepherd Bushiri; my spiritual mum, Prophetess Mary Bushiri; my spiritual grandfather, Emeritus Professor, Senior Major Prophet Uebert Angel; and grandmum, Prophetess Bebe Angel. I thank them for their fountain of spiritual nourishment, anointing, and grace ceaselessly and liberally poured over me. I love you daddy, grandpa, mommy, and grandmom, with all my heart, soul, and spirit!

# ACKNOWLEDGEMENTS

A *million thanks* to the omnipotent God of Major1, and omniscient Lord Jesus Christ; the *invisible* ever-supervening supernatural power of the omnipresent Holy Ghost – the source of my knowledge and wisdom; and Major 1 for amazing and inexplicable abundant grace! I consider myself fortunate to have had the rare opportunity of drinking, as it were, from the fountain of intellectual prowess of my doctoral promoter, Professor Dire Tladi. I am also grateful for the encouragement received in finalising this thesis from my Head of Department, Professor Annelize Nienaber – it has meant so much to me. Professor Neville Botha's erudite editorial role cannot be gainsaid.

My son, Dennis Junior, deserves special commendation for the way in which he stuck with me emotionally and endured my frequent absence while I was *burning the midnight oil* during my doctoral research – I love you so much son! My daughter, Tshepo Laone, who also endured my long absence with fortitude and patience – I love you Princess. Thanks to my sweet wife, Catherine, for her enduring life-long support.

Thanks, also, to all who supported me during my doctoral study leave abroad in London, Los Angeles, Hollywood, New York, Albany, Washington DC, Miami, Phoenix, Las Vegas, Paris, Amsterdam, Prague, Dubai, and Mauritius. Many people, though not mentioned, contributed, directly or indirectly, to the finalisation of this work – to all of you, my heartfelt gratitude.

Finally, all errors and shortcomings in this work are mine alone, and I accept full and sole responsibility for them.

# ABBREVIATIONS

| | |
|---|---|
| ACHPR | African Charter on Human and Peoples' Rights |
| ASP | Assembly of States Parties |
| AU | African Union |
| CICC | Coalition for an International Criminal Court |
| EU | European Union |
| Ibid | Identical to the immediately preceding reference |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the Former Yugoslavia |
| Id | The same source as the immediately preceding reference but a different page, section, article, etcetera |
| ILC | International Law Commission |
| IMT | International Military Tribunal held at Nuremberg |
| IMTFE | International Military Tribunal for the Far East held at Tokyo |
| LRA | Lord's Resistance Army |
| OTP | Office of the Prosecutor |
| RPE | Rules of Procedure and Evidence. |

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# CHAPTER 1

# BACKGROUND AND INTRODUCTION

## 1 Background and introduction to the study

The Rome Statute of the International Criminal Court (the Rome Statute)[1] was adopted on 17 July 1998 by a resounding majority of the states attending the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.[2] The Conference was held in Rome, Italy, over a period of one month from 15 June - 17 July 1998.

The Rome Statute subsequently entered into force on 1 July 2002 upon attaining the required minimum ratification by sixty states as required under the Statute.[3] The International Criminal Court of the Rome Statute (ICC), unlike earlier international criminal tribunals, is a permanent court whose jurisdiction is not limited to specific situations occurring at specific times. It came into being by way of a treaty – the Rome Statute – which provides that

> [a]n International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be *complementary* to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.[4]

[1] Rome Statute adopted by the United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 Doc A/CONF/183/9 available at http://legal.un.org/icc/staute/romefra.htm (date of use: 14 May 2017) and at https://treaties.un.org/doc/Publication/UNTS/Volume%202187/v2187.pdf (date of use: 14 May 2017).
[2] Of the more than 160 states in attendance, 120 voted in favour of the adoption of the Rome Statute, 21 abstained, and only 7 states' votes went against the treaty (China, Iraq, Libya, Israel, Yemen, Qatar, and the United States of America). These statistics include the 54 African states in attendance. There are 139 signatures appended to the Statute, and of these 124 are parties to the Statute.
[3] The Rome Statute entered into force 4 years after its adoption.
[4] Article 1 of the Rome Statute.

The provisions of the Rome Statute establish complementarity,[5] one of the cornerstones of the functioning and jurisdiction of the ICC, which forms the basis for the rise of the concept of positive complementarity. Positive complementarity, as such, is not provided for in the text of the Rome Statute.[6]

Before the rise of international criminal law in its current form, justice was, in terms of the general rules of international law, served in domestic law by domestic courts and under national criminal jurisdiction.[7] With the rise of the international criminal tribunals – including the ICC – and the emergence of a jurisprudence of international criminal law, this scenario has changed.

The purpose of this study is two-fold. Firstly, it interrogates the definition, scope, and nature of positive complementarity. Secondly, it identifies what a legal and institutional framework for the implementation of positive complementarity effectively to combat impunity, will entail.

For a clear understanding of the evolution of the concept of positive complementarity it is necessary first to examine the nature and meaning of complementarity as set out in the provisions of the Rome Statute.[8]

The principle of complementarity and the concept of positive complementarity are intricately linked. The discussion will, therefore, proceed from the premise of the nature of complementarity as presented in the Rome Statute, and thereafter engage directly with issues revolving around the concept of positive complementarity.

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[5] Holmes "The Principles of Complementarity" 41-78.
[6] The policy of positive complementarity has been stated as one of the cardinal principles of the prosecutorial strategy at the ICC. Its nature and scope remain largely unclear and highly debatable.
[7] See generally Bergsmo, Bekou & Jones "Complementarity and construction of national ability" 1052-70. See also Delmas-Marty "The International Criminal Court and the Interraction of International and National Legal Systems" 1915-16.
[8] See Bernard (2011) 1/19 *International Journal of Humanities and Social Science* 203-16.

It is interesting to note that other than the references to the term 'complementary' in the Preamble and in article 1 of the Rome Statute, there is no definition, or even a mention, of the term in any other of the Statute's provisions. The term complementarity was coined by the delegates during the Statute drafting sessions of the Rome Conference to cover the admissibility requirements under article 17 of the Rome Statute.[9] The *lacuna* created by the absence of a concrete definition of the term in the Rome Statute creates an agenda for debate in this study.

Complementarity may be defined as a principle which sets out the idea that states, rather than the ICC, will enjoy priority in proceeding with cases within their respective jurisdictions. Complementarity may be regarded as a tool for the apportionment of jurisdiction between the ICC and national courts.[10] It would follow that, complementarity signifies a situation whereby the ICC complements domestic jurisdiction, but in so doing, does not supercede that domestic/national jurisdiction. This means that domestic courts will enjoy priority in the investigation and prosecution of core international crimes committed within their national jurisdictions, while the ICC will only intervene when the national courts are 'unable or unwilling' to perform their responsibilities.[11]

From the preceding paragraph, complementarity thus means that the ICC can only investigate and prosecute core international crimes when the national criminal jurisdictions are genuinely unable and unwilling to do so. This undercores the

[9] See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome 15 June-17 July 1998 Official Records vol 1 Final Documents A/CONF.183/13 (vol I). The Final documents are available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf. See also Crawford "Drafting of the Rome Statute" 109, 147. See further Benedetti & Washburn *Global Governance* 22. See also Heller (2006) 17 *Criminal Law Forum* 257 available at http://papers.ssrn.com/so13/ papers.cfm?abstract_id=907404 (date of use: 15 October 2017). See further Schabas "Article 17".

[10] See Bergsmo (1998) 4 *European Journal of Crime, Criminal Law and Criminal Justice* 345-63.

[11] Ibid

preference afforded to national jurisdictions in the investigation and prosecution of crimes falling within their jurisdictions.

The various definitions of complementarity by scholars and academic writers are discussed in the Chapter 2.

Positive complementarity, is also not expressly defined in any of the formal international criminal law sources.[12] Positive complementarity is also not mentioned in the Rome Statute, nor has the ICC come up with any functional definition, or authoritatively pronounced on the elements of the concept. Consequently, this study notes that positive complementarity remains no more than a concept without formal legal content.[13]

However, to clarify at the outset, positive complementarity may be defined as an approach by the ICC Prosecutor and the OTP which "encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation." [14] Therefore positive complementarity connotes national and international networks.

[12]See discussion in Thormundsson J "The sources of international criminal law with reference to the human rights principles of domestic criminal law" *Stockholm institute of Scandinavian law* 387-393 available at http://www.scandinavianlaw.se/pdf/39-17.pdf (date of use: 8 August 2016).

[13] Nieto-Navia R "International peremptory norms (jus cogens) and international humanitarian law" available at http://www.iccnow.org/documents/WritingColombiaEng.pdf (date of use: 8 May 2017). For further discussion on the normative value see Byers (1997) 66 *Nordic Journal of International Law* 213.

[14] Office of the Prosecutor "Report on 14 September 2006" available at http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf (date of use: 2 December 2017). See also Gioia "Reverse cooperation" 75-102. See also on the failure of state cooperation, Coalition for the International Criminal Court "State Cooperation: The weak link of the ICC" available at http://www.coalitionfortheicc.org/blog/?p=588&langswitch_lang-en (date of use: 25 February 2017).

The concept of positive complementarity has also been defined by the Office of the Prosecutor as "a proactive policy of cooperation aimed at promoting national proceedings".[15]

It is further defined 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, without involving the Court in capacity building, financial support and technical assistance."[16]

These definitions and the scholarly discussions on the meaning of positive complementarity are discussed in detail in Chapter 4.

This study attempts to fill the gap in the literature as regards positive complementarity. It is envisaged that the proposals advanced here will assist in expressly and unequivocally cementing a place for the tenets of positive complementarity in international criminal law.

In the following section, the scope of the research is set out. This is done by way of a general overview of the study during which the research questions are addressed by tackling the issues of the 'impunity gap',[17] the lack of a fixed definition, and the scope of the concept of positive complementarity.

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[15] Office of Prosecutor "Report on Prosecutorial Strategy 1 February 2010" available at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/Office of the ProsecutorProsecutorialStrategy20092013.pdf paras 8 and16 (date of use: 23 February 2017).

[16] See generally Review Conference of the Rome Statute Draft Resolution on Complementarity ICC-ASP/8/Res.9 Annex VII 8 June 2010.

[17] See discussion in Tladi D "Complementarity and cooperation in international criminal justice: Assessing initiatives to fill the impunity gap" *Institute of Security Studies* Paper 27 November 2014. See further Assembly of State Parties 'Report of the Bureau on Stocktaking: Complementarity. Taking stock of the principle of complementarity: Bridging the impunity gap' ICC-ASP/8/51 Resumed Eighth Session 18 March 2010 held in Kampala to take stock of development under the Rome Statute.

## 1.1 General overview of the study

A general survey of existing literature suggests that there is a gap in the understanding of the concept of positive complementarity. Accordingly, the overview undertaken in this section aims to show the need to present both a comprehensive analysis and a coherent interpretation of the concept.[18]

The study aims to explain the legal dimensions of positive complementarity to establish a conceptual framework for its application in the broader context of the global requirements of international criminal justice. This ultimately leads to a proposition aimed at translating the policy components of positive complementarity into a plausible legal framework. It is submitted that the translation of the policy concept of positive complementarity into an enforceable legal framework, is the ultimate justification for the reinforcement of an effective system to combat impunity. In this regard, the bolstering of the capacity of the jurisdiction of states is an important objective of positive complementarity.

In light of this observation, this study pursues a broader and deeper analysis of the concept of positive complementarity. In so doing, it analyses the current institutional framework, including that of the Permanent Secretariat of the Assembly of States Parties to the Rome Statute (ASP Secretariat).[19] It explores, among other aspects, the

[18] See the discussion in Hewett (2006) 31 *Yale Journal of International Law* 276.
[19] See Resolution on Establishment of the Permanent Secretariat of the Assembly of States Parties to the International Criminal Court ICC-ASP/2/Res.3 12 September 2003, setting up a permanent Secretariat as an administrative organ of the ASP with express core functions including administration, conference-preparation, financial, and legal. The ASP and its Permanent Secretariat are discussed in detail in Chapter 4 of this study.

programme activities related to positive complementarity undertaken by the ASP Secretariat. The study evaluates the effectiveness of the ASP Secretariat in its effort to reach state parties with a view to supporting their domestic efforts to achieve the effective investigation and prosecution of serious crimes under the Rome Statute.

### 1.1.1 The 'impunity gap' argument: Shortcomings of complementarity

This study is aimed at exploring the meaning, nature, and rationale from the concept of positive complementarity from a legal perspective. The impunity gap arises where an international forum prosecutes only those most responsible for international crimes, so allowing lesser-ranking offenders a degree of impunity.[20]

Due to its capacity limitations, the ICC tends to deal only with situations and cases involving high-ranking suspected offenders. Consequently, many lesser-ranking offenders are not prosecuted by the ICC but are left for the domestic criminal courts to deal with.[21] Coupled with the limitations inherent in national jurisdiction, the result is that the 'impunity gap' tends to remain largely unaddressed.

The strategy of focussing on those who bear the greatest responsibility for crimes falling within the jurisdiction of the ICC, will continue to result in an impunity gap unless national authorities, the international community, and the ICC work together to ensure that all appropriate means for bringing other perpetrators to justice are used.[22] It has been argued that positive complementarity can help close the impunity gap by

[20] See generally Report of the Bureau on Stocktaking of the Principle of Complementarity: Bridging the Impunity Gap ICC-ASP/8/51 Resumed Eighth Session 18 March 2010.
[21] See, for example, *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05-377 (10 March 2009) available at http://www.icc-cpi.int/iccdocs/doc/doc641259.pdf. (date of use: 5 August 2017)
[22] Ibid.

encouraging domestic prosecutions of international crimes, including those that may not meet the gravity threshold for prosecution by the ICC.[23]

The present thesis discusses the extent to which the ICC and the international community are faced with limitations with regard to dealing with the impunity gap, and proposes how these challenges may be overcome.

The study, therefore, underscores the significance of the concept of positive complementarity in addressing the effects of the impunity gap. Positive complementarity, though currently unsettled, could, if properly understood, serve as an instrument to accelerate the pace of restoration of the rule of law in traumatised communities.[24]

### 1.1.2 The unsettled scope of positive complementarity

If positive complementarity is viewed as a possible practical tool with which to address the impunity gap, the need arises for greater clarity as to what it means from a legal perspective. The principal tenets – most notably the definition, the constitutive elements, and the scope – of the concept of positive complementarity, remain largely unclear.[25] Differently phrased: the parameters of application and the formal justification for positive complementarity, have remained unclear, thereby rendering the concept susceptible to varied interpretations.[26] The absence of a universally acceptable definition introduces a degree of uncertainty as to the exact nature of

[23] See generally Burke-White (2008) 1 *Harvard International Law Journal* 49 available at http://www.harvardilj.org/site/wp-content/uploads/2010/07/HILJ_49-1_Burke-White.pdf (date of use: 7 June 2017).
[24] See generally Bjork & Goebertus "Complementarity in action" (2014) 14 *Yale Human Rights and Development Journal* 205-29.
[25] Chapter 4 deals with the nature of the concept of positive complementarity.
[26] There are differences as to what the concept of positive complementarity means. Some of these are discussed in the ensuing chapters.

positive complementarity. This, in turn, renders it less effective, turning it into an instrument of rhetoric rather than a tool for the realisation of its principal aim: filling the impunity gap.

Attempts by various scholars to refine the basic tenets of positive complementarity do not appear to have settled this issue. Many contemporary works – for example, those of Carstens, Stahn and other international criminal law scholars – addressing positive complementarity are instructive.[27] Some of Stahn's studies, for example, explore and evaluate the background to and historical development of the concept of positive complementarity.[28]

In certain of his publications, Stahn discusses the future of positive complementarity, but lays no particular emphasis on the development of a coherent institutional and legal framework for its implementation.[29] Consequently, Stahn's works, while significant, merely provide a general overview of the concept of positive complementarity, without offering a detailed analysis of the legal and institutional framework within which the concept can be implemented. It is this *lacuna*, arising from lack of current detailed analysis of the concept of positive complementarity, which I seek to fill.

A more contemporary series of works edited by Politi and Nessi,[30] is similarly instructive as regards the exposition of the general legal principles of international criminal law. This collection of writings, inter alia, explores and evaluates the basic

[27] See generally Stahn (2005) 3 *Journal of International Criminal Justice* 695-720; Stahn, El Zeidy & Olásolo (2005) 99 *American Journal of International Law* 421-31; Stahn (2010) 23 *Leiden Journal of International Law* 311-18; Stahn (2008) 19 *Criminal Law Forum* 87-113.
[28] Ibid.
[29] See generally Stahn "Judicial review of prosecutorial discretion" 247-79; Stahn "Taking complementarity seriously" 233-82.
[30] See Politi & Nessi (2001)*The Rome Statute of the International Criminal Court. A challenge to impunity* Ashgate Alderschot 301.

principles of international criminal law in the Rome Statute.[31] It is particularly useful in providing a theoretical basis for the analysis of the conceptual framework used to assess the effectiveness of the relevant provisions of the Rome Statute with specific reference to the classic principle of complementarity. These writings, however, do not address the development of a legal framework for positive complementarity comprehensively.

The principle of complementarity is largely dependent on an effective national dispensation with the capacity to undertake effective domestic investigations and prosecutions of serious crimes under the Rome Statute. This relationship of dependency is greatly exacerbated by effective domestic legislation implementing the Rome Statute in domestic law. For the African continent, in particular, where one of the African Union's (AU) criticisms of the ICC is its bias against Africa states, many of the problems would be ameliorated were there to be more effective domestic investigations and prosecutions.[32] The adoption of national legislation could, therefore, be seen as a demonstration of commitment on the part of the domesticating state and thus help stave off claims of a 'focus' on Africa and the consequent tension between Africa and the ICC.[33]

In addition to the dearth of relevant literature on the concept of positive complementarity, the jurisprudence of the ICC has to date offered little in the way of

[31] See Fernandez de Gourmendi "The role of the Prosecutor" 55- 61; Gaja "Issues of admissibility" 49-52; Gioia "The complementary role of the international criminal court" 71-80; Greppi "Inability to investigate" 63-70;

[32]For further discussion see also a series of work by Du Plessis: Du Plessis M & Fritz N "New diplomatic fiasco looms" *Business Day* 2 May 2009; Du Plessis (2003) 16 *South African Journal of Criminal Justice* 1; Du Plessis & Gevers (2005) 14/2 *African Security Review* 23-34; Du Plessis "The International Criminal Court and its work in Africa: Confronting the myths" *Institute of Security Studies Paper* 173 November 2008.

[33] See generally Du Plessis, Maluwa, & O'Reilly *Africa and the International Criminal Court* (Chatham House London 2013) 3-4.

exposition of the concept.[34] The ICC, however, has issued judgments, notably in the *Kenyan* cases, that have contributed to the jurisprudence of the court on classic complementarity.[35] In the *Kenyan* cases, the ICC explained the principle of complementarity. The various elements of the admissibility rule in articles 17 and 54 of the Rome Statute were dealt with at length.[36] The cases provided an opportunity for the parties to present their respective arguments on the principle of complementarity, thereby providing a basis on which the court could expounded on complementarity and its application.

The interesting dimension of complementarity in the context of 'self-referral' has also been addressed by the ICC and certain scholars.[37] Schabas explores the concept of complementarity in practice.[38] He presents self-referral as one of the approaches the prosecutor of the ICC may invoke to secure state participation in combating impunity.[39] Schabas attempts an evaluation of the success of the principle of complementarity in effectively fighting impunity since the establishment of the ICC. He concludes that greater effort is required to reinforce the operation of the

[34] However, with regard to the classic concept of complementarity, this has been a subject of the court's pronouncement and clarification on a number of points, notably when adjudicating on matters of the admissibility test under article 17 of the Rome Statute. See generally, *The Prosecutor v Francis Karimi Muthaura, Uhuru Muigai Kenyatta and Muhammed Hussein Ali* ICC-01/09-02/11 (30 May 2011) available at http://www.icc-cpi.int/iccdocs/doc/doc1078823.pdf (date of use: 27 May 2017). See further the appellate judgment in *The Prosecutor v Francis Karimi Muthaura, Uhuru Muigai Kenyatta and Muhammed Hussein Ali* ICC-01/09-02/11A ICC-01/09-02/11-274 (30 August 2011) available at http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf (date of use: 27 May 2017).

[35] See *Prosecutor v Francis Karimi Muthaura, Uhuru Muigai Kenyatta and Muhammed Hussein Ali* ICC-01/09-02/11-274 (30 August 2011) available at http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf (date of use: 12 May 2017).

[36] See Williams & Schabas "Article 17. Issues of admissibility" 605-25.

[37] See Akande D "Darryl on self-referrals: is the International Criminal Court really a Court of last resort?" *European Journal of International Law Blog* available at www.ejiltalk.org/darryl-robinson-on-self-referrals-is-the-international-criminal-court-of-last-resort/ (date of use: 4 March 2017).

[38] See generally a series of pertinent works: Schabas "Article 29. Non-applicability of statute of limitations" 845-8; Schabas "Complementarity in practice" 25-48; Schabas "Prosecutorial discretion" 229-46; Williams & Schabas "Article 17. Issues of admissibility" 605-25; Schabas (2008) 19 *Criminal Law Forum* 5-33; Schabas (2008) 6 *Journal of International Criminal Justice* 731-61.

[39] See generally Schabas (2006) 27 *Human Rights Law Journal* 27.

principle.[40] Schabas's works have proved relevant in articulating a useful theoretical basis for reinforcing the conceptual framework by which to assess the options for establishing a new institutional and legal framework for positive complementarity. His work, however, is aimed principally at classical complementarity as provided for in the text of the Rome Statute, and not, as such, at positive complementarity which is the topic of this study.

Various eminent international criminal law scholars have written on a number of themes touching on positive complementarity.[41] The works of these writers are examined with a view to determining the extent to which they advance justifications for positive complementarity. Their writings also help to identify the challenges associated with the nature and characteristics of positive complementarity.

Bergsmo, Bekou, and Jones have generated a number of authoritative legal works on a variety of themes concerning positive complementarity.[42] In certain of their publications the trio provide detailed analysis of questions such as the nature of positive complementarity and the question of capacity building. They have dealt in detail with the significance of the web-tool known as the 'International Criminal

[40] See generally Schabas "The rise and fall of complementarity" 150-64.
[41] For insight into the nature, intensity and direction of this debate, see generally a series of works, inter alia, Benzing M 'The complementarity regime of the international criminal court: International criminal justice between state sovereignty and the fight against impunity' available at http://www.mpil.de/files/pdf3/mpunyb_benzing_7.pdf (date of use: 7 June 2017); Burke-White (2008) 9 *Criminal Law Forum* 59; El Zeidy (2002) 23 *Michigan Journal of International Law* 869; Holmes "Principle of complementarity" 41, 45; See also a very concise, but important work by Takemura H 'A critical analysis of positive complementarity' available at http://www.defensesociale.org/warandpiece/HITOMI%20TAKEMURA.pdf (date of use: 23 May 2017); and Tallgren (1998) 67/2 *Nordic Journal of International Law* 107.
[42] See generally the following series of works: Bekou "In the hands of the state" 830-52; Bergsmo, Bekou & Jones A "Construction of national liability" 1052-70; Bergsmo "Selection and prioritization" 15-19; Bekou (2008) 8 *Human Rights Law Review* 343-55; Bergsmo (1998) 4 *European Journal of Crime, Criminal Law and Criminal Justice* 345-63; Bergsmo (2000) 69 *Nordic Journal of International Law* 87-101; Bergsmo, Bekou & Jones (2010) 2 *Goettingen Journal of International Law* 791-811.

Court Legal Tools' (ICC Legal Tools)[43] which provides comprehensive online legal resources to support all stakeholders engaged in the international criminal justice processes associated with the ICC.[44]

Issues surrounding the legal nature and practical significance of positive complementarity have for several years been attracting the attention of stakeholders across the board. From the inception of the ICC, the principle of complementarity has been subjected to intense academic scrutiny in terms of both its constitutive elements, and the potential ramifications of its use. But even more vexing is the issue of the true legal nature and scope of positive complementarity.[45]In conclusion, therefore, this study seeks to augment existing legal literature by considering the institutional and legal aspects of the concept of positive complementarity.[46] It also explores the opportunities presented, the benefits generated, and the challenges posed by the emerging concept of positive complementarity.[47]

## 1.2 The research question

This research is designed to respond to the following questions:

(i) What is the juridical nature and content of the concept of positive complementarity and what is its relation to the classic complementarity of the Rome Statute?

[43] The ICC Legal Tools can be accessed, among others, at https://www.legal-tools.org/ and at https://www.casematrixnetwork.org/icc-legal-tools-database/ (date of use: 1 June 2017).
[44] See generally Bergsmo, Bekou & Jones (2010) 2 *Goettingen Journal of International Law* 791-811.
[45] See similar views expressed by Blaak (2010) 2 *Equality of Arms Review* 10-13.
[46] See Bernard (2011) 1/19 *International Journal of Humanities and Social Science* 203-16.
[47] See Blaak (2010) 2 *Equality of Arms Review* 10-13. See also Salvatore (2010) 8/1 *Journal of International Criminal Justice* 137.

(ii) What is an appropriate legal and institutional framework for the effective implementation of positive complementarity?

## 1.3 Objectives of the study

In light of the problem statement and research questions, this study identifies the content of the concept of positive complementarity. Within the framework of this broad objective it specifically sets out to:

(a) explore the development of the concept of positive complementarity against the background of the principle of complementarity as contained in the Rome Statute;

(b) contextualise the concept of positive complementarity within the system of international criminal justice;

(c) explore the philosophical and theoretical foundations of the concept of positive complementarity and determine its normative viability;

(d) assess the opportunities presented, the benefits generated, and the challenges raised by the concept of positive complementarity;

(e) analyse capacity building requirements of national criminal courts; and

(f) propose a legal framework which provides for the definition of positive complementarity.

## 1.4 Justification of the study

My decision to pursue this study was prompted largely by the following considerations.

(1) There is a glaring dearth of scholarly work on a legal and institutional framework for the concept of positive complementarity. This study is thus conceived as a modest contribution to address this *lacuna*.

(2) The need to analyse policy and to design a viable legal and institutional framework for positive complementarity cannot be gainsaid. This study provides a conceptual and theoretical framework that may form a basis for national and international policy-makers to consider in accelerating the pace of the establishment of an effective institutional and legal framework for the concept of positive complementarity, which will ensure an effective enforcement regime for the Rome Statute.

(3) This work offers a template upon which to develop, inspire, and engender impetus for further scholarly legal research in international criminal law as it relates to the concept of positive complementarity.

## 1.5 Methodology of the study

This study relies on the analysis of relevant principles of international criminal law and elements of national criminal law.

In engaging in a qualitative research inquiry,[48] this thesis critically analyses the concept of positive complementarity from the perspectives of both national and international law. Consequently, the study assesses the extent to which a viable legal and institutional framework could be designed for a universally coherent application of the concept of positive complementarity.

[48] See generally Creswell *Qualitative Inquiry* 35-177.

The research analyses both primary and secondary material. The legal materials dealing with the ICC are drawn from a cross-section of official sources, including the various ICC Legal Tools,[49] decisions of the ICC, International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). The material has been accessed from the vast repository of authoritative online sources. Numerous authoritative works on the various legal themes addressing the concept of positive complementarity are also explored in order to develop a framework for analysis, evaluation, and proposals. Reliance is also placed on numerous articles in international legal journals and authoritative textbooks.

Various relevant international and domestic policy documents are analysed in order to identify appropriate national policies in various states and their approach to complementarity in general, and positive complementarity, in particular.

Judgments of the ICC and of the ICTY and ICTR are analysed in detail.

In conclusion, the methodology adopted in this research recognises the notable dearth of legal resources on positive complementarity, and so seeks to contribute to a better understanding of this concept.

[49] See generally Bergsmo, Bekou & Jones (2010) 2/2 *Goettingen Journal of International Law* 791-811. See also the International Criminal Court Legal tools data base at http://www.casematrixnetwork.org/icc-legal-tools-database/ and http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/legal%20tools%20extern/Pages/legal%20tools.aspx (date of use for both: 8 May 2017).

# CHAPTER 2

# THE EMERGENCE OF THE COMPLEMENTARITY PRINCIPLE

## 1. Introduction

The topic of this study, positive complementarity, is deeply rooted in the principle of complementarity as articulated in the Rome Statute.[50] The principle of complementarity within the context of international criminal justice, is concerned with the distribution of jurisdiction between the ICC and the courts within national criminal systems.[51] Any attempt at developing a legal framework for positive complementarity must begin with an analysis of the relevant provisions of the Rome Statute.

This chapter starts by tracing the historical evolution of the principle of complementarity through a description of the evolution of the distribution of jurisdictional competence between national criminal courts and international criminal courts and tribunals. The tribunals considered include the *ad hoc* international military tribunals established after the Second World War, namely the International Criminal Court, the International Military Tribunal (Nuremberg), and the

[50] See art 1 of The Rome Statute, which provides, inter alia, that: "An international Criminal Court… shall be complementary to national criminal jurisdiction." See further Preamble to the Rome Statute. See also Krings (2012) 4 *Goettingen Journal of International Law* 737-63; Kleffner *Complementarity* 114-16; El Zeidy (2002) 23 *Michigan Journal of International Law* 869; Holmes "Principle of complementarity" 41-5.

[51] For definition of jurisdiction see generally Legal Encyclopedia *Legal Information Institute* https://www.law.cornell.edu/wex/jurisdiction (date of use: 5 March 2017). Jurisdiction has been defined as the power of a court to adjudicate cases and issue orders. Also defined as territory within which a court or government agency may properly exercise its power. A jurisdictional question may be broken down into three components: whether there is jurisdiction over the person (*in personam*); over the subject matter or *res* (*in rem*), and whether there is jurisdiction to render the particular judgment sought. In other words jurisdiction is the authority given by law to a court to try cases and rule on legal matters within a particular geographical area and/or over certain types of legal cases.

International Military Tribunal for the Far East (Tokyo Tribunal), as well as the ICTY and ICTR.[52]

To explain the context in which the concept of positive complementarity evolved, it is important to understand the nature of the principle of complementarity and its limitations.[53] The analysis of the principle of complementarity provides a background to the discussion of the concept of positive complementarity in subsequent chapters.

The Nuremberg and Tokyo international military tribunals are discussed only to illustrate the distribution of jurisdictional competence. An historical survey of the ICTY and ICTR is undertaken as regards jurisdictional competence.[54]

An historical survey of the international military tribunals, the ad hoc tribunals and the Sierra Leone court is therefore undertaken to demonstrate the significance of the origin and evolution of the court systems that culimnated into the ICC, that has eventually sought to adopt a positive complementarity system. The historical survey of these earlier courts is, therefore, significant to a background understanding of the evolution of the concept of positive complemenatrity which owes its existence to certain structural failures in the rigid framework which formed the basis of these courts.. The analysis of the distribution of jurisdiction competence over a period of time and in evolving jurisdictions provides a useful background to explain the evolution of the concept of positive complementarity.

The trend that emerges from the work of these tribunals up to the establishment of the ICC, may be described, in international criminal law terms, as the shift or transition

[52]See art 1 of International Military Tribunal (1945) and art 1 of International Military Tribunal for the Far East Charter (1946).
[53] See generally Bernard (2011) 1/19 *International Journal of Humanities and Social Science* 203-16.
[54] See generally Brown (1998) 23 *Yale Journal of International Law* 383-95.

from primacy to complementarity. It is to this legal and judicial transition from primacy to complementarity, that attention now turns.

## 2. From primacy to complementarity

### 2.1 General

The principle of complementarity is essentially about jurisdiction and who can exercise jurisdiction in the context of international criminal law.[55] It is necessary at this point to examine how the rules of general international law deal with the distribution of jurisdiction.[56] Thereafter, attempts at establishing international jurisdiction are considered.

The ICC is premised on the concept of complementarity, which in effect means that the primary responsibility for exercising jurisdiction in respect of international crimes rests with domestic criminal systems.[57] However, it should be noted that there is no comprehensive convention obliging states to criminalise and exercise jurisdiction over international crimes at national level.[58]

There are two approaches to state jurisdiction under public international law.[59] The first allows states to exercise jurisdiction as they see fit unless there is a prohibitive rule to the contrary.[60] The second prohibits states from exercising jurisdiction unless

[55] See discussion in Philippe (2006) 88 *International Review of the Red Cross* 380.
[56] Ibid.
[57] See generally Tladi D "Complementarity and cooperation in international criminal justice: Assessing initiatives to fill the impunity gap" *Institute for Security Studies Paper* 277, Institute for Security Studies, Pretoria, November 2014 at 1.
[58] Ibid.
[59] See generally Ryngaert *Approach to Jurisdiction* 5-20.
[60] See generally the approach taken by the *Lotus Case (France v Turkey)* PCIJ (1927) (ser A) No 10.

there is a permissive rule allowing them to do so.[61] Under the latter approach, states are not authorised to exercise their national jurisdiction unless they can rely on permissive principles such as territoriality, personality, protection, and universality.[62]

The territoriality principle can be viewed as either subjective or objective.[63] It is subjective where the state has the power to exercise its criminal jurisdiction or authority within its national territory.[64] The territoriality principle is objective where the state has jurisdiction over extraterritorial conduct which has an injurious effect in its territory. This is sometimes referred to as 'effects' jurisdiction.

Under customary international law, territoriality serves as the basic principle of jurisdiction. However, in exceptional circumstances, national laws may be given extraterritorial application, provided the national laws can be justified by one of recognised principles of extraterritorial jurisdiction under public international law.[65]

Whereas under the nationality principle a state may exercise jurisdiction over its nationals and their conduct, irrespective of whether they are in or outside of its territory; the passive personality principle arises where a state exercises jurisdiction over acts committed by a non-national but where the victim is a national of the prosecuting state.[66]

The protective personality principle allows a state to exercise jurisdiction over conduct outside of its borders but which threatens its security; while the principle of universality recognises that conduct outside its national borders is a danger to the state

[61]See generally Brown (1998) 23 *Yale Journal of International Law* 383-95.
[62]See (1964)111/1 *Recueil des Cours de l"Academie de Droit Internationale* 23.
[63] See generally Buxbaum (2009) 57 *American Journal of Comparative Law* 631.
[64]See Lowe (1981) 75 *American Journal of International Law* 257, 263.
[65]See generally Beale (1923) 36 *Harvard Law Review* 241.
[66]See generally O'Keefe (2004) 2 *Journal of International Criminal Justice* 735 at 741. See also Berman (2007) 32 *Yale Journal of International Law* 301, 317 and Bradley (2001) *University of Chicago Legal Forum* 323.

and its nationals.[67] Against this background the question of jurisdictional competence emerges as important.

In an era without international tribunals, national courts did not only have primacy of jurisdiction, but also had sole jurisdiction over criminal acts. Therefore, it was states, whether exercising jurisdiction based on territoriality, nationality, or passive or protective personality, that were responsible for the prosecution of offences. Without international criminal tribunals, the issue of the distribution of jurisdiction between international tribunals and domestic courts did not arise. The only issue involving the distribution of jurisdictional competence that *may* have arisen, concerned its horizontal distribution between states *inter se*.

## 2.2 The international military tribunals

A consideration of the establishment and functions of the United Nations' War Crimes Commission (UNWCC) set up on 20 October 1943, provides a background against which to analyse international military tribunals.[68] The UNWCC was primarily a fact-finding body which performed advisory functions for the

[67] See generally Inazumi *Universal jurisdiction* 138. See also Ryngaert (2009) 9 *International Criminal Law Review* 197.

[68] See generally United Nations Archives and Records Management Section, at https://archives.un.org/sites/archives.un.org/file/files/Finding%20Aids/2015_Finding_Aids/AG-042.pdf (date of use: 17 May 2017). The Commission established before the formation of the United Nations was initially called the United Nations Commission for the Investigation of War Crimes. It was the result of a meeting at the Foreign Office in London by 17 Allied Nations, including all of the major powers except the USSR. It was established on 20 October 1943. The constituent legal status of the UNWCC can be traced to the Diplomatic Conference held at the Foreign Office, London. See London International Assembly, Proceedings of the Second Meeting 20 October 1941 at 14 LSE Achives MF434; LNU – Legue of Nations Union vol 6/5. Also available at https://www.legal-tools.org/doc/641ea3/pdf/.

development of the principles of international law and planning for international tribunals.[69]

The UNWCC was established to collect, investigate, and record evidence of war crimes, and to identify, where possible, the individuals responsible.[70] However, the UNWCC had no power to prosecute suspected war criminals and could only report back to its UN members.

It was then incumbent upon the governments of the member states of the UNWCC to convene a tribunal – such as the International Military Tribunal (Nuremberg) – which would prosecute.[71] Against this backdrop, the nature and jurisdiction of the international military tribunals are discussed in the next section.

The Nuremberg and Tokyo military tribunals were designed to address the atrocious crimes committed during the Second World War.[72] The origins, composition, and jurisdiction of the Nuremberg and the Tokyo tribunals differ in several significant respects.[73] This survey begins with the International Military Tribunal (Nuremberg), which was constituted before the Tokyo War Crimes Trials.

### 2.2.1 The International Military Tribunal (Nuremberg)

The International Military Tribunal held at Nuremberg (IMT Nuremberg) was a product of victory in war. In early winter 1942, the governments of the Allied Powers

[69] See generally Cassese A "The role of international courts" 1, 13.
[70] See generally Megerman S *The Tokyo War Crimes Trials (1946-48): Notes, Selected Links & Bibliography* available at www.law2.umkc.edu/faculty/projects/ftrials/tokyolinks.html.
[71] See Office of Historian, Department of State USA "The Nuremberg Trial and the Tokyo War Crimes Trials" available at https://history.state.gov/milestones/1945-1952/Nuremberg (date of use: 9 June 2017).
[72] See generally Brown (1998) 23 *Yale Journal of International Law* 383-395.
[73] Ibid.

(the United States of America, Great Britain, France, and the Soviet Union) who had emerged victorious in the Second World War announced in a joint statement from the Palace of St James in London, United Kingdom (the St James Joint Statement),[74] their intention to prosecute and punish Nazi war criminals

The St James Joint Statement affirmed the determination of the Allied Powers to prosecute those responsible for violent crimes against civilian populations during the Second World War.[75] In the statement, Germany's 'policy of aggression'[76] was condemned. The statement announced that the participating governments

> placed among their principal war aims the punishment, through the channel of organized justice, of those guilty of, or responsible for, these crimes, whether they have ordered them, perpetrated them or participated in them.[77]

This statement shows that the international community had begun to recognise the need for an organised form of international criminal justice to enforce international criminal law at an international level. The need to mete out justice for criminal offences, of course raises the prospect of potential competition between national jurisdictions and the international entity established for this purpose. It is this potential competition that necessitated some framework for distribution of jurisdictional competence.

In October 1943, the Moscow Declaration was signed by the three main powers represented by the British Prime Minister, Winston Churchill, the Soviet Union leader, Josef Stalin, and the President of the United States of America, Franklin D

[74]See generally United States Holocaust Memorial Museum "Introduction to the Holocaust" at www.ushmm.org/wlc/en/Article.php?ModuleId=10005143 (date of use: 8 June 2017).
[75]Ibid.
[76]See generally Office of Historian, Department of State USA, "The Nuremberg Trial and the Tokyo War Crimes Trials" available at https://history.state.gov/milestones/1945-1952/Nuremberg (date of use: 9 June 2017).
[77]Ibid.

Roosevelt.[78] The essence of the Declaration was that, when armistice was signed, persons deemed responsible for war crimes would be returned to those territories in which the crimes had been committed, and would be judged according to the laws of the nation concerned.[79] This is reminiscent of the nationality principle in international criminal jurisdiction, and served to emphasise the primacy of (national) jurisdiction.

The leaders further resolved that the major war criminals whose crimes could not be assigned to any particular geographic location, would be punished by joint decisions of the Allied governments.[80] The distribution of competence in this context, involves, it is submitted, the allocation of jurisdiction to identified competent adjudicating authorities. This allocation, however, does not necessarily grant primacy to international tribunals. This resolution underscored the significance of a concerted effort by members of the international community to combat impunity. It is submitted that the element of complementarity, as understood in the context of the Rome Statute, was absent from this new development.

Notwithstanding that certain political leaders advocated the summary execution of the Nazi war criminals rather than subjecting the suspects to trial, ultimately the Allied Powers settled for a formal trial process to determine the guilt of the accused. This represents a shift in attitude by certain of the Allied Powers from summary execution to prosecution and trial in which proof of the guilt of the accused was accepted as a requirement for punishment. And in this shift we see the origins of international

[78] See Moscow Declaration on Atrocities, Protocol signed and Issued at Moscow on 1 Novemebr 1943, 1943 For.Rel. (I) 749 available at http://www.cvce.eu/obj/moscow_on_atrocities_november_1943-en-699fc03f-19a1-47f0-aec0-73220489efcd.html (date of use: 5 March 2017).
[79] Ibid.
[80] Ibid.

criminal justice at the hands of an international tribunal[81] – a process which also gave rise to the question of the distribution of jurisdictional competence.

In August 1945, soon after the end of the Second World War, the four major states which had emerged victorious signed the 1945 London Agreement, which effectively established the IMT Nuremberg to prosecute and punish "the major war criminals of the European Axis."[82] The focus at this point appears to have been largely on war crimes, but elements of crimes against humanity were also prosecuted by the tribunal.

Additional countries subsequently 'adhered' to the London Agreement to show their support for the fight against impunity. These countries included Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Uruguay, and Yugoslavia.[83] This was a clear demonstration that the idea of international criminal justice through the trial of suspected war criminals by international tribunals, was increasingly gaining favour among the major states of the world in the post-war era.

The IMT Nuremberg's constitution, functions, and jurisdiction were outlined in the Charter of the International Military Tribunal (the Nuremberg Charter), which was annexed to the 1945 London Agreement.[84] The Nuremburg Charter provided that the Tribunal had the authority to try and punish persons who "committed any of the

[81] See generally Bassiouni *Crimes Against Humanity* 150.
[82] See generally Cassese "The role of international courts" 1, 13.
[83] See Brown (1998) 23 *Yale Journal of International Law* 383-95.
[84] The Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis available at http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf. See specifically, arts 9, 10 and 11 of the Nuremberg Charter.

following crimes" which were listed as crimes against peace, war crimes, and crimes against humanity.[85]

The trials of the German leaders before the IMT Nuremberg for post-war crimes officially commenced in Nuremberg, Germany, on 20 November 1945.[86] The IMT Nuremberg represented the genesis of international criminal law. The Nuremberg trials had a significant impact on the development of international criminal law, including issues of distribution of jurisdictional competence between national and international tribunals.[87]

The IMT Nuremberg presided over the joint trial of senior Nazi political officials and military authorities, as well as several Nazi organisations, for war crimes and other wartime atrocities.[88] These trials of Nazi leaders represent the first serious prosecution of international crimes at an international level before an internationally constituted tribunal.

On 18 October 1945, twenty-four top Nazi political and military leaders were arraigned before the IMT Nuremberg. Nazi leaders charged included Hermann Goering, Rudolph Hess, Joachim von Ribbentrop, Alfred Rosenberg, and Albert Speer. Nazi military dictator Adolf Hitler avoided indictment by committing suicide in April 1945 during the final moments of Germany's surrender.[89] It can be seen from the above list of indictees that indeed the IMT Nuremberg concentrated its prosecution on high- profile suspected criminals.

[85] See Doc A/CN.4/5 available at http://www.un.org/law/ilc/index.htm.
[86] This was about six-and-a-half months after Germany surrendered to the Allied Forces.
[87] See generally Karibi-White (1998) 9 *Criminal Law Forum* 55.
[88] See Nsereko (2008) 19 *Criminal Law Forum* 373-93.
[89] Ibid.

The four charges brought against the Nazi officials arraigned for trial before the IMT Nuremberg were: war crimes; crimes against peace; crimes against humanity; and conspiracy to commit these crimes. It should be noted that the Rome Statute also provides for the prosecution of certain similar crimes – specifically, crimes against humanity (with different elements), crimes of aggression, genocide, and war crimes. These serious crimes were already subject to prosecution as early as at the inception of the IMT Nuremberg.[90]

The Nuremberg trials lasted from November 1945 to October 1946. The IMT Nuremberg invariably prosecuted prominent members of the Nazi regime, who were suspected of having orchestrated or participated in the Holocaust and war crimes. These were personalities who controlled the government systems and power, and it was, consequently, not possible for the German state machinery to bring them to trial without devastating repercussions.[91]

The distribution of jurisdictional competence emerges as an important factor here, in that the IMT Nuremberg focussed on serious international crimes. The study will now focus on the Tokyo War Crimes trials and the other military tribunal addressed which also made a major contribution to the fight against impunity – the International Military Tribunal for the Far East.

### 2.2.2 The International Military Tribunal of the Far East (Tokyo Tribunal)

The IMT Nuremberg was followed by the lesser-known International Military Tribunal for the Far East (Tokyo Tribunal) which was established in Tokyo, Japan, on

[90]See similarities with art 5 of the Rome Statute for the international crimes over which the ICC has competence to exercise jurisdiction.
[91] Ibid.

19 January 1946,[92] although it only convened for the first time on 29 April 1946. The Charter essentially set out the laws and procedures by which the Tokyo trials were to be conducted.[93]

Unlike the IMT Nuremberg, which was set up by the four Allied Powers, the Tokyo Tribunal was set up by the individual initiative of United States' General Douglas MacArthur, Supreme Commander of the Allied Forces in occupied Japan, who issued a special proclamation establishing the Tribunal.[94] MacArthur approved the Charter of the Tokyo Tribunal (Tokyo Charter) on the same day he issued the proclamation.[95] To this extent the Tokyo Tribunal differs from the ICC, which was created by way of a treaty adopted multilaterally by states. The question arising is, of course, whether, given the facts of its establishment, the Tokyo Tribunal can truly be regarded as an international tribunal.

On 6 October 1945 MacArthur received a directive – subsequently endorsed by the other Allied Powers – granting him the authority to proceed with the major trials, and giving him basic guidelines for their conduct.[96]

The Tokyo Tribunal presided over a series of trials of senior Japanese political and military personnel pursuant to its authority "to try and punish Far Eastern war criminals."[97]

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[92] Article 1 of International Military Tribunal of the Far East Charter (1946) available at www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf

[93] Article 6 Charter of the International Military Tribunal London 8 August 1945 available at www.un.org/en/genocideprevention/documants/atrocity-crimes/Doc.3_3_1946%20Tokyo%20Charter.pdf.

[94] See Preambular Special Proclamation by Douglas MacArthur, International Military Tribunal for the Far East, Tokyo 19 January 1946, 20 available at http://un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (date of use: 23 June 2017).

[95] In accordance with the provisions of art 7 of the CIMTFE the original Rules of Procedure of the International Military Tribunal for the Far East with amendments were promulgated on 25 April 1946, 3 days to the convening of the Tribunal.

[96] See Truman HS *Tokyo War Crimes Trials (Library & Museum)* at http://www.trumanlibrary.org/whistlestop/study_collections/Nuremberg/Tokyo.htm (date of use: 2 May 2017).

The prosecution team at the Tokyo Tribunal consisted of judges from eleven Allied Powers, namely: Australia; Canada; China; France; Great Britain; India; the Netherlands; New Zealand; the Philippines; the Soviet Union; and the United States of America.[98] The Tokyo Tribunal, like the IMT Nuremberg, provided a basis for the distribution of jurisdictional competence in terms of which the focus of international tribunals was on serious crimes, while less serious crimes were left to the national courts of the relevant states.

### 2.2.3 Conclusion

The IMT Nuremberg and Tokyo Tribunal did not use the principle of complementarity in their trials. The trials proceeded before the military tribunal, irrespective of the consent or concurrence of national states, as there had been a complete breakdown in system of the national courts of the states[99] covered by the jurisdiction of the military tribunals. The international military tribunals essentially exercised sole jurisdiction. They enjoyed jurisdictional primacy, and had no need to seek prior approval or compliance before they could exercise criminal jurisdiction over any suspect arraigned before them. The exercise of primary jurisdiction is one feature which distinguishes the international military tribunals from the ICC. The historical survey of these courts is therefore important in providing a background in understanding the evolving concept of positive complementarity.

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[97] Ibid.
[98] See Megerman *The Tokyo War Crimes Trials* accessible at www.law2.umkc.edu/faculty/projects/ftrials/tokyolinks.html (visited 15 May 2017).
[99] See The International Military Tribunal, Trials of the Major War Criminals before the International Military Tribunal Nuremberg 14 November 1945-1 October 1946 Official Text at 24-6 available at https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

In a similar vein, the exercise of jurisdiction by the international military tribunals differed from the basis of jurisdiction exercised later by the *ad hoc* international criminal tribunals, as will be indicated in the following section.

### 2.3 The *ad hoc* international criminal tribunals

After the mayhem of the Second World during the 1940s, international criminal justice became a matter of urgent concern to the international community. Shocking atrocities perpetrated in Rwanda and the Former Yugoslavia again attracted attention of the world.[100] The mass killings in these two regions consequently resulted in the establishment of the *ad hoc* tribunals to deal urgently with cases arising from the atrocities. This section of the study examines the *ad hoc* criminal tribunals set up to deal with the rapidly deteriorating situations in the two territories.

The last quarter of the 20th century, witnessed significant developments in international criminal law. This period saw the creation of two *ad hoc* international criminal tribunals, the ICTY and the ICTR. The creation of these two tribunals represents a significant step forward in the interpretation and implementation of the principles of international criminal law.[101]

Equally significant, is the fact that the ICTY and the ICTR represent a post-Cold War emerging international consensus on holding individuals accountable for atrocities committed.[102]

The United Nations Security Council (UNSC) set up ICTY and ICTR in 1993 and 1994 respectively, by resolutions adopted under Chapter VII of the UN Charter.[103]

[100] See generally Tolbert & Kontic "The International Criminal Tribunal" 135.
[101] Roper & Barria *Designing Criminal Tribunals* 18.
[102] Ibid.
[103] United Nations Security Council Resolution SC res 827(1993) adopted on 25 May 1993.

The terms of the international criminal tribunals were tailored specifically for the situations they were mandated to address in Former Yugoslavia and Rwanda, respectively.[104]

### 2.3.1 The International Criminal Tribunal for the Former Yugoslavia (ICTY)

The ICTY was created as an *ad hoc* entity to deal with the unique and deteriorating security situation in the Former Yugoslavia.[105] It is *ad hoc* in that it is intended to be temporary and once the situation for which it was established has been resolved, its mandate will fall away.[106]

The armed conflict in Former Yugoslavia had a dual character; dual, in that the war was, on the one hand, an international war between the former Yugoslavian Republics of Bosnia-Herzegovina, Croatia and Serbia; while, on the other hand, it was also an internal conflict between the different Bosnian ethnic groups – Croats, Serbs and Muslims – within Bosnia-Herzegovina.[107] Whether one chooses to describe the conflict as international or internal, ultimately it was essentially an ethnic-based conflict.

The humanitarian disasters resulting from the conflicts in former Yugoslavia, Croatia, and within the Federal Republic of Yugoslavia, demanded the immediate attention of

[104] See generally *Prosecutor v Dusko Tadic aka "Dule"* IT-94-1-T (2 October 1995).
[105] See generally Tolbert & Kontic "The International Criminal Tribunal" 135.
[106] It is important to note that the tribunal has now ended and been replaced by Residual Mechanism. The Completion Strategy entailed an important step in the establishment of the Mechanism for International Criminal Tribunals, a new ad hoc body established by the UN Security Council resolution 1966 (2010), to continue the "jurisdiction, rights and obligations and essential functions" of the ICTY. All the Tribunal's investigations were completed on schedule by 31 December 2004.
[107] The Bosnian Croats were supported by Croatia while the Bosnian Serbs received support from the Federal Republic of Yugoslavia.

the international community.[108] Against the background of mass killings and other atrocities, the ICTY was established to prosecute the perpetrators of the atrocities. The Statute of the ICTY provided the legal framework for the prosecution and punishment of the criminals involved in these violent conflicts.

Article 9 of the Statute of the ICTY[109] prescribed the relationship between the national courts and the tribunal by granting the latter primacy over the former.[110] Article 9 provides:

> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
> 2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.[111]

While article 9(1) makes it clear that the ICTY will enjoy primacy of jurisdiction over national courts, the Statute also expressly retains the 'concurrent' jurisdiction of national courts.

The precise nature of the relationship between domestic courts and the ICTY, reflecting both concurrence and primacy, emerges from the ability of the ICTY, at any stage in the procedure, formally to request the national courts to defer to its competence as set out in article 9(2).[112] This jurisdictional primacy, as expressed in

[108] Ibid at 20.
[109] Article 9 Statute of the ICTY UNSC res 827/1993 reprinted in 1993 *ILM* 1159.
[110] See, generally, the discussion in Karibi-White (1998) 9 *Criminal Law Forum* 55; see also Brown (1998) 23 *Yale Journal of International Law* 383, 394-5.
[111] Article 9 ICTY Statute.
[112] Ibid.

the ICTY Statute and Rules of Procedure, is exercised by the ICTY as a judicial discretion. Consequently, the jurisdiction of the ICTY is grounded in the UNSC enforcement measures, rather than the consent of the state – as would be the case with a tribunal (such as the ICC) created in terms of a treaty. The fact that the creation of the ICTY flowed from a UNSC resolution impacts on its jurisdictional competence in that the UNSC specifically allocated jurisdictional competence to the creature of the Statute of the ICTY. This resolved the issue of the allocation of jurisdictional competence between the ICTY and the national courts.

The ICTY was established amid heated debate as to whether Chapter VII of the Charter of the United Nations (UNC) included the power to establish a court or judicial system.[113] This debate was effectively resolved by the ruling of the ICTY Appeals Chamber in the case of *Prosecutor v Tadic (Decision on the Defence Motion for the Interlocutory Appeal on Jurisdiction)*.[114]

Briefly, in the *Tadic* appeal case the Appeals Chamber ruled that the ICTY was empowered to pronounce on the plea challenging the legality of the establishment of the Tribunal. The appellant had argued, inter alia, that the establishment of such an international criminal tribunal had not been contemplated by the framers of the UNC as one of the measures specified under Chapter VII.[115] The appellant further contended that the UNSC was constitutionally or inherently incapable of creating a judicial organ, as it was conceived in the UNC as an executive organ, and so did not have judicial powers which could be exercised through a subsidiary organ.[116]

[113] The ICTY was established in 1993 by UNSC res 808.
[114] The *Tadic* Case ICTY 94-1 (2 October 1995).
[115] Ibid.
[116] Ibid.

The Appeals Chamber dismissed the challenge to the primacy of the ICTY over national criminal courts. This ruling was in response to the challenge by the defendant to the jurisdiction of the ICTY, on the second ground that "the primacy over national courts which Security Council resolution 827 purported to give to the Tribunal was unlawful."[117]

The Chamber accordingly ruled that the ICTY enjoyed subject-matter jurisdiction over the case before it. In sum, the Appeals Chamber held that the establishment of the ICTY fell squarely within the powers of the UNSC in terms of article 41 of the UNC.[118] For these reasons, the Appeals Chamber concluded that the ICTY had been lawfully established as a measure under Chapter VII of the UNC.[119]

Notwithstanding the primacy of its jurisdiction as explained above, the ICTY has referred certain cases to national criminal courts in accordance with the so-called 'completion strategy for tribunals'.[120] The completion strategy was designed to ensure a phased and coordinated completion of the work of the ICTY by 2010.[121] The ICTY was, however, unable to meet this tight timetable and was compelled to notify the UNSC that all trials were expected to be completed by end of 2012. In reality, the ICTY only completed its last full trial – the *Ratko Mladic* case – in December 2016; and this case is still open for appeal.[122] Accordingly, the UNSC unanimously adopted

[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] The Completion Strategy as established by UNSC res 1503 UN Docs S/REA/1503. See Completion Strategy Reports available at http://www.icty.org/sid/10016 (date of use: 12 May 2017).
[121] See generally UNSC res 1534 (2004) UN Doc S/RES/1534 at 5. Completion Strategy adopted in UNSC res 1503 (2003) UN Docs S/REA/1503.
[122] See Mulholland A "Farewell to the ICTY: A look back at twenty-four years of international justice" *Human Rights Brief* 21 February 2017 available at www.hrbriefs.org/hearings/farewell-icty-look-back-twenty-four-years-international-justice/.

resolution 2329 which effectively extended the ICTY mandate and the terms of its ICTY judges to 30 November 2017, or "until the completion of their cases."[123]

This completion strategy enabled the ICTY to shift focus to the so-called high-profile offenders while leaving the lesser-ranking suspects to be dealt with by the national courts in Bosnia-Herzegovina or other national jurisdictions competent to try the cases.[124] This is in line with the principle of primacy in that it is the ICTY which determines this jurisdiction.

The strategy of referring cases to national criminal courts effectively reinforces the capacity of the national courts to handle core international criminal cases.[125]

The following section turns to the background to and basis for the jurisdiction of the 'twin' *ad hoc* international criminal tribunal – the International Criminal Tribunal for Rwanda.

### 2.3.2 The International Criminal Tribunal for Rwanda (ICTR)

Insecurity and a rapidly deteriorating humanitarian situation in Rwanda, necessitated the intervention of the international community to redress the atrocities visited upon the innocent civilian population in the Central African state. Unlike the atrocities in the former Yugoslavia, the Rwandan conflict was essentially an internal ethnic conflict.[126]

[123] UNSC res 2329 19 December 2016.
[124] See generally Raab (2005) 3/1 *Journal of International Criminal Justice* 82-102 available at https://doi.org/10.1093/jicj/3.1.82 (date of use: 12 March 2017).
[125] Ibid.
[126] The two major tribes in Rwanda are the Tutsi and the Hutu.

Rwanda (as Rwanda-Urundi) was placed under Belgian rule, both under the mandate of the League of Nations (1916-1945) and as a United Nations trust territory (1945-1961). In 1961 the Belgian rulers organised parliamentary elections in which the Hutu majority won most of the mayoral seats.[127] This election outcome sparked conflict which led to some of the defeated Tutsis fleeing into exile.

The exiled Tutsis organised themselves as a liberation movement and launched a military invasion using their paramilitary wing the Rwanda Patriotic Front (RPF) led by Paul Kagame. Owing to the pressure of incessant military incursions into Rwanda, the Arusha Peace Accords were signed between the RPF and the Rwandan government in August 1993. The Accord provided for a transitional power-sharing deal between the RPF and the elites among the majority Hutu in power.[128]

The 1994 Rwandan genocide involved the mass killing of between 500 000 and 900 000 Tutsi Rwandese and politically moderate Hutus by gangs of Hutu extremist military and police, or security personnel directed by the Hutu government.[129] The killings started in April 1994 immediately after the signing of the peace agreement creating democratic institutions in Rwanda. The genocide continued after the peace agreement for some one hundred days until mid-July when the majority of the Hutu rebels had been defeated. Some 500 000 Tutsis were killed[130] and in the region of two million refugees (mostly Hutus) had fled into neighbouring Tanzania, Uganda, the current Democratic Republic of Congo, and Burundi.[131]

[127] See generally Morrill (2004) 6/1 *Online Journal of Peace and Conflict Resolution* 1-66 available at http://www.trinstitute.org/ojpcr/6_1morrill1.pdf (date of use: 5 March 2017).
[128] See generally United Nations Mechanism for the International Criminal Tribunals available at http://www.unictr.unmict.org/en/tribunal (date of use: 5 March 2017).
[129] See generally Rohne *International Jurisdiction and Reconciliation*.
[130] These are conservative figures.
[131] Many more remained unaccounted for, and again these statistics are conservative.

One of the measures taken by the international community was the establishment of the International Criminal Tribunal for Rwanda (ICTR) in November 1994 by a resolution of the UNSC.[132]

The ICTR was established to "prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994."[133] Interestingly, much as the Tribunal was established at the request of the government of Rwanda,[134] its establishment was later the subject of reservations from the government of Rwanda itself.[135] The reservations arose when it came to the attention of the Rwandan government that the jurisdictional competence of the ICTR extended beyond acts of genocide, and further, that government officials were precluded from being granted immunity.[136] The absence of immunity for government officials was a great disincentive which immediately prompted the Rwandan government to enter a reservation with the UN.[137]

The offices and chambers of the ICTR were located in Arusha, Tanzania with satellite offices in Kigali, Rwanda. The Tribunal started work in 1995.

Article 8 of the Statute of the ICTR (which is similar to art 9 of the Statute of the ICTY) confers primacy of jurisdiction on the *ad hoc* tribunal.[138] Article 8 of the ICTR Statute provides:

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[132] United Nations SC res 955 (1994), S/RES/955 (1944) adopted on 8 November 1994 UN Doc S/1994/1115 (1994).
[133] See information posted on the official website of United Nations Mechanism for the International Criminal Tribunals available at http://www.unictr.unmict.org/en/tribunal (date of use: 16 May 2017).
[134] See UNSC resolution adopted in response to request by Rwanda to set up the ICTR; UNSC S/RES/955 (1994).
[135] Ibid.
[136] Article 6(2) Statute of the ICTR.
[137] See UN Doc S/1994/1115 (1994). See further art 6(2) Statute of the ICTR.
[138] Article 8(2) Statute of the ICTR.

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.
2. The International Tribunal for Rwanda shall have primacy over national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Since its commencement, the ICTR had indicted ninety-three individuals suspected of having been responsible for serious violations of international humanitarian law in Rwanda during 1994. Among the indictees are high-ranking military officials, prominent business persons, religious leaders, politicians, media personalities, and members of the local militia.[139] In this way – as had the tribunals preceding it – the ICTR also focussed on prosecuting high-profile offenders, leaving the lower-level suspects to the jurisdiction of the national criminal courts.

With its 'sister' international tribunals, the ICTR played a crucial pioneering role in the establishment of a credible criminal justice system, and in the process generated a substantial body of jurisprudence on war crimes, crimes against humanity, and genocide – all crimes reflected in the Rome Statute.[140]

The last trial judgment by the ICTR was delivered on 20 December 2012 in the *Ngirabatware* case.[141] Only cases serving before the Appeals Chamber remained. The United Nations Mechanisms for International Criminal Tribunals (MICT) assumed

[139]Ibid.
[140]Article 5 of the Rome Statute.
[141] *Prosecutor v Augustin Ngirabatware* ICTR-99-54-T before Trial Chamber II. Augustin Ngirabatware was charged with genocide, complicity in genocide, direct and public incitement to commit genocide, extermination, and rape as crimes against humanity in Gisenyi prefecture in Rwanda between 1 January and 17 July 1994. Ngirabatware was found guilty on 3 counts including genocide and rape as crime against humanity, and was sentenced to 35 years' imprisonment.

responsibility for the residual functions of the ICTR on 1 July 2012. The MICT assumed the key function of tracking-down and arresting the three accused fugitives from justice on charges of genocide and crimes against humanity – Felicien Kabuga, Protais Mpiranya, and Augustin Bizimana.[142]

Given the serious atrocities the *ad hoc* international criminal tribunals were dealing with, they needed a more than simple concurrent jurisdiction with national courts, if they were to deal effectively with the alarming security conditions. It is suggested that it was necessary to grant the tribunals extraordinary jurisdiction that would not be subject to unwarranted interference from vested interests in the national states. Accordingly, it could be argued that extraordinary jurisdictional primacy granted to the *ad hoc* international criminal tribunals was justified in the circumstances. It is suggested that the degree of the atrocities was indeed a threat to global peace and security. In effect, the situations in Rwandan and Former Yugoslavia were seen as constituting a threat to international peace and security.[143]

An important point worth making is that the Statute of the ICTR provided that by undertaking prosecution it was intended to make a contribution towards reconciliation within Rwandan society.[144] This is expressly stated in the Statute where it is provided in its seventh preambular paragraph, that:

> [C]onvinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law

[142]The mechanism has jurisdiction to conduct trials and supervise any sentencing along with previous sentences imposed before the ICTR was wound up.
[143]Article 39, Charter of the United Nations adopted 26 June 1945 entered into force 24 October 1945, as amended by GA res 1991 (XVIII) (17 December 1963) entered into force 31 August 1965 in 557 *United Nations Treaty Series* 119.
[144] The ICTR Statute is available at http://www.un.org/ictr/statute.html.

> would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.[145]

This statement reflects on the position of the ICTR Statute regarding the distribution of jurisdiction in favour of an international tribunal. However, it could be argued that the statement is a mere preambular proclamation, and would have carried greater weight had it been incorporated in the text of the Statute.

To summarise: having considered both the ICTY and the ICTR, some comparisons can be made and conclusions drawn. It is noted that the two *ad hoc* international criminal tribunals enjoyed jurisdictional primacy in the sense that they had priority jurisdiction in respect of international crimes committed in the states concerned, irrespective of whether or not the national authorities failed to investigate or prosecute the suspected offenders. This underscores the tribunals' jurisdictional primacy over national criminal courts. Finally, it is equally important to observe that apart from their primacy of jurisdiction, the tribunals' jurisdiction was also designed to be concurrent with that of the national courts.

It can be seen that the ICTR and the ICTY shared a common feature in that both were created by UNSC resolutions pursuant to Chapter VII of the UNC.[146] Unlike the ICTY, the ICTR was created at the request of the government in the territory of which the crimes had been perpetrated, namely, Rwanda. The ICTR and the ICTY share a common appeals chamber in The Hague, Netherlands.[147]

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[145]See discussion by Morrill (2004) 6/1 *The Online Journal of Peace and Conflict Resolution* 1-66 available at http://www.trinstitute.org/ojpcr/6_1morrill1.pdf (date of use: 20 October 2016). See further discussion in Rohne *International Jurisdiction and Reconciliation*.

[146] The UN empowering provision on international peace and security.

[147] See United Nations Mechanism for International Criminal Tribunals available at http://unmict.org/en/news/registrars-ictr-sign-statement-co-operation (date of use: 24 September 2017)

The Statute of the ICTR differs from that of the ICTY in a number of respects, notably: the applicable law; subject matter, temporal, personal, and territorial jurisdiction, and organisational structure. This, of course, affected the way in which each of these institutions interacted with the relevant national jurisdictions when it came to the principle of complementarity.

In conclusion, unlike the ICTY and the ICTR which enjoyed primary jurisdiction over the national authorities,[148] as already indicated, the ICC is not based on the principle of the jurisdictional primacy but rather on the principle of complementarity which is explored further in Chapter 3.

The primacy regime was designed to generate "a jurisdictional hierarchy in which domestic jurisdictions retain the ability to prosecute perpetrators, but which preserves an 'inherent supremacy' for the international tribunal."[149] In this way the national authorities still retain the right to prosecute offenders or exercise national jurisdiction notwithstanding the primacy of the tribunals. In this regard, the primacy of jurisdiction appears to have three key elements, namely: (i) concurrence of jurisdiction; (ii) hierarchy; and (iii) the power of the higher court to decide on the issue of jurisdictional competence.

In summary, the Rome Statute elected to distribute jurisdictional competence by way of complementarity and not by primacy of the international tribunal. Apart from the twin international criminal tribunals – the ICTR and ICTY – there were other international criminal tribunals that would generally be described as hybrid in character. It is now necessary to examine this category of tribunal.

[148] Article 9(1) Statute of the ICTY and art 8(2) Statute of the ICTR.
[149] Newton (2001) 167 *Military Law Review* 20, 42.

### 2.3.3 Hybrid international criminal jurisdictions

Like earlier international tribunals, hybrid tribunals had to provide for the distribution of jurisdictional competence. Apart from the ICTR and ICTY, other special courts were established to promote overall efforts in the fight against international crime.[150]

This group of tribunals is important in the context of positive complementarity as they provide an historical background to state efforts to combat impunity within their own national jurisdictions.

The mixed criminal tribunals represented a shift away from the structure of the ICTR and ICTY to a hybrid model with both domestic and international components.[151] It is for this reason that they are referred to as 'hybrid' or 'mixed' tribunals. In 2000, these mixed criminal tribunals were set up in Sierra Leone, East Timor, Kosovo, Lebanon, and Cambodia. They represented a new regime designed to give impetus to the fight against international crimes on a domestic level.

In March 2000, the Serious Crimes Panel for East Timor (SCPET) was established, and in July of the same year, the Extraordinary Chambers for Cambodia (ECC). In August, the Special Court for Sierra Leone (SCSL) was likewise established.[152]

The so-called hybrid international criminal tribunals each exhibits distinct features designed to suit the peculiar circumstances obtaining in a given situation within a specific state. As an example, the SCSL is considered in detail.

[150] See generally *Prosecutor v Augustin Ngirabatware* ICTR-99-54-T
[151] See generally *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T (2 Spetember 1998) 166 available at http://www.unhcr. org/refworld/docid/40278fbb4.html (date of use: 5 March 2017).
[152] See generally Cassese "The role of international courts" 13.

### 2.3.3.1 The Special Court for Sierra Leone (SCSL)

The agreement establishing the SCSL [153] provided that the court would have jurisdiction over certain serious crimes committed in Sierra Leone. This meant that Sierra Leonese domestic courts could prosecute only under limited circumstances.[154] On the other hand, the constitution of the tribunal also promoted domestic ownership of the process in that its judges were drawn from both the domestic and the international 'pool' of judges.[155]

The conflict in Sierra Leone, unlike those in Rwanda and Former Yugoslavia or Cambodia, had no ethnic component. Because there was no ethnic component, the crime of genocide was not included in the crimes under the Statute of the SCSL. The rampant crimes in Sierra Leone were perpetrated by rebel forces whose main aim was personal enrichment.[156] It has been suggested that the armed conflict in Sierra Leone began when the Revolutionary United Front (RUF) rebels, headed by Foday Sankoh, launched armed incursions into the eastern part of the country on 23 March 1991.[157]

After protracted fighting, escalating rebel activity, and mounting international pressure on the President of Liberia, Charles Taylor, in June 2000 the government of Sierra Leone requested the assistance of the United Nations to establish a court to prosecute the perpetrators of the civil war in Sierra Leone.[158]

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[153] Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone available at www.rscsl.org/Documents/scsl-agreement.pdf .
[154] Artcile 5 Statute of the Special Court for Sierra Leone.
[155] Article 2 of the Agreement on the Establishment of a Special Court for Sierra Leone available at www.rscsl.org/Documents/scsl-agreement.pdf.
[156] See generally Roper et al *Designing Criminal Tribunals* 31. No ideology drove the rebels to create havoc. The rebels did not specifically target the ethnic communities of Temne, Mende or Krio.
[157] Ibid at 37.
[158] The Sierra Leone conflict had a regional component given the way Liberian President, Charles Taylor, supported the RUF rebels to fuel the civil war in Sierra Leone and ensure continuity of the 'blood diamond' trade.

The case of Sierra Leone appeared unique in that an independent special court in preference to an *ad hoc* international criminal tribunal was established. This was prompted by the need to adjudicate innumerable serious violations of international law within Sierra Leone.[159]

Because of the prohibitive financial implications involved, the UNSC was reluctant to establish the SCSL.[160] Instead, in August 2000, the UNSC adopted resolution 1315 requesting the UN Secretary-General to negotiate with the government of Sierra Leone to establish an independent special court.[161] The resolution provided that the special court would prosecute those "who bear the greatest responsibility" for human rights violations.[162]

During the course of the negotiations, jurisdiction emerged as a key question. The temporal jurisdiction of the SCSL proved contentious,[163] with the distribution of jurisdiction taking on particular importance in light of the amnesties granted under domestic law pursuant to the Lome Agreement.[164] The Lome Agreement provided, for example, that "in order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon."[165]

In the end, the agreement establishing the SCSL provided bifurcated temporal jurisdiction restricting jurisdiction over domestic crimes to crimes committed after 7

[159] See generally Schocken (2002) 20 *Berkeley Journal of International Law* 436-61.
[160] Ibid.
[161] United Nations res 1315 adopted 14 August 2000; S/RES/1315.
[162] Roper et al *Designing Criminal Tribunals* 36.
[163] Ibid.
[164] See art IX of the Lome Accord available at www.sierra-leone.org/lomeaccord.html.
[165] Ibid.

July 1999; while jurisdiction over international crimes extended back to 30 November 1996.[166]

Despite the argument that the Sierra Leonese conflict began with the incursion by the RUF into eastern Sierra Leone, the UN Secretary-General opted to use 30 November 1996 – the date of the signing of the Abdijan Accord – as the cut-off point as "the Prosecutor and the Court should not be overloaded".

The end-date of the temporal jurisdiction was, however, left open because of the on-going civil war at the time. As much as there was disagreement on specific issues, the bulk of resolution 1315, the draft Statute, and the report by the Secretary-General constituted part of the final Statute adopted by the UNSC.[167]

The agreement officially establishing the SCSL was eventually signed in January 2002.[168] The Statute forms part of the annexure to the Agreement on the Establishment of a Special Court for Sierra Leone. The SCSL finally began operating in July 2002.[169]

The Statute of the SCSL sets out four different types of crime over which the court has jurisdiction, namely crimes against humanity, war crimes (violations of common article 3 of the Geneva Conventions and of Additional Protocol II), other serious violations of international humanitarian law, and crimes under the law of Sierra Leone.[170]

[166] Ibid at 37. United Nations res 1315 adopted 14 August 2000; S/RES/1315.
[167] Ibid.
[168] See generally Romeo (2004) 2/1 *Northwestern Journal of International Human Rights* 2-19.
[169] Ibid.
[170] See generally the Statute of the SCSL.

As a result, the SCSL is a treaty-based court as opposed to the ICTR and ICTY which were established by UNSC resolutions.[171] The jurisdiction of the SCSL is hybrid or mixed in the sense that both the national courts and the special court enjoy concurrent jurisdiction.[172] An important feature of this concurrent jurisdiction, however, is that, like the ICTR and ICTY, the SCSL has primacy and may, at any stage in the proceedings, formally request the national court to defer to its jurisdiction.[173]

Similarly, primacy of jurisdiction may be witnessed in that an individual who has been tried by a national court, may still be arraigned before the SCSL if, for example, the national court failed to show independence or impartiality, or where the proceedings are regarded as a sham[174]

In conclusion, the hybrid nature of the SCSL is reflected not only in the composition of the bench which includes both international and local judges,[175] but also in its jurisdiction over prescribed domestic and international law crimes.[176]

### 2.3.4 Conclusion

From the above analysis of the international tribunals, one may conclude that primacy has had no regard for the consent of the state before instituting prosecution – ie, it was

[171] The *ad hoc* international criminal tribunals, namely the ICTY and the ICTR are products of UN Security Council resolutions and not agreement.
[172] See generally Frulli M "The Special Court for Sierra Leone: Some preliminary comments" *European Journal of International Law* available at www.ejil.org/article.php?article=557&issue=42#download_acrobat_reader (date of use: 5 May 2017).
[173] In this respect there is similarity with the international criminal tribunal in that the Special Court retains primacy of jurisdiction.
[174] In this regard, it has similarities with the ICC which is governed by the principle of complementarity.
[175] See arts 12 and 13 of Statute of the Special Court for Sierra Leone.
[176] Ibid at arts 1 and 4.

immaterial whether or not the state was willing or able to exercise national jurisdiction.

States increasingly feared that their sovereignty was being eroded. To get round this it was necessary to devise a new jurisdictional relationship with states to secure their state sovereignty while at the same time not compromising efforts to fight impunity on an international level.[177]

The core issue here is how to deal with juridical competence where both the domestic and international criminal jurisdiction are invoked concurrently to adjudicate international crimes. In this regard, the historical survey of the ad hoc tribunals sets a useful background for understanding the basis of the evolution and development of the concept of positive complementarity.

## 2.4 The negotiating and drafting history of the Rome Statute

The preparation for and the negotiations surrounding the Rome Statute – including its drafting and adoption – were long and drawn out over more than a century. The idea of a global criminal court can be traced back to the early nineteenth century when Gustav Moynier first advanced the idea of a permanent court to deal with crimes committed during the Franco-Prussian War.[178]

In the following sections, I trace the progressive development of the idea of complementarity in the context of the drafting of the Rome Statute. The study starts – in the next section – with an historical survey of the proceedings of the International

[177] Primacy of jurisdiction would then not be the best option in this regard.
[178] Gustav Moynier was a co-founder of the International Committee of the Red Cross (ICRC).

Law Commission (ILC), concentrating on its preparatory work for the drafting of the Rome Statute.

### 2.4.1 The International Law Commission (ILC)

Resolution 260(III) adopted by the United Nations General Assembly (UNGA) in December 1948, called on the ILC to investigate the possibility of creating an international criminal court, including the option of establishing a Criminal Chamber within the International Court of Justice (ICJ).[179] This followed immediately on the victory of the Allied Powers at the end of the World War II so linking with the establishment of the IMT Nuremberg and the Tokyo Tribunal.[180]

The ILC held its first deliberations between 1949 and 1950. The main focus was on whether or not it was necessary, desirable, and possible to set up an international criminal court as provided for in the authorising resolution of the UNGA.[181] A Committee on International Criminal Jurisdiction was set up by the UNGA on the recommendation of the ILC, to prepare for draft conventions on the establishment of an international criminal court and its constituting Statute.[182]

After considerable deliberations, the ILC finally came up with a Draft Statute for the ICC. In presenting its 1994 final version of the Draft Statute, the ILC stated that in drafting the Statute it took into consideration "the fact that the court's system should

[179] United Nations GA res 260 (III) December 1948. See also United Nations GA res 44/39 A/RES/44/39 4 December 1989.
[180] The Nuremberg Tribunal was set up the victorious Allied Powers. The Tokyo Tribunal was a result of a declaration by USA Military General MacArthur and not by way of any treaty at all.
[181] United Nations GA res 260 (III) B.
[182] Ibid.

be conceived as complementary to national systems which function on the basis of existing mechanisms for international cooperation and judicial assistance …" .[183]

In its 1994 Draft Statute, the ILC sought to allow the international court to intervene in cases where there was no prospect of a suspect being prosecuted before domestic criminal courts.[184] In that context it was intended that the court would, in the interest of international cooperation, act as an entity to complement national criminal jurisdiction.[185]

The principle of complementarity was addressed in the third paragraph of the preamble to the 1994 Draft Statute by providing that the ICC was "intended to be complementary to national criminal justice system in cases where …. trial procedures may not be available or may be ineffective."[186]

The ILC further observed that

> the emphasis is thus on the Court as a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts, or to affect the rights of States to seek extradition and other forms of international judicial assistance under existing arrangements.[187]

Accordingly, draft articles 20, 25, 27, 34 and 35 were proposed to establish the complementary nature of the court.[188]

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[183] (1994) II *Yearbook of the International Law Commission* part 2 para 81.
[184] See first preambular para of the Draft Statute for an International Criminal Court 1994 available at www.legal.un.org.
[185] Ibid at third preambular para.
[186] Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court UN GAOR Forty-Ninth Session Supp No 10 UN Doc A/49/10 1994, Preamble para 3.
[187] Ibid.
[188] (1993) vol II/Part 2 *Yearbook of the International Law Commission* Annex at 37.

Draft article 20 provided for the crimes within the jurisdiction of the court. These crimes included

> the crime of genocide, the crime of aggression, serious violations of laws and customs applicable in armed conflict, crimes against humanity, and crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.[189]

Draft article 25 laid down a process of investigation and prosecution for dealing with complaints by a state party. Draft article 27 provided for the commencement of prosecution, while draft article 34 addressed challenges to jurisdiction, and draft article 35 set out provisions dealing with issues of admissibility.[190]

The ILC noted that

> it is thus by combination of a defined jurisdiction, clear requirements of acceptance of that jurisdiction and principled controls on the exercise of jurisdiction that the statute seeks to ensure, in the words of the preamble, that the court will be complementary to the national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.[191]

The definition of complementary jurisdiction emanated from this observation by the ILC. The concept of complementarity was finally accepted on the basis of the presentation by the Preparatory Committee.

The ILC noted that the purposes set out in the preamble to the Draft Statute were intended to assist in the interpretation and application of the Statute – notably in the exercise of the power derived from draft article 35 which addressed the question of

[189] Article 20 of Draft Statute for an International Criminal Court 1994.
[190] Ibid draft arts 25, 27, 34 and 35.
[191] Ibid.

admissibility.[192] This draft article empowered the ICC to decide, having regard to defined criteria, whether a particular case was admissible and established jurisdiction.

In terms of draft article 35 a case would be inadmissible in three circumstances

> …on the ground that the crime in question
>
> (a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;
>
> (b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or
>
> (c) is not of such gravity to justify further action by the Court.[193]

In its commentary on draft article 35, the ILC observed that

> the grounds for holding a case to be inadmissible are, in summary, that the crime in question has been or is being duly investigated by any appropriate national authorities or is not of sufficient gravity to justify further action by the Court. In deciding whether this is the case the Court is directed to have regards to the purposes of the Statute as set out in the preamble.[194]

The ILC's Draft Statute identified two categories of crimes over which the ICC would have jurisdiction. These were categorised as 'core crimes' and 'treaty crimes.' Core crimes consisted of genocide, aggression, serious violations of the laws and customs applicable to armed conflict, and crimes against humanity.[195]

As regards other crimes, the custodial state and the territorial state would have to consent before the ICC could exercise jurisdiction. In this case, the mere fact that a

[192] Ibid.
[193] Article 35 of Draft Statute for the International Criminal Court.
[194] Holmes "Complementarity: National Courts" 671.
[195] ILC Draft Statute art 20.

state became party to the Statute would not automatically give the ICC jurisdiction. This was regarded as an opt-in system. In the case of referral by the UNSC acceptance of jurisdiction was not required, [196] and the jurisdiction of the ICC was triggered automatically. This provision appears to have been inspired by the practice of the *ad hoc* international tribunals, the ICTY and ICTR, established under UNSC resolutions.

In 1994 the ILC presented the Draft Statute of the International Criminal Court to the UNGA.

### 2.4.2 The *ad hoc* Committee on the Establishment of an International Criminal Court

On receiving the ILC text, the *ad hoc* Committee on the Establishment of an International Criminal Court was established in 1995.

The *ad hoc* Committee met twice and formulated a report which it submitted to the UNGA in September 1995.[197] The report dealt with, inter alia, what happened during the sessions dealing with the concept of complementarity.[198]

The issues of threshold and admissibility procedures, as well as the burden of proof, remained outstanding.[199] Certain members of the Committee were of the view that

[196] Id at art 23.
[197] See generally Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court UN GAOR Fiftieth Session Supp No 22 UN Doc A/50/22 (1995).
[198] Ibid.
[199] Ibid at para 30.

"the principle of complementarity should create a strong presumption in favour of national jurisdiction," which they felt was justified by the advantages available in national judicial systems and the vital interest of states in remaining responsible and accountable for prosecuting violations of their laws.[200]

On the other hand, others contested the view that complementarity generated a presumption in favour of national jurisdiction. Between these two conflicting views, a third view emerged, which advocated a balanced approach that "it was important not only to safeguard the primacy of national jurisdictions, but also to avoid the jurisdiction of the court becoming merely residual to national jurisdiction."[201] I discuss this further in Chapter 3.

The *ad hoc* Committee was replaced by the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom)[202] in late 1995.

### 2.4.3 The Preparatory Committee sessions

The negotiations on the establishment of a permanent international criminal tribunal accelerated in 1995 when the UNGA adopted a resolution to convene the PrepCom.[203]

The PrepCom's mandate was to generate a text that could later be adopted by the member states. In terms of the UNGA resolution, the PrepCom was mandated "to prepare a widely acceptable consolidated text of a convention for an international

[200] Ibid at para 31.
[201] Ibid at para 33.
[202] See UNGA res 50/46 UN GAOR Fiftieth Session Supp No 49 at 307; UN Doc A/50/46 (1995).
[203] Ibid.

criminal court."[204] The PrepCom met at UN Headquarters on six occasions between 1996 and 1998.

The point of departure for the PreCom was a consideration of a preliminary text consisting of 68 articles prepared by the ILC.[205] This text formed the basis for the PrepCom's preparation which culminated in a comprehensive draft convention containing 116 articles, which they submitted to the Rome Conference for further consideration.[206]

The PrepCom analysed, in detail, the different facets of complementarity with regard to the substantive aspects of content and procedure.[207]

During its early sessions it was clear that there was consensus among the delegates that the idea of complementarity was to govern the relationship between the prospective permanent international criminal court and domestic criminal courts.[208] When the PrepCom opened its sessions in March-April 1996, there were varying views as to "how, where, to what extent and with what emphasis complementarity should be reflected in the statute."[209] Differences among Committee delegates as to the scope and full character of the concept of complementarity in the context of the Draft Statute persisted.[210]

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[204] See generally Washburn (1999) 11 *Pace International Law Review* 361 available at http://digitalcommons.pace.edu/pilr/vol11/iss2/4.
[205] Ibid.
[206] See "Report of the Preparatory Committee on the Establishment of an International Criminal Court" United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court UN Doc A/Conf 183/2/Add 1 (1998) (hereafter 'The 1998 Report of the PrepCom'). The Draft Convention had 1700 brackets containing disagreed language.
[207] See Coalition for the International Criminal Court "History of the International Criminal Court" available at http://www.iccnow.org/?mod=icchistory (date of use: 20 October 2016).
[208] See generally Report of the Preparatory Committee on the Establishment of the International Criminal Court vol I 1996 UN Doc A/51/22 para 153.
[209] Ibid.
[210] Ibid.

There seemed, however, to be general agreement within the Committee that the structure of complementarity had been well expressed in article 35 of the Draft Statute.[211]

It was suggested at the PrepCom, that, as regards the meaning of complementarity, the ICC should assume jurisdiction on the grounds of lack of good faith and absence of a credible national justice system.[212] This proposal was based on the argument that the police and criminal law fell within individual state prerogative under international law, and that ICC jurisdiction should be regarded as an exception to this prerogative.[213]

The issue of resource constraints facing the court was a matter of concern for most members of the PrepCom. It was observed that "the limited resources of the Court should not be exhausted by taking up the prosecution of cases, which could easily and effectively be dealt with by national courts."[214] The Committee was also careful to observe that "the establishment of the Court did not by any means diminish the responsibility of States to investigate vigorously and prosecute criminal cases."[215]

On the other hand, certain delegates expressed the view that "complementarity should not be used to uphold the sanctity of national courts. This approach would shift the emphasis from what the Court could do to what the Court should not do."[216] These arguments express the conflicting concerns among delegates regarding preserving national sovereignty on the one hand, and ensuring an effective mechanism for prosecution of serious crimes, on the other. Therefore, while there was agreement on

[211] Ibid.
[212] Ibid para 154.
[213] Ibid paras 153-154.
[214] Ibid para 155.
[215] Ibid para 156.
[216] *Report of the Preparatory Committee on the Establishment of an International Criminal Court,* Vol. I, 1996, A/51/22, para. 158.

the notion of complementarity, it seems clear that there was less agreement on its purpose and application, as will be examined further in Chapter 3.

Certain states also expressed their concern that the terms 'unavailability or ineffectiveness' in the preamble to the ILC's Draft Statute were both vague and intrusive.[217] Others suggested that article 35 be expanded to incorporate not only cases that were still under investigation, but also cases that had been or were being prosecuted, subject to qualifications of impartiality, diligent prosecution, and so forth.[218]

The PrepCom and a Draft Statute introduced two important changes as regards complementarity which went beyond that which was dealt with in the ILC's Draft Statute. These are considered in the next paragraph. The Draft Statute was then submitted to the Rome Conference, so suggesting tentative agreement among Committee members on the admissibility criteria.

The PrepCom also considered the procedural aspects of complementarity – specifically challenges to the court's jurisdiction and the admissibility of a case before the ICC. Article 36 eventually expressed the outcome of discussions in the PrepCom on this topic.[219]

The United States of America (USA) introduced a proposal that sought to allow states to invoke complementarity to challenge the ICC prosecutor's investigations, whether initiated *proprio motu* or as a result of referral by a state party. This, the USA argued,

[217] Article 35 Decision Taken by the Preparatory Committee at its Session held 4 to 15 August 1997 A/AC 249/1997/L 8/Rev 1 1997 annex 1.
[218] The 1998 Report of the PrepCom vol I para 164.
[219] Decisions Taken by Preparatory Committee at its Session held in New York 1-12 December 1997 A/AC 249/1997/L 9/Rev 1 18 December 1997 at 28, 29.

would introduce a stronger safeguard to protect national jurisdictions.[220] The underlying purpose of this provision was to ensure that states were notified of any investigation being conducted by the ICC prosecutor. It meant that the prosecutor would be required to defer investigations in these circumstances, if, for example, he or she was conducting, had conducted, or had an interest in conducting the investigation.[221]

Interestingly, a majority of states favoured limiting the court's jurisdiction to 'core crimes', namely, war crimes, aggression, genocide, and crimes against humanity "to avoid trivializing the role and functions of the Court and interfering with the jurisdiction of national courts."[222] Proposals to extend the list of core crimes to include acts of terrorism and drug trafficking were rejected, leaving only the four crimes noted above on the final list.

The PrepCom completed its work and issued a Draft Statute during its session in March and April 1998.[223] The result was the Draft Statute and Draft Final Act. More specifically, these drafts were completed on 3 April 1998.[224] The Drafts were then submitted to the Rome Conference for further consideration and adoption.

[220] Draft Statute Article 11Bis, preliminary Rulings regarding admissibility: Proposal submitted by the United States of America A/AC 249/1998/WG 3/DP 2 (25 March 1998).
[221] Ibid.
[222] The 1998 Report of the PrepCom para 51.
[223] The 1998 Report of the PrepCom.
[224] See generally Bassiouni (1997) 13 *Novelles Etudes Penales* 5-36.

## 2.5 The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (the Rome Conference)

The UNGA allowed the Rome Conference five weeks within which to finalise the negotiation, drafting, and adoption of the text.[225] The Conference was held in Rome, Italy, between 15 June and 17 July 1998.

In April 1998 a final report and new Draft Statute were presented to the Rome Conference.[226] The principle of complementarity – expressed as draft article 15 on admissibility – was eventually expressly incorporated in various provisions of the ICC Statute, inter alia, paragraph 10 of the Preamble and articles 1, 17, 19 and 53.

According to Bassiouni, about two-thirds of the delegates to the Rome Conference had not participated in either the *ad hoc* Committee or the PrepCom. Many did not have adequate time to study the text as its translation delayed its being distributed to all states by some three weeks. The draft itself was lengthy, totalling some 173 pages and consisting of 116 articles with in the region of 1 300 bracketed sections to allow for optional provisions and word choices. This slowed down negotiations and the speed of the proceedings at the Rome Conference.[227]

Most states were not entirely satisfied with the formulation of complementarity in draft article 15, but the Conference nonetheless settled on it as a balanced compromise provision.[228] China, Egypt, India, Indonesia, and Mexico proposed

[225] See generally GA RES 52/160 UN GAOR Fifty-Second Session Supp NO 32 UN DOC A/RES/52/32 (1997). See also "Report of the Preparatory Committee on the Establishment of an International Criminal Court" UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court UN Doc A/Conf 183/2/Add 1 (1998).
[226] For the negotiation process, see generally Washburn (1999) 11 *Pace International Law Review* 361 available at http://digitalcommons.pace.edu/pilr/vol11/iss2/4 (date of use: 20 October 2016).
[227] See the 1998 Report of the PrepCom at 119-210.
[228] Ibid.

revisiting the negotiations on the provisions concerned on the ground that the texts did not serve what they perceived as their interests.[229] For example, there were concerns that the ICC judges would have too broad a discretion in determining the question of unwillingness to prosecute on the part of the national courts, yet there were no objective criteria to guide the court in arriving at a decision on 'unwillingness'.[230]

In a similar vein, some felt that the term 'undue delay' set too low a threshold,[231] while others considered the criterion of 'partial collapse' of a domestic judicial system, inadequate as a basis of determining inability. These concerns were dealt with by adding the phrase "having regard to the principle of due process recognized by international law" to the criteria for determining unwillingness in paragraph 2 of the draft text.[232]

Some changes were made to the draft to clarify contentious terms. For example, the term 'partial collapse' was replaced by the term 'substantial collapse' in a bid to limit this criterion; while 'unjustified delay' replaced 'undue delay' to allow states an opportunity to justify delay in their proceedings prior to the court making a determination on admissibility.[233] Ultimately, all these proposed changes were incorporated into a final draft for approval by the Conference as a whole.

It was argued by certain states that since article 15 (which eventually became article 17 of the adopted Rome Statute) had provided explanatory texts on complementarity, it was unnecessary to provide further elaboration on the principle in the Preamble.[234] It is, however, suggested that further explanatory provisions would have solved most

[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] Holmes "The Principles of Complementarity" 41.
[233] Ibid at 53 and 54.
[234] Ibid at 54.

of the problems associated with the interpretation of complementarity. For the sake of clarity, it was suggested, however, that a reference to complementarity be added to article 1 of the Rome Statute.[235] Accordingly, complementarity was referred to in the Preamble and in article 1 of the adopted Rome Statute.

Another contentious issue was the right of states not party to the Rome Statute to challenge the jurisdiction of the ICC. It was argued that such a challenge could be mounted only by state parties as only they had accepted the obligations under the Rome Statute.[236] There were states who argued that the principle of complementarity should apply irrespective of whether the objectionable domestic proceedings were conducted by a state party or by a non-party state.[237] A compromise was eventually reached in terms of which a challenge to the jurisdiction of the ICC could be mounted by any state which had jurisdiction over the case and was investigating or prosecuting it, or had done so.[238] Equally important was a compromise which allowed the ICC prosecutor – to avoid the loss of valuable evidence and delays in matters before the court – to continue with investigations pending a determination by the court on the admissibility challenges.[239]

The USA proposed the inclusion of draft article 16 which, it argued, would be necessary because it recognised the ability of a national judicial system to investigate and prosecute international crimes.[240] The USA's proposal was, however, contested by a number of states – mostly from the Like-Minded Group.[241] Their view was that

[235] Ibid at 56.
[236] Summary Records of 1998 Diplomatic Conference A/CONF 183 C 1/SR 11 (22 June 1998).
[237] Ibid.
[238] Ibid.
[239] Ibid.
[240] Proposal submitted by the United States of America A/CONF 183/C 1/L 25, 29 June 1998. See also Summary Records of the 1998 Diplomatic Conference A/CONF 183 C 1/SR 11, 22 June 1998.
[241] This was a group of largely developing countries who created a block for purposes of pushing their agenda through the negotiation process of the Rome Conference.

the USA's proposal only helped to create obstacles to the operation of the ICC.[242] However, the text of draft article 16 was further negotiated, and a balance was struck to ensure complementarity. These provisions acted as a filter, particularly where investigations were initiated *proprio motu*. Ultimately, article 16 was adopted and became article 18 of the adopted Rome Statute.

It is equally important to note that the Bureau of the Committee of the Whole introduced a final draft which included an opt-out provision for war crimes which restricted prosecution to a period of seven years after entry into force of the Rome Statute.[243]

A Drafting Committee was established to finalise work on the Draft Statute.[244] Notwithstanding some of the challenges it faced, the Drafting Committee finally completed all 111 articles of the draft text by 15 July 1998.[245] On 16 July 1998, interestingly, Part 2 of the Draft Statute (which consisted of articles 5-21) was delivered to the Drafting Committee with instructions not to alter the text.[246] All texts dealing with the principle of complementarity as contained, most notably, in the Preamble, article 1, article 17 and all other provisions in the Draft, were adopted by the Rome Conference as a package deal.

The negotiation process at the Rome Conference tended to build on the work of the *ad hoc* Committee and the PrepCom. [247]

[242] Summary Records of the 1998 Diplomatic Conference A/CONF 183 C1/SR 11, 12, 29, 30, 31, 33.
[243] Draft Statute of the Rome Conference art 12.
[244] The Drafting Committee consisted of 25 elected delegates from different states.
[245] See UN Doc CN/577 1998 Treaties-8 (1998).
[246] Ibid.
[247] Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court UN GAOR Forty-Ninth Session Supp No UN Doc A/49/10 1994 Preamble para 3.

# CHAPTER 3

# THE PRINCIPLE OF COMPLEMENTARITY IN THE ROME STATUTE

## 1. Introduction

The previous chapter discussed the evolution of the distribution of jurisdictional competence, beginning with traditional international law and the exclusive competence of national jurisdiction, shifting to the exclusive jurisdiction of the military tribunals after World War II, and culminating in the primacy of jurisdiction enjoyed by the *ad hoc* tribunals established by the UNSC. The evolution of complementarity, first introduced by the ILC in its Draft Statute and then considered and endorsed by the *ad hoc* Committee on the ICC, the PrepCom, and finally the Rome Conference, was also considered.

This chapter delves deeper into the nature and meaning of complementarity under the Rome Statute. This is done with a view to establishing a foundation upon which the analysis of the policy concept of positive complementarity will proceed.

The principle of complementarity may be regarded as one of the key pillars of the legal structure of the ICC;[248] a fundamental principle upon which the ICC is premised.

The Preamble to the Rome Statute of the ICC provides, inter alia, that

> ...emphasizing that the International Criminal Court established under this Statute shall be *complementary* to national criminal jurisdictions.[249]

[248] Delmas-Marty "The International Criminal Court" 1915.
[249] Preamble to Rome Statute para 10.

This is reinforced by article 1 of the Rome Statute which provides that the court shall be complementary to national criminal jurisdictions.[250]

Complementarity is accepted as a central component of the entire Rome Statute system and of the very idea of an ICC.[251] It is critical to note that, apart from the reference to the term 'complementary' in the Preamble and article 1 of the Rome Statute, no definition of this term can be found in the remaining provisions of the Statute.

The judicial opinion of the ICC on the principle of complementarity can be seen in the 2009 *Admissibility* decision, in which Pre-Trial Chamber II noted, inter alia, that

> the cornerstone of the Statute and of the functioning of the Court is the principle of complementarity according to which the Court 'shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern … and shall be complementary to national criminal jurisdictions.' Complementarity is the principle reconciling the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes.[252]

## 2. The meaning of complementarity

The term 'complementarity' can be described as referring to the normative features describing the complementary relationship between the ICC and domestic criminal courts.

[250] Article 1 of the Rome Statute.
[251] See generally Ellis (2012) 10 *Journal of International Criminal Justice* 9. See also Burke-White (2005)18 *Leiden Journal of International Law* 557-90.
[252] See generally, Decision on the admissibility of case under Article 19(1) of the Statute, International Criminal Court-02/04-01/05-377 (10 March 2009) para 34. *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (10 March 2009) before the Pre-Trial Chamber II available at http://www.icc-cpi.int/iccdocs/doc/doc641259.pdf (date of use: 23 May 2017).

Today the term 'complemetarity' appears to have been adopted, in general, by commentators to refer to the "entirety of norms governing the complementary relationship between the International Criminal Court and national jurisdictions." [253] Various writers have advanced definitions of the term 'complementarity' but it appears from their works that there is no common ground as to certain aspects of its meaning, particularly outside of the Rome Statute. Legally, complementarity may be considered as "a technical admissibility rule in the Rome Statute determining when the International Criminal Court may proceed with investigations or prosecution of a case within its jurisdiction" ,[254] or whether the relevant national courts can proceed with the case.

Complementarity has also been defined as "a functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primacy jurisdiction."[255] This implies that the principle of complementarity comes into play where the primacy of national jurisdiction has failed to guarantee justice for either the victims or the accused. Unlike in the *ad hoc* criminal tribunals (the ICTY and ICTR) where the primacy of the tribunal was the operative principle, the principle of complementarity governs the operation of the ICC. This means that primacy rests with the national system. It is submitted that complementarity means the reversal of the primacy that characterised the jurisdiction of the *ad hoc* tribunals. It should be observed further that, while the primacy of *ad hoc* tribunals meant subservience of the domestic courts, the primacy of national jurisdiction under complementarity does not mean the subservience of the ICC, mainly because it is the ICC which has the discretion to determine whether it can exercise jurisdiction or not.

[253] See generally Benzing (2003) 7 *Max Planck Yearbook of United Nations Law* 592.
[254] Nouwen SMH *Complementarity in the Line of Fire* 11.
[255] Philippe (2006) 88 *International Review of the Red Cross* 380.

As Nouwen observes, a priority rule is necessary because the ICC's jurisdiction is concurrent with that of national courts.[256] It has been argued that complementarity is nothing other than a principle of priority among several bodies able to exercise criminal jurisdiction.[257] In this it is, as I have described it in earlier chapters, a concept used to distribute jurisdictional competence between different courts which enjoy jurisdiction.

The Rome Statute empowers the ICC to intervene and exercise criminal jurisdiction where a state is unable or unwilling genuinely to investigate or prosecute[258] persons suspected of committing, or of involvement in the commission of, international crimes proscribed under the Rome Statute.[259] The ICC does not necessarily overshadow a national criminal court that otherwise functions properly. More importantly, this principle is invoked only in the case of crimes set out in article 5 of the ICC Statute, and which satisfy the conditions prescribed in articles 6 to 8 of the Rome Statute.[260]

The classic model of complementarity means that the ICC would only, as a general rule, exercise complementary jurisdiction when a state's national courts are either unwilling or unable genuinely to investigate or prosecute the suspects of international crimes in its territory, and, significantly, if the gravity threshold has been met.[261]

The model provided in the Rome Statute ensures that the state retains its right to exercise criminal jurisdiction, and only forfeits its jurisdictional primacy when it does

[256] Nouwen *Complementarity in the Line of Fire* 11.
[257] See generally Brown (1998) 23 *Yale Journal of International Law* 386.
[258] Rome Statute art 17.
[259] Ibid.
[260] Ibid at arts 6, 7, 8.
[261] Ibid art 17. The gravity threshold is a parameter used to determine admissibility of cases depending on how serious they are.

not exercise that jurisdiction satisfactorily in accordance with the set minimum standards prescribed in the Rome Statute.[262]

From a different perspective, the principle of complementarity may be explained as the product of a compromise between the recognition of the principle of universal jurisdiction and the protection of the sovereignty of states.[263] The principle of universal jurisdiction means that a national court may prosecute individuals for any serious crime against international law, irrespective of where the crime was committed, based on the notion that such crimes harm the international community or international order.[264] This notion would appear to be an encroachment on the inherent sovereign rights of the state on whose territory the crime was committed.[265] This argument played a crucial role in the acceptance of the principle of complementarity by most delegates, and led to complementarity finally finding its place in the final draft of the Rome Statute.[266] As indicated above, historically, during the negotiations leading to the Rome Statute, the principle of complementarity was adopted in order to accommodate the interests of those advancing arguments based on state sovereignty. States thereby retained their right of primacy in the exercise of criminal jurisdiction within their respective territories. The motivation for the balancing act, therefore, was the retention of the right of states to primacy over criminal jurisdictional matters, and which, indeed, the principle of complementarity has maintained.

States have traditionally maintained a primary right to exercise criminal jurisdiction over acts committed in their territory or by their nationals. In international law, state

[262] See art 17 of the Rome Statute.
[263] See Philippe (2006) 88 *International Review of the Red Cross* 380.
[264] See O'Keefe (2004) 2 *Journal of International Criminal Justice* 735-60.
[265] Ibid.
[266] Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court UN GAOR Forty-Ninth Session Supp No UN Doc A/49/10 1994 Preamble para 3.

sovereignty is defined by certain key elements, one of which is jurisdiction.[267] It is, therefore, submitted that the sovereignty of a state is not complete where the state is deprived of its ability to exercise its national criminal jurisdiction over its own nationals or over acts occurring in its territory, save for instances where it voluntarily relinquishes jurisdiction.

However, under the Rome Statute, the principle of state sovereignty has not been permitted to override the greater interests of international criminal justice.[268] The need to preserve the state sovereignty of every independent state cannot be gainsaid. At the same time, the intervention of the international community as a whole in redressing international injustice and crime, must be upheld in order to counteract impunity.

The principal reason for the preservation of state sovereign while allowing international intervention, is that in circumstances where the states failed, or were unwilling genuinely to investigate and prosecute international criminal acts, the ICC has been given the legal authority to intervene to safeguard the broader interests of international criminal justice.[269] Intervention by the ICC is, in such a case, based on inaction on the part of the state, or on a lack of a genuine attempt to prosecute as evidenced by an irregular handling of the case.[270]

It has been argued that complementarity is an expression of an antagonistic relationship in which states have often "preferred to exercise their jurisdiction exclusively, and only occasionally, when coerced by special circumstances, have they accepted international intervention."[271]Such intervention by the ICC would thus be

[267] See generally Brownlie *Principles* 301.
[268] See Kor "Sovereignty in the Dock" 64.
[269] See generally arts 17 and 19 of the Rome Statute.
[270] Ibid.
[271] El Zeidy (2002) 23 *Michigan Journal of International Law* 870.

inspired by the Rome Statute's aim to combat impunity, coupled with the inability or unwillingness of the state concerned to exercise its jurisdiction.[272]

In the preceding context, it is important to note that the dominant and overriding interest that the complementarity regime of the ICC seeks to protect and uphold is state sovereignty of not only the state parties to the Statute, but also the third parties.[273] This must be viewed in the light of the fact that under the general principles of international law, states have the right to exercise criminal jurisdiction over acts within their respective jurisdictions. In this regard, the right to exercise criminal jurisdiction can be viewed as a key component of the state sovereignty.

However, there is need to exercise caution when explaining complementarity, in the context of state sovereignty, and the need for a state to invoke its national criminal jurisdiction. This is because complementarity as a rule of admissibility creates no duty or obligation for a state, and no such provision can be identified in the Statute.[274] As Nouwen argues, such a presumed obligation to prosecute on the part of a state, is an assumption which is unacceptable and cannot survive analysis.[275] It is suggested that the correct approach is that, while a state may indeed be under an obligation to investigate or prosecute under other regimes of international law, no such legal obligation or duty is established by the principle of complementarity as enshrined in the Rome Statute.[276]

It is critical to note that the Rome Statute has no express provision supporting the imposition of a duty to prosecute. The only reference to a 'duty' is the sixth recital in

[272] See the Preamble to the Rome Statute.
[273] Benzing (2003) 7 *Max Planck Yearbook of United Nations Law* 595.
[274] Nouwen *Complementarity in the Line of Fire* 34.
[275] Ibid.
[276] Article 20(3) of the Statute, positively read and construed, must mean that the article does not impose any obligation or duty on a state to investigate or prosecute international crimes under the Statute.

the Preamble to the Statute, which provides that "recalling that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes."[277] As Nouwen argues, the sixth preambular statement merely 'recalls', but does not affirmatively establish, a legal duty. Nouwen argues that considering the ordinary meaning of the text, the context, and the treaty's object and purpose, it is clear that this recital does not create a legal obligation.[278]

Having considered the various provisions in the Rome Statute and the numerous arguments on the meaning of complementarity, it is now necessary to discuss the rationale for complementarity. Accordingly, the next section of the study examines the rationale for complementarity as a legal principle. This is important as it establishes the basis for the existence of the principle of complementarity and so provides the necessary transition to an analysis of the concept of positive complementarity.

## 3. The rationale for complementarity

According to Seils, there are at least four reasons advanced in support of the system of complementarity under the Rome Statute, namely:[279]

1. The complementarity system protects the accused if they have already been prosecuted before domestic criminal courts. Where an accused has been tried and convicted or acquitted under the proceedings of a national criminal court, he or

[277] Sixth preambular statement, Rome Statute.
[278] Nouwen *Complementarity in the Line of Fire* 37.
[279] Seils *Handbook on Complementarity: An introduction to the role of national courts and the International Criminal Court in prosecuting international crimes* (2016) International Centre for Transitional Justice. Available at https://www.ictj.org/sites/default/files/ICTJ_Handbook_International_Criminal_Court_Complementarity_2016.pdf (last accessed 7 November 2016). Information also available at https://www.ictj.org/complementarity-icc/.

she cannot be re-tried before the ICC by virtue of the criminal law principle of double jeopardy.[280]

2. The system of complementarity respects national sovereignty in the exercise of criminal jurisdiction. The primacy of jurisdiction means that the national criminal courts will always have the first option to try the offender under their jurisdiction and only if they fail to meet the requirements under the Rome Statute, may the ICC intervene and investigate or prosecute to ensure international justice prevails. In this way the sovereignty of the state entitled to exercise national criminal jurisdiction is respected unless that state fails to honour its responsibilities under the Rome Statute.[281]
3. Complementarity seeks to promote greater efficiency because the ICC cannot deal with all cases of serious crime. This efficiency is achieved by the ICC focusing on cases involving high-profile offenders, while leaving lesser offenders to be dealt with by the national criminal courts of the state concerned.[282]
4. The system of complementarity vests the onus in the state parties to perform their responsibility to investigate and prosecute alleged serious crimes under international and national law – in other words, the responsibility is not merely a question of efficiency but also a matter of law, policy, and morality. This, however, opens the debate as to whether or not there is a legal duty to prosecute. All in all, states are expected to exercise primary jurisdiction and have the first opportunity to fight impunity within their national criminal law.[283]

In general, the exercise of this complementary jurisdiction by the ICC is to ensure that, in the final analysis, the most serious crimes of concern to the international

[280] Ibid at 3.
[281] Ibid.
[282] Ibid.
[283] Ibid.

community as a whole do not go unpunished. Therefore, the effective prosecution of the suspected perpetrators of Rome Statute crimes arguably contributes towards the prevention of such crimes and assures respect for the human rights of victims in the communities traumatised by these heinous crimes.[284]

A crucial point flowing from the preceding arguments, is that the principle of complementarity is designed to assure protection of the sovereign rights of not only the state parties to the Rome Statute, but also of third parties.[285] One of the key characteristics defining sovereignty is the state's exercise of and control over criminal jurisdiction within its territory. In essence, a state has the right, under general principles of international law, to exercise criminal jurisdiction over acts committed and omissions perpetrated within its jurisdiction.[286] As noted in the previous section, the states' interests vested in sovereignty must be balanced against the interest of the international community as a whole in ending impunity by prosecution of perpetrators of international crimes. The principle of complementarity is instrumental in striking the balance between these two interests. In effect, it provides the rationale for the principle of complementarity.

The fact that the ICC is a permanent court – as opposed to its *ad hoc* predecessors (the ICTY and ICTR)[287]– reinforces the efficacy of the principle of complementarity. Given its permanent nature, there is greater assurance of sustainability in the proceedings before the ICC.[288]

[284] See the Preamble to the Rome Statute.
[285] See generally Bergsmo (2000) 69 *Nordic Journal of International Law* 99.
[286] See generally Nsereko (2000) 10 *Criminal Law Forum* 72.
[287] The *ad hoc* international criminal tribunals, by definition, are meant to wind up as soon as they matters are concluded or deferred to the national criminal jurisdiction.
[288] The Rome Statute provides that the ICC will be permanent.

The other instrument of complementarity used by the ICC is the threat of intervention in the domestic affairs of a recalcitrant state irrespective of the sovereignty of that state.[289] This threat usually takes the form of the ICC prosecutor expressing interest in opening preliminary investigations into a situation in the state concerned. This threat is generally enough – as evidenced by the *Kenya* cases – to move a state to exercise its domestic criminal jurisdiction to satisfy the requirements under the Rome Statute so as avoid intervention by a supranational entity. In this way complementarity acts as a catalyst for the effective functioning of the international criminal justice system.[290]

As the ICC is a court which upholds human rights, it is argued that the protection of the rights of persons accused of Rome Statute crimes is critical. In this regard, through its strict application of the admissibility rules under the Statute, the principle of complementarity assures due process.[291] This is because a party is given the opportunity under the Rome Statute to challenge the admissibility of a case before the ICC.[292] Moreover, the principle of complementarity guarantees that the accused defendant enjoys equal benefit and protection of due process during his or her trial before the court.[293]

In similar vein, the principle of complementarity assures the accused person of the right to be tried by a national court unless there is a potential of the inadequacies in the national prosecution falling under article 17 of the Rome Statute.

By virtue of article 31(2) of the Rome Statute: "[T]he Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in [this] Statute to the case before it." The grounds for excluding criminal responsibility are set

[289] See generally Nsereko (2000) 10 *Criminal Law Forum* 72.
[290] Ibid.
[291] See generally Birnbaun (2015) 48 *Vanderbilt Journal of Transtional Law* 307-58.
[292] See art 17 of Rome Statute.
[293] See Heller (2006) 17 *Criminal Law Forum* 257.

out in article 31(1) of the Statute. For instance, article 31(1) of the Rome Statute provides grounds for the exclusion of criminal responsibility. It provides, inter alia, that

> … a person shall not be criminally responsible if, at the time of that person's conduct:
>
> ..(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and lawful use of force in a manner proportionate to the degree of danger to the person or the other or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph… .

In conclusion, the principle of complementarity is clearly a key tool in the global fight against impunity which helps to assure an effective exercise of both the national and the international criminal justice systems.

## 4. The admissibility rule and jurisdiction

### 4.1 Prelude

Article 17 of the Rome Statute embodies the substantive provisions constituting the legal regime of the principle of complementarity. The principle of complementarity is outlined in the Rome Statute as an admissibility rule. It has been argued that complementarity does not affect the existence of the jurisdiction of the ICC as such,

but determines at what stage or under what conditions that jurisdiction may be exercised by the court.[294]

In general, the eventual exercise of jurisdiction by the ICC is conditional upon the admissibility of the case before it.[295] It follows that the jurisdiction is irrelevant where a case is found to be inadmissible.

The preconditions outlined in articles 5 to 8, 11 to 16 and 26 of the Rome Statute[296] must be satisfied before the international criminal jurisdiction of ICC can be exercised. Articles 17 to 20 of the Statute govern the process to be followed in assessing the admissibility of a case before the court.

Against this background, it is necessary to analyse the provisions of article 17 of the Rome Statute which addresses the criteria and requirements for the admissibility rule within the context of the Statute. Article 17 sets out the main legal framework that a judge of the ICC would invoke when determining admissibility in any situation or case presented before the court.

## 4.2 Analysis of article 17 of the Rome Statute

The determination of the stage at which the ICC should become involved in national criminal proceedings, remains controversial. Article 17(1)(a) provides that a case is inadmissible before the ICC if it "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out

[294] Benzing (2003) 7 *Max Planck Yearbook of United Nations Law* 591-32.
[295] See Holmes "Complementarity: National Courts" 672. See further Crawford "Drafting of the Rome Statute" 109.
[296] Articles 5, 8, 11-26 of the Rome Statute.

the investigation or prosecution."[297] Within the Rome Statute itself there is no definition of the terms 'unable' or 'genuinely unwilling'.[298]

Article 17(2) of the Rome Statute provides that:

> In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court…;
> (b) There has been unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with intent to bring the person concerned to justice… .[299]

### 4.2.1 Jurisdiction of the state

Article 17(1) of the Rome Statute provides:

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
> (d) The case is not of sufficient gravity to justify further action by the Court.

[297] Article 17(1)(a) of the Rome Statute.
[298] Ellis "Complementarity in international criminal justice" 37-8.
[299] Article 17(2) of the Rome Statute.

It is plain from the ordinary meaning of this provision that the existence of any one of the elements outlined under article 17(1) of the Statute, would render a case inadmissible before the ICC.

The first requirement, as set out in article 17(1)(a), is based on establishing whether the state investigating or prosecuting the case has the requisite capacity to determine the matter. This applies not only to a state parties, but also to non-state parties, irrespective of their commitment to the Rome Statute.[300] Phrased differently, article 17(1)(a) provides that a case is inadmissible where a state party is either investigating or prosecuting the case at hand, or has investigated it and refrained from prosecuting. The inaction on the part of the state in the face of crimes, may render the situation or case admissible before the ICC.

There are elements that must be identified in the provisions of article 17 – 'unwillingness' and 'inability' – in establishing whether the national proceedings have been genuinely carried out in accordance with the Statute. However, even the term 'genuinely' has not been determined with exactitude. This uncertainty in the exact meaning of the terms has persisted since the drafting of the Statute.[301]

To avoid uncertainty, unwillingness or inability will only be considered by the ICC once the 'procedural requirements' have been satisfied as was decided by the Pre-Trial Chamber in the *Gadaffi* case.[302] In that case, the Pre-Trial Chamber rejected the Libya's admissibility claim. However, that decision did not clarify whether 'unwillingness' or 'inability' should be dealt with first.

[300] Ibid art 17(1)(a).
[301] See "Report of the Ad Hoc Committee on the Establishment of an International Criminal Court" para 41.
[302] See *Prosecutor v Gaddafi, International Criminal Court* 01/11-01/11-344-Red.

In the *Libyan* case political factors may well have influenced the decision to discuss the 'inability' element first and only.[303] The better view is that the order in which 'unwillingness' or 'inability' are discussed, is in fact irrelevant. The order should be determined on the basis of all the circumstances of each case.

#### 4.2.1.1 Unwillingness

While there are many interpretations of the term 'unwillingness', no clear definition can be found in the Statute or any other legal document. The ICC must turn to international law principles of due process to establish what amounts to unwillingness in any given case.[304]

Ordinarily, 'unwillingness' under article 17(2) of the Statute would have to be established in three possible scenarios. The first is where proceedings were or are being undertaken, or the national decision has been made, with the aim of shielding the person concerned from criminal responsibility for article 5 crimes.[305]

The next two scenarios deal with instances where proceedings have been conducted in a manner which, in the circumstances, is inconsistent with an intention to bring the person concerned to justice. These are, firstly, where there has been unjustified or inordinate delay, presumably deliberately occasioned by interested national individuals;[306] and secondly, where proceedings were or are characterised by partiality

[303] Ibid.
[304] Article 17(2) of the Rome Statute.
[305] Ibid art 17(2)(a).
[306] Ibid art 17(2id)(b).

and lack of independence on the part of the national tribunal.[307] The *Al Bashir* case is an example of the latter two scenarios.[308]

The language of article 17 of the Rome Statute provides that the court 'shall consider'. Used in this context, 'shall' is mandatory. 'Consider', in turn, means that the court must take all the materials facts into account. Moreover, the list provided under article 17 is exhaustive. But clearly, unwillingness is used as an exception to the general rule in article 17.

There are a number of examples of whether a state is 'unwilling' in terms of the Rome Statute. For instance, certain extra-judicial proceedings – such as truth and reconciliation commissions – have been used to shield suspects from the jurisdiction of the ICC.[309] Likewise, blanket amnesties, inordinately lenient sentences, and a general disregard of evidence material to a trial or investigation, would point towards the unwillingness of the state to investigate or prosecute suspects of serious crimes under the Rome Statute.[310]

There are instances where sham proceedings are conducted with the sole purpose of hoodwinking observers into believing that the state is indeed prosecuting the suspects, while in reality the outcome has already been decided. The ICC may consider such circumstances and declare the case admissible so as to ensure the effective prosecution of the offenders.

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[307] Ibid art 17(2)(c).
[308] See Situation in Dafur, Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 available at www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf.
[309] Ellis "Complementarity in international criminal justice" 38.
[310] See UN Report of the International Law Commission, Sixty-Ninth Session 1 May-2June and 3 July-4 Aug 2017 GAOR Suppl No 10 A/72/10 at 20, 219-20 see nn 756, 229-283. See Robinson (2003) 14 *European Journal of International Law* 481-505. See also Seibert-Fohr (2003) 7 *Max Planck Yearbook of United Nations Law* 553-90.

However, caution must be exercised before arriving at the conclusion that a state is acting in a manner that demonstrates unwillingness to prosecute an offender. In some instances a truth and reconciliation process may have been pursued in *good faith*, to ensure peace and healing in the society and not necessarily to evade the justice process. This does not, however, explain instances where a state undertakes certain overt acts to create the impression that it is willing to prosecute, when it is, in fact, unwilling. In such a case, therefore, the 'unwillingness' is not 'genuine'.

Where the ICC determines that there was unwillingness on the part of the state to investigate or prosecute a suspect, it is entitled to intervene under the principle of complementarity.[311] The debate, however, is whether the court would be entitled to have recourse to other factors not included in the criteria in article 17(2) (a)-(c) of the Rome Statute, in determining unwillingness.[312] Whether the chapeau of article 17(2), which requires the court to have "regard to the principles of due process recognised by international law", extends the scope of the possible meaning of 'unwillingness', remains unclear.[313]

There are instances where the state simply elects not to act as regards an investigation or case in its territory. The question as to whether inaction on the part of the state to investigate or prosecute amounts to unwillingness, is an interesting one. Suffice it to note that in such a scenario the ICC would consider each case on its merits. The interpretation of the facts should guide the court in determining whether the inaction stems from inability or unwillingness.

[311] The court in this case would intervene by declaring the matter admissible before it.
[312] Article 17(2)(a), (b) and (c) of the Rome Statute.
[313] Ibid art 17(2).

It has been argued that when considering whether a state is shielding a suspect from criminal responsibility, the ICC must assess the subjective nature of the state's action.[314] During the Rome Conference negotiations, it was noted that a simple delay resulting from state inaction is too low a threshold for deciding whether there has been an unjustified delay in the proceedings. The ICC would, rather, need to look to the "usual procedures and time-frames in that individual state" to determine whether there may be an indication that the state is unwilling to institute proceedings.[315]

It is further argued that intent is critical when the prosecution seeks to prove that a state's inaction or delay, relative to the usual time frames, is geared towards evasion of prosecution.[316] Arguably, where the prosecutor can establish the intention to evade criminal responsibility on the part of the state, then the ICC must find that the case is admissible and assert its jurisdiction. In reality, however, the process is not that simple as the court must satisfy fixed criteria in arriving at such a decision.

In summary, therefore, it may be argued that the process of determining unwillingness entails an objective evaluation of all the relevant facts obtaining in each given situation and at any given time. This requires the judge to evaluate all material circumstances in each given case before making an appropriate determination.[317]

#### 4.2.1.2 Inability

The statutory definition of 'inability' is found in article 17(3) of the Rome Statute. In terms of the Statute, a state is 'unable' if there is a "substantial collapse or

[314] Some scholars have advanced the argument that a determination of whether a state is acting in reconciliation should be made by an impartial, objective party independent of the ICC. See generally arguments to this effect in Ellis "Complementarity in international criminal justice" 38. See further Cryer et al *International Criminal Law and Procedure* 156.
[315] See generally Benzing (2003) 7 *Max Planck Yearbook of United Nations Law* 608-9.
[316] See generally Ellis "Complementarity in the international criminal justice" 39.
[317] See *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* 01/04-01/07-1369 (25 September 2009) paras 20-22.

unavailability of its national judicial system… [to such an extent that] the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out proceedings."[318] The wording of this provision implies that "only one kind of collapse or unavailability would satisfy Article 17(3): namely, the kind that prevents a State from effectively investigating or prosecuting the accused."[319]

There are circumstances in which the ICC may be required to determine whether the state has the ability to investigate or prosecute in its national courts. The following is a list of some of the factors that would guide the court in deciding the 'inability' of the state in the context of article 17(3): whether a state is engaged in conflict, whether civil or international; political or economic crises that threaten the independence of the state's judicial institutions; absence of respect for the rule of law; a judicial system incapable of meeting international standards of justice and fairness; failure to incorporate necessary legislation into the judicial system; and failure to guarantee fair trial proceedings.[320]

The Informal Expert paper by the Group of Experts set up by the ICC prosecutor, proposed that the court should consider the following factors in determining whether the national judicial system has collapsed or is 'unavailable': lack of necessary personnel, judges, investigators, and prosecutors; lack of judicial infrastructure; lack of substantive or procedural penal legislation rendering the system unavailable; lack of access rendering the system unavailable; obstruction by uncontrolled elements rendering the system unavailable; and amnesties or immunities rendering the system unavailable.[321]

[318] Article 17(3) of the Rome Statute.
[319] Heller (2006) 17 *Criminal Law Forum* 2.
[320] Ellis M "Complementarity in international criminal justice" 39.
[321] The Informal Expert Paper 2009 at 31.

States involved in a conflict situation are unlikely to have the necessary judicial capacity or stability effectively to exercise national jurisdiction as, invariably, the judicial infrastructure will have broken down.[322] Arguably, the ICC would be entitled to exercise jurisdiction in such an event. In reality, if all cases involving 'conflict states' were to be taken over by the ICC it would be overwhelmed, to say the least!

Certain scholars argue that it could be concluded from the list of factors of inability listed above, that inability may arise from the absence or inadequacy of national legislation, especially when a state's criminal legislation does not correspond to the substantive provisions of the Rome Statute with the result that an international crime can be prosecuted only as an ordinary crime. However, the existence or otherwise of provisions governing international crime in national legislation is not a determining factor for the inability of the national courts to investigate or prosecute.

The ICC considered 'inability' in the *Gaddafi Admissibility Challenge* case.[323] The Pre-Trial Chamber found that Libya was unable genuinely to carry out the investigation or prosecution of Saif Al-Islam Gaddafi. Having established the inability element, the Pre-Trial Chamber did not find it necessary to delve into the alternative requirement of 'unwillingness'. Similarly, in arriving at its decision the court did not give due consideration to other issues raised by the defence such as the impossibility of a fair trial within a reasonable time before an independent tribunal established by law.[324]

The defence further argued that the actions and statements of Libyan government officials, firstly, violated the accused's presumption of the innocence, and that

[322] The breakdown of the judicial infrastructure could mean that the court premises have been destroyed by war or conflict, or that the judges and personnel of the judiciary have been killed, maimed, or fled into exile as a result of violent conflict.
[323] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/09-02/11-274.
[324] Ibid.

instead, he suffered under a 'presumption of guilt'. Secondly, the defence revealed the extent of inappropriate executive influence over the case.[325] It also argued that Gaddafi's minimum defence rights would not be guaranteed if the trial were to be conducted in Libya. One of the irregularities alleged was that Gaddafi had never been notified of the charges levelled against him by the state. Moreover, he had not been afforded sufficient time and facilities to prepare his own defence, as demonstrated by refusal of access to consult with counsel of his choice.[326]

The Pre-Trial Chamber considered the arguments advanced by the defence, most notably the right of the accused to access a defence counsel, in determining whether Libya was 'unable genuinely' to investigate or prosecute the case against Gaddafi. The court observed that "this assessment has been pertinent because those issues impact on Libya's ability to carry out its proceedings in accordance with Libyan law."[327] The court was of the view that the ability of the state "must be viewed in the context of the relevant national system and procedures."[328]

The Pre-Trial Chamber ruled, on 31 May 2013, that the case against Saif Al-Islam Gaddafi was admissible before the court. It explained that Libya had not indicated whether and how it would "overcome the existing difficulties in securing a lawyer for the suspect", as well as its inability to secure the transfer of the suspect from the Zintan militia.[329] In rejecting Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi, the Pre-Trial Chamber came to the conclusion that Libya had not substantiated, by means of evidence of a sufficient degree of specificity and probative value, that Libya's domestic investigations covered the same case that

[325] Ibid.
[326] Ibid paras 163-164.
[327] Ibid.
[328] Ibid.
[329] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11 (7 June 2013) 91.

was before the court.[330] Moreover, the Pre-Trial Chamber concluded that Libya was genuinely unable to carry out the investigations and prosecution of Saif Al-Islam Gaddafi because of its inability to secure his transfer from his place of detention in Zintan, into the custody of the state.[331] The Pre-Trial Chamber also found that other limitations on the part of the Libya included the lack of capacity to secure necessary testimonies, absence of adequate witness protection arrangements, and inability to provide effective control over detention facilities.[332] There were, in addition, significant practical impediments to securing legal representation for Gaddafi.[333]

In response to the Pre-Trial Chamber judgment, the Libyan government filed an appeal, and also requested suspension of the order for Gaddafi's surrender pending the determination of the appeal.[334] The Appeals Chamber, on 21 May 2014, rejected this request and ruled that the Pre-Trial Chamber had not erred in its conclusion that Libya had not adequately demonstrated in evidence that it was conducting investigations over the same case as that serving before the ICC.[335] It should be noted that the Appeals Chamber, having upheld the appeal on the ground of lack of investigations, did not proceed to consider the rest of the arguments regarding the 'inability' of Libya to conduct effective national proceedings.[336] Accordingly, the Appeals Chamber upheld the Pre-Trial Chamber judgment on admissibility before the ICC.[337]

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[330] Ibid.
[331] Ibid.
[332] Ibid.
[333] See "The International Criminal Court and Libya: Complementarity in Conflict" Meeting Summary, International Law Programme, Chatman House, 22 September 2014 available at https://www.chathamhouse.org/sites/files/chathamhouse/field_document/20140922Libya.pdf at p. 3.
[334] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11 A Ch (7 June 2013).
[335] Ibid.
[336] Ibid.
[337] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11 OA 4 A Ch (18 July 2013) 1 and para 27.

The decision of the Appeals Chamber was, however, not unanimous. Therefore, the analysis of the case of Saif Al-Islam Gaddafi would not be complete without mentioning the dissenting positions taken by the judges of the Appeals Chamber who heard the appeal. A significant judicial opinion in the Appeals Chamber worth noting, is that of Judge Song, who, although finding with the majority of the bench that the case was admissible, based his opinion on different considerations.[338] Judge Song, in a separate opinion, argued that Libya was indeed investigating the same case as the one before the ICC. His point of departure, however, was that the reason for the admissibility of the case was that Libya was unable to secure custody over Saif Al-Islam Gaddafi for purposes of the proceedings.

It is important to note that Judge Usacka, in outright dissent, maintained in his dissenting opinion, that the decision of the Pre-Trial Chamber should be reversed and remanded to be decided afresh. His reason for the dissent was that the test which the lower Pre-Trial Chamber had applied to determine whether Libya was investigating the case against Gaddafi, was erroneous and too demanding in its application.[339]

The other controversial issue is what should be understood by the term 'genuineness' in the context of both inability and willingness, under article 17 of the Rome Statute.[340]

The *Al-Senussi* case provides a contrasting dimension to the *Gaddafi* case. In *Al-Senussi* the Chamber acknowledged that Al-Senussi lacked legal representation during the national proceedings, that there was no effective witness protection programme, and that challenges existed in the exercise of control by national

[338] Ibid.
[339] Ibid.
[340] See generally art 17 of the Rome Statute.

authorities over detention facilities in Libya.[341] Notwithstanding all the arguments by the defence, the Pre-Trial Chamber ruled on 11 October 2013 that the case against Al-Senussi was inadmissible before the ICC on the basis that the case was already the subject of national proceedings, and that the State of Libya was not unwilling or unable genuinely to carry out its obligations under the Rome Statute.[342]

The Appeals Chamber, on 24 July 2014, unanimously rejected the defence's appeal and upheld the finding of the Pre-Trial Chamber that the *Al-Senussi* case was inadmissible, and confirmed that Al-Senussi should be tried in Libya.[343] In this case the Appeals Chamber held that in order to establish a state's unwillingness it must be shown that the proceedings have or will not be conducted independently or impartially. And further that it must be shown that the proceedings have or will be conducted in a fashion inconsistent with the intention to bring the accused person to justice.[344]

The above decision represents a landmark in that the court found in favour of a state challenging an admissibility decision. In the *Al-Senussi* case, the defendant sought to preclude ICC jurisdiction, and the court found in its favour.

The ICC's Appeals Chamber also had occasion to pronounce on the 'same person/same conduct' test in the two Kenyan cases: *Prosecutor v Francis Karimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*[345] and *Prosecutor v*

[341] *Prosecutor v Saif Al-Islam and Abdullas Al-Senussi* ICC-01/11-01/11 PT Ch (21 May 2014).
[342] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11 A Ch (7 June 2013) 151 and para 311.
[343] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/110A6 (24 July 2014)
[344] Ibid.
[345] *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11-274 (30 August 2011).

*William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang.*[346] The Kenyan cases illustrate a failed attempt by the Kenyan government to invoke the *ne bis in idem* principle, on the basis that on-going investigations were underway, and that parallel proceedings would jeopardise the interests of the accused. The essence of the appeal in those two Kenyan cases was the admissibility challenge to the decision of the Pre-Trial Chamber II by the government of Kenya pursuant to article 19(2)(b) of the Statute.

The challenge related to a "case in which a summons to appear had been issued against specific suspects for specific conduct."[347] It is trite law that the 'proceedings requirement' will be satisfied only if the national proceedings involve the same person and the same conduct. This has been dubbed the 'same person/same conduct test'. By virtue of this test, the national proceedings in question must "cover the same individual and substantially the same conduct as alleged in the proceedings before the Court."[348]

The court was of the view that the test had to be applied in the appropriate context. The stage of the proceedings before the court is crucial in considering whether or not the test can be applied. In *Prosecutor v Thomas Lubanga Dyilo,* the Pre-Trial Chamber stated that it considered a "*conditio sine qua non* for a case arising from investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court."[349]

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[346] *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ICC-01/09-01/11-307 (30 August 2011).
[347] Ibid.
[348] Ibid.
[349] *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-8-US-Corr (9 March 2006) 31.

The ICC Appeals Chamber also commented on the 'same person/same conduct' in the case of *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui,*[350] but the Chamber declined to make a ruling on the correctness or otherwise of the test largely because it was not relevant to the case before it. It was also unnecessary for the Chamber to decide on the question of 'same person' as the domestic proceedings were about Germain Katanga and as such were not relevant for determination.[351]

In interpreting the phrase 'is being investigated' the Appeals Chamber observed that it signified the taking of steps directed at ascertaining whether "*those suspects* are responsible for *that conduct.*"[352] On this basis, the Appeals Chamber rejected the Kenyan argument that national investigations into the conduct in question need only cover "persons at the same level in the hierarchy being investigated by the International Criminal Court."[353] The Chamber also upheld the position of the Pre-Trial Chamber II that concrete investigative steps must be undertaken at the domestic level if the case is to be held inadmissible.[354] Arguments based on reform and undertakings or promises to carry out investigations are insufficient for purposes of inadmissibility.[355]

On the 'same conduct' requirement, prosecutors "cannot charge crimes … that involve conduct the International Criminal Court is not investigating, even if prosecuting different conduct would be far more likely to result in a conviction."[356] It has been argued that in such a situation the state would need to invoke the provisions

[350] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* 01/04-01/07-1369 (13 August 2009).
[351] Ibid.
[352] Ibid.
[353] Ibid at 32.
[354] Ibid.
[355] Ibid.
[356] Ibid.

of Part IX of the Rome Statute to enable it to prosecute the same person but for different conduct.[357]

In cases where the conduct prosecuted is an ordinary crime, if the prosecution deals with the same conduct, this should be sufficient to satisfy the test.

To summarise, the ICC has made a significant contribution to the jurisprudence, through its decisions in cases analysed above, by expounding on the concepts of 'unwillingness', 'genuine' and 'inability.'

**(a) No ground to prosecute after investigations**

Where the national authority has finalised credible investigations and reached a finding grounded on its national substantive or procedural law and based on sound reasons, that there is no basis on which to proceed with prosecution, the ICC would not enjoy jurisdiction.[358]

It is critical to note that even in the case of failure at the national level to prosecute after investigations have been concluded, the ICC is entitled to determine whether the investigations were indeed genuine, or whether they were tainted by elements of unwillingness or the inability to prosecute genuinely.[359] The ICC's analysis of these elements has been discussed in the preceding section of this chapter.

The inherent power of the ICC enables it to monitor national criminal proceedings at all levels, in order to satisfy itself that the acceptable legal standard is maintained in the proceedings in accordance with acceptable standards of international criminal justice. Where the ICC decides that minimum standards for the investigation and

[357] See Robinson (2012) 53/April *Harvard International Law Journal Online* 177.
[358] Article 17(1)(b) of the Rome Statute.
[359] Ibid art 17(1)(a) and (b).

prosecution of international crimes under the Rome Statute have not been met in the national proceedings, it has the power to step in and take over proceedings to ensure international criminal justice is adequately dispensed.

The lack of genuine domestic criminal investigation should be regarded as the core criterion for the exercise of jurisdiction by the ICC. If the matter has been genuinely and exhaustively investigated and no ground for prosecution has been found, the ICC should not exercise jurisdiction. The question of whether the investigations were genuine is a question of fact depending on circumstances obtaining in each given case.

**(b) *Ne bis in idem* rule**

In the determination of the admissibility of a situation or case, the third requirement is that the case will be found inadmissible where the accused has been tried for the same conduct in a previous case before a court in the national system. This criterion is contained in article 17(1)(c) of the Rome Statute.[360] The *ne bis in idem* rule or the rule against double jeopardy, provides that a person cannot be tried twice for the same crime.

The *ne bis in idem* rule requires that the national court proceedings must have been concluded and that there is no further appeal available under the national legal system. It may be argued, however, that in the case of an acquittal or conviction, a final judgment on the merits may not be necessary.[361] The prohibition is thus based on the general criminal law principles of *autrefois acquit* and *autrefois convict*.[362] It

[360] Ibid art 20(2).
[361] See generally *Prosecutor v Tadić* IT-94-1-T (14 November 1995).
[362] These are terms, which simply mean respectively, that after being acquitted or convicted by a court of competent jurisdiction, the person so convicted or acquitted cannot suffer the same process of justice for the same offence or same facts of the allegations leveled against such a person.

follows that it is sufficient that a case has been terminated, for instance, on a procedural technicality. On that ground, it could be argued that the case would be inadmissible before the ICC.[363]

Where a person has been tried by a competent national court, the ICC would determine its admissibility on the principle of *ne bis in idem* and its exceptions. [364] It will immediately be noted that 'inability' as contemplated in the Statute is not regarded as an exception to the *ne bis in idem* rule. The underlying assumption in all these instances is that the proceedings were genuinely conducted by the state concerned.

There are no clear and detailed guidelines in the Rome Statute as to the actual conditions national proceedings must satisfy in order to comply with the proceedings requirement under the provisions of article 17 of the Rome Statute. The guidelines available are, therefore, largely derived from the jurisprudence of the ICC.

In summary, the *ne bis in idem* rule fortifies the principle that there must be an end to litigation. The principle of avoidance of *double jeopardy* is also pertinent in that a person must not suffer the same process of trial twice for the same conduct once he or she has been either convicted or acquitted on the same facts.

**(c) The case is of sufficient gravity**

This is the fourth and final requirement in the proceedings to determine admissibility under the Rome Statute. The essence of article 17(1) (d) of the Rome Statute is that a case shall be found inadmissible before the ICC if it is not of sufficient gravity to

[363] See generally *Prosecutor v Tadic* IT-94-1-T (14 November 1995).
[364] Article 20(3) read with art 17(1)(c) of the Rome Statute.

justify further action by the court. In terms of this criterion, the gravity or seriousness of the crime is the basis for determining which cases will be admissible in the ICC.

The rationale for the principle of sufficient gravity can be seen in the drafter's intention to provide for control over flooding the court with minor offences while the high-profile offenders go about free and unpunished.[365] This reasoning appears to be grounded on the declaration by member states in the Preamble to the Rome Statute that they undertake to fight impunity for the "most serious crimes of concern to the international community as a whole."[366]

It has been argued that the issue of sufficient gravity may not, strictly, be part of the admissibility rules – or of complementarity for that matter. Moreover, the question of sufficient gravity is subjective. The Rome Statute contains no explanation of what amounts to sufficient gravity or its application.[367]

According to El Zeidy, the question that only cases of a certain degree of gravity should be dealt with before the court has received little attention in the literature.[368] He then proceeds to discuss the idea of introducing an element of gravity to serve as part of the system of admissibility of complaints before the court.[369]

The court may, in determining the sufficiency of gravity, take the degree and magnitude of the offence and the seriousness of the consequences of the prohibited

[365] See Benvenuti "Complementarity" 21.
[366] See generally El Zeidy (2008) 57 *International & Comparative Law Quarterly* 403-15; El Zeidy (2008) 19 *Criminal Law Forum* 35-57.
[367] See generally these works by El Zeidy: El Zeidy (2002) 23 *Michigan Journal of International Law* 869-975; El Zeidy (2005) 5 *International & Comparative Law Quarterly* 83-119.
[368] El Zeidy (2006) 19 *Leiden Journal of International Law* 741-51; El Zeidy (ed) *The International Criminal Court and Complementarity* 393-420;
[369] El Zeidy MM "The legitimacy of withdrawing state party referrals" 55-78.

act into account. The degree of participation in the offence is also relevant in influencing the determination of the sufficiency of gravity.[370]

In final analysis, the requirement of sufficient gravity is arguably a factor that could facilitate an impunity gap. An 'impunity gap' because it appears to allow for minor offenders to evade the ICC and walk away from their crimes scot-free, solely on the basis of the legal technicality of insufficient gravity not meeting the threshold.[371]

The requirement of 'sufficient gravity' applies to all cases before the ICC, irrespective of whether the national jurisdiction has already acted upon them or not.

## 5 Conclusion

From the preceding analysis it may be concluded that the complementarity principle as provided for in the Rome Statute plays a crucial role as a legal instrument that strikes a critical balance between the desire to ensure an effective international criminal justice system to prevent impunity, on the one hand, and the protection of state sovereignty, on the other hand.

The discussion in this chapter has underscored the significance of the interpretation of by the ICC of the various tenets of the principle of complementarity.

Therefore, any suggestion that the court has become complicit in the refusal of some states to confront the most serious violators of international human rights and humanitarian law on the domestic level, has not been effectively established.[372] This

[370] Ibid.
[371] See Preamble to the Rome Statute para 4 which expresses the desire of the states to counter impunity for the most *serious crimes* of concern to the international community as a whole.
[372] See generally, Pisani *System of the International Criminal Court* 4 available at http://eprints-phd.biblio.unitn.it/744/1/Thesis_Complementarity_Pisani.pdf. (date of use: 16 September 2017).

accusation, in the view of this study, is entirely debatable, but, given the constraints imposed by the scope of this study, this may not be the ideal forum in which to pursue this further.

It was necessary to provide the above analysis of the principle of complementarity so as to establish a basis upon which to construct the ensuing analysis of the concept of positive complementarity. In the ensuing chapter the concept of positive complementarity is discussed.

# CHAPTER 4

# THE CONCEPT OF POSITIVE COMPLEMENTARITY

## 1 Introduction

In the preceding chapter, it was concluded that the principle of complementarity plays a crucial role as a legal instrument with which to strike the critical balance between the need for the preservation of state sovereignty, and the desire to ensure an effective international criminal justice system designed to halt impunity.[373] The chapter also sought to distil from the Rome Statute, the case law of the ICC, and scholarly writings the core content of complementarity.

The implementation of the principle of complementarity has not been very effective due to its many inherent challenges and limitations.[374] The limited resources available to the ICC has meant that not all cases could be speedily addressed by the Office of the Prosecutor (OTP).[375] This has led to the OTP to focus largely on the so-called high-ranking offenders while leaving the many lower-ranking offenders to be dealt with by national courts.[376] This is reinforced by the discussions in Chapter 2, where the evolution of the principle of complementarity was explored.

[373] See generally Gioia (2006) 19 *Leiden Journal of International Law* 1095-1123. See further arguments in Burke-White (2008) 19/2 *Criminal Law Forum* (2008) 71.
[374] See discussion in Kleffner (2003) 1 *Journal of International Criminal Justice* 87. See further discussions by Kleffner *Complementarity* 7.
[375] See Robinson (2010) 22/3 *Criminal Law Forum* 67-102. See also Schabas (2008) 19 *Criminal Law Forum* 5.
[376] Paper on some policy issues before the Office of the Prosecutor September 2003, available at http://www.icc-cpi.int/otp_policy.html para II (2.2) (date of use: 1 June 2017). The issue of high-ranking offenders has been a core point of consideration in the International Criminal Court Prosecutor's policies and strategies in dealing with international crimes under the Statute.

In light of the focus of the OTP on high-ranking offenders, the concept of positive complementarity emerged to address some of the challenges in the application of complementarity as articulated in the Rome Statute.[377] It has been suggested that this focus on high-ranking offenders has meant that many lower-ranking offenders will never be brought to justice[378] – a phenomenon, as we saw above, referred to as the impunity gap.

The concept of positive complementarity continues to engender considerable intellectual interest and continuing scholarly discourse. The unsettled legal character of the concept has generated intense debate[379] centering on the definition, nature, and scope of positive complementarity. Much uncertainty lingers as to the exact meaning of positive complementarity and the practicality of attaining the goals it is intended to achieve.[380]

The limited resources available to the ICC have prevented the court from achieving the lofty objectives of international criminal justice,[381] and have, in part, influenced

[377]See generally Arsanjani & Reisman (2005) 99 *American Journal of International Law* 385, 387. See also Marshall "Prevention and complementarity in the International Criminal Court: A positive approach" available at http://www.wcl.american.edu/hrbrief/17/2marshall.pdf (date of use: 10 February 2017).

[378] See generally Burke-White (2008) 1 *Harvard International Law Journal* 49 available at http://www.harvardilj.org/site/wp-content/uploads/2010/07/HILJ_49-1_Burke-White.pdf (date of use: 7 June 2017).

[379] See generally a series of works by: Ambo "Slow wheels of justice: International Criminal Court's disappointing track record" *Spiegel Online International* available at http://www.spiegel.de/international/world/slow-wheels-of-justice-the-icc-s-disappointing-track-record-a-803796.html (date of use: 23 August 2016); Ainley (2011) 24/3 *Cambridge Review of International Affairs* 309-33 available at http://www.academia.edu/362897/The_International_ Criminal_Court_on_Trial (date of use: 23 August 2016). See further, Burke-White (2008) 19 *Criminal Law Forum* 59; El Zeidy (2002) 23 *Michigan Journal of International Law* 869; Holmes "The Principle of Complementarity" 41, 45; Perrin (2006) 18 *Sri Lanka Journal of International Law* 301.

[380]See generally Walters "The ICC in practice: Its ability to prevent the future occurrence of mass atrocity" in *Consultancy Africa Intelligence* available at http://www.consultancyafrica.com/index.php?option=com_content&view=324&itemid=220 (date of use: 11 February 2017).

[381]See generally Damaska (2009) 14 *University of California Los Angeles Journal of International Law & Foreign Affairs* 19, 32.

the OTP to reconsider the prosecutorial strategies it adopted with regard to its role within the court structure.[382]

Against this background the aim of this chapter is to examine the evolution of the concept of positive complementarity.

## 2 Evolution of the concept of positive complementarity

### 2.1 The Informal Expert Report

The policies of the OTP as regards complementarity were partly influenced by the Informal Experts Report dealing with the topic.[383] In this section, that informal report is discussed.

The evolution of the concept of positive complementarity may be traced to the consultative work of a group of experts who in 2003 submitted a report to the OTP containing their expert opinion on positive complementarity.[384] The group of experts, consisting of eminent scholars and legal experts was constituted on the initiative of the OTP.[385]

In this part of the study the expert report is analysed. It is, therefore, critical to examine the various facets of the report so as to inform further analysis of the concept

[382]See generally Danner (2002) 97 *American Journal of International Law* 510, 543.
[383] Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice", ICC-OTP 2003 at 2 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 1 June 2017).
[384] The Informal Expert Paper described 'positive' complementarity as a policy concept.
[385] Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 at 2 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 1 June 2017).

of positive complementarity as perceived in later fora, such as the Kampala Review Conference on Stock-Taking of the Rome Statute.[386]

In April 2003 a suggestion was made by the start-up team of the OTP of the ICC that there be an expert consultation process on complementarity in practice for the benefit of the incoming Chief Prosecutor and OTP staff.[387] The suggestion was approved[388] and the Group of Experts was entrusted with preparing a reflection paper on the potential legal, policy, and management challenges which were likely to confront the OTP as a consequence of the complementarity regime under the Rome Statute.[389]

It was clear from the beginning of the operations of the ICC that the OTP was bound to encounter teething and other challenges connected with the application of the principle of complementarity as entrenched in the Rome Statute.[390] The Informal Expert Report, in general, casts light on the foundation of the concept of positive complementarity.

[386]See generally Assembly of State Parties Report of the Bureau on Stocktaking: Complementarity "Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap" ICC-ASP/8/51 Resumed Eighth Session 18 March 2010 hled in Kampala to undertake stocktaking of the Rome Statute. See also Review Conference of the Rome Statute, Complementarity, Resolution RC/Res 6 8 June 2010. See further, Clark (2010) 2 *Goettingen Journal of International Law* 687-711.
[387] Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 at 2 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 February 2017).
[388]Ibid.
[389]See generally, "Paper on some policy issues before the Office of the Prosecutor, September 2003" available at http://icc-cpi.int/library/asp/LMO_20040906_En.pdf (date of use: 11 February 2017).
[390]See Schiff *Building the International Criminal Court* 73. Members of the Expert Group were Xabie Agirre, Antonio Cassese, Rolf Einar Fife, Hakan Friman, Christopher Hall, John Holms, Jann Kleffner, Hector Olasolo, Norul Rashid, Darryl Robinson, Elizabeth Wilmshurst, and Andreas Zimmermann.

### 2.1.1 The Informal Expert Report: Complementarity in practice

The Informal Expert Report begins by highlighting the main areas considered by the group.[391] It notes that the principle of complementarity, unlike that of the *ad hoc* tribunals, governs the exercise of the jurisdiction of the ICC.[392] Under this principle, states have the first responsibility and right to prosecute international crimes.[393] Under the Rome Statute, the ICC may only exercise jurisdiction where the domestic courts fail to do so.[394] This failure could be as a result of the state being unwilling genuinely to conduct proceedings.[395] This proposition is now reflected in article 17 of the Rome Statute, and is one of the guiding principles of admissibility applied by the court today.[396]

The Informal Expert Report further noted that the principle of complementarity is based both on respect for the primary jurisdiction of states, and on considerations of efficiency and effectiveness.[397] Considerations of efficiency and effectiveness are informed by the fact that states would ordinarily have the best access to evidence and witnesses, coupled with the resources to conduct the proceedings.[398]

Moreover, the ICC is limited as regards the number of prosecutions it can practically and feasibly handle.[399] For this reason, the Informal Expert Report felt it necessary to

[391] Ibid.
[392] See generally the Informal Expert Paper ICC-OTP 2003 at 20-24 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 1 June 2017). The *ad hoc* tribunals were established on a needs basis and were intended to wind up as soon as their mandates expired. These include the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).
[393] *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-772 (14 December 2006) paras 20-22.
[394] See generally El Zeidy (2002) 23 *Michigan Journal of International Law* 869.
[395] Office of the Prosecutor "Informal Expert Paper, the Principle of Complementarity in Practice", ICC-OTP 2003 2 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 May 2017).
[396] See art 17 of Rome Statute.
[397] See Rodman (2009) 22 *Leiden Journal of International Law* 96-126.
[398] Ibid.
[399] See generally Bergsmo (1998) 4 *European Journal of Crime, Criminal Law and Criminal Justice* 345-63.

vest primary jurisdiction in the national authority as prescribed by the Rome Statute.[400] This sentiment also resonates with the argument that the concept of positive complementarity requires that, as far as possible, domestic courts should be empowered to exercise their national jurisdiction over some of the most serious crimes (incuding genocide, and crimes against humanity).[401]

Indeed the Informal Expert Report adopted by the Group of Experts, observed that the OTP "will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means"[402]

The Informal Report provides that the overall object of complementarity is to establish an international order in which national institutions respond effectively to international crimes, thereby reducing the number of cases coming before the ICC.[403] This clearly is a very lofty goal as it would still be expected that trials before the ICC would continue to be significant in combating impunity.[404] Arguably, trials before the ICC are expected to continue because, regrettably, national courts will invariably be unwilling or unable effectively to address international crimes that arise within their respective jurisdictions.[405]

The stated objective of the court's first Chief Prosecutor was not to 'compete' with states for jurisdiction, but rather effectively to reinforce the overall goal of putting an

[400]See generally art 17 Rome Statute. See also comprehensive analysis of the extent of jurisdiction of the ICC advanced by the Appeals Chamber in *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-772 (14 December 2006) paras 20-22.
[401]See generally Stahn (2005) 3 *Journal of International Criminal Justice* 709.
[402]See generally "Paper on some policy issues before the Office of the Prosecutor September 2003" available at http://www.icc-cpi.int/otp_policy.html (date of use: 11 February 2017).
[403]Ibid.
[404]See generally Nsereko (2008) 19 *Criminal Law Forum* 374.
[405]See Jallow (2005) 3 *Journal of International Criminal Justice* 145.

end to impunity by ensuring that the most serious international crimes do not go unpunished.[406] Thus the report by the Group of Experts noted that complementarity is not intended to generate competition between the OTP and the domestic courts, but rather to encourage and support the domestic authorities to exercise national jurisdiction over serious international crimes within their territories.[407]

The Informal Expert Report further notes that in order to encourage future prosecutions by the states, the ICC must demonstrate the determination of the international community to supress international crimes decisively and effectively.[408] In this way it would be demonstrating real prospects of ICC intervention where there are lapses on the part of states.[409]

On the basis of the objectives of complementarity identified, the Group of Experts set out guiding principles for the exercise of jurisdiction by both the ICC and domestic courts.[410]

In effect, the two guiding principles recommended by the Group of Experts to form the basis of the approach of the OTP in confronting impunity were 'partnership' and 'vigilance.'[411] In this regard, a number of activities would be pursued with the overall objective of putting an end to impunity.[412] It will be shown below that, paradoxically,

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[406]See generally, Office of the Prosecutor "Paper on some policy issues before the Office of the Prosecutor September 2003" available at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (date of use: 22 May 2017). See also Brubacher (2004) 2 *Journal of International Criminal Justice* 71.

[407]Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 at 2 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 May 2017).

[408] Ibid at 9-14.

[409] See discussion in Vandermeersch (2005) 3 *Journal of International Criminal Justice* 403.

[410] Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 at 8-14 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 May 2017).

[411]It is interesting to note the discussion and arguments in Summers (2003) 21 *Boston University International Law Journal* 63.

[412] See generally, Rubin (2001) 64 *Law & Contemporary Problems* 153.

these twin aspects of the complementary function – partnership and vigilance – are in constant conflict.[413] This means that whereas partnership between the states and the ICC is essential, the ICC needs to remain vigilant when confronting states which renege on their responsibility to prosecute suspected perpetrators of international crimes. In this way, the two principles of partnership and vigilance tend to pull in opposite directions. For example, it was argued that the need to exercise jurisdiction by the ICC under its vigilance function, could be avoided simply by extending the 'advice and guidance' element of the partnership function.[414] In the following section, the partnership and vigilance are explored in greater detail.

### 2.1.2 Partnership and dialogue with states

The Informal Expert Report suggests that the OTP should enter into a positive and constructive relationship with a state that is genuinely investigating and/or prosecuting an international crime.[415] This statement reflects the first use of the word 'positive' in the context of complementarity. The Report further proposes that under the legal mandate provided by the Rome Statute, the prosecutor can encourage the state concerned to initiate national proceedings, help develop cooperative anti-impunity strategies, and possibly provide certain forms of assistance to facilitate national efforts.[416]

A consensual division of labour between the OTP and the state is proposed by the Informal Report in situations where such an institutional arrangement would serve the

[413] See generally, Rabinovitch (2005) 28 *Fordham International Law Journal* 500.
[414] Ibid.
[415] See generally, Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 at 11-12 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 May 2017).
[416] Ibid at 11-19; see also the discussion in Osofsky (1997) 107 *Yale Law Journal* 191.

best interest of justice.[417] Such a division of labour could be implemented, for instance, in a state that is unable to exercise jurisdiction effectively due to a dysfunctional infrastructure caused by the ravages of war or some form of civil strife.[418]

The Informal Expert Report outlines the partnership framework under three subheadings: encouraging national action and promoting anti-impunity measures; providing direct assistance and advice; and the relationship between roles, ie, partnerships and vigilances.[419] However, the overall purpose of developing partnerships between the ICC and the state's domestic institutions is to encourage genuine national proceedings.

### (i) Encouraging national action and anti-impunity measures

At a state level, it was recommended by the Informal Expert Report that the OTP should, as a high priority, remind states of their responsibility to undertake effective investigations and prosecutions.[420] It was indicated that such encouragement could be *general*, for instance, in public statements; or *specific*, for instance, in private bilateral meetings.[421]

[417] See discussion in Kress (2006) 4 *Journal of International Criminal Justice* 561. See also Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 at 11-14 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 May 2017).
[418] Consider the discussion in Akehurst (1972-73) 46 *British Yearbook of International Law* 145. See also *Situation in Kenya*, Decision pursuant to article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya ICC-01-09-19, PT Ch II 31 March 2010. See further, *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-772 A Ch (14 December 2006).
[419] Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 at 11-14 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 May 2017).
[420] Ibid at 11-17.
[421] Ibid. See Byers *Role of International Law* xvi 354.

According to the Informal Expert Report, the determination of the OTP to combat impunity by intervening at any stage when the national jurisdiction fails, should remain as a constant reminder to non-compliant states.[422] This should send a clear message to the errant states that should they fail to act, the ICC would step in to investigate and/or prosecute international crimes.[423]

It is submitted, however, that it is not within the legal mandate of the OTP or the ICC under the provisions of the Rome Statute to remind states to meet their obligations and responsibility to exercise national jurisdiction.[424] To insist that the OTP assume the responsibility of *reminding* states of their obligations, would be tantamount to its engaging in advocacy, for which there would appear to be no authority in the Rome Statute.[425] This does not, however, mean that such action is prohibited by the Rome Statute – the matter remains open.

The next section looks at what the Informal Expert Report had to say on the provision of direct assistance and advice to states which are willing to cooperate in the processes under the Rome Statute.

### (ii) Providing direct assistance and advice

It has been noted in the preceding section that the two guiding principles of vigilance and partnership form a balanced basis for the role of the OTP in the issue of

[422] Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 at 9-14 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 May 2017). See also Beale (1923) 36 *Harvard Law Review* 241.
[423] Ibid.
[424] See, for instance, Reydams (2002) 96 *American Journal of International Law* 231. See also Safferling (1998) 92 *American Journal of International Law* 528.
[425] See discussion in "The protection of human rights through international criminal law: A conversation with Madame Justice Louise Arbour, Chief Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda" (1999) 57 *University of Toronto Faculty of Law Review* 83, 97.

complementarity. The assistance to be provided by the ICC to states may take many forms. The first form of assistance to be examined under the Informal Expert Report is information and evidence.[426]

The Report argues that it is within the mandate of the ICC prosecutor to exchange information and evidence to facilitate national investigations.[427] This argument is anchored in the provisions of article 93(10) of the Rome Statute.[428] In effect, the Report states that by virtue of article 93(10), the court may cooperate with and provide assistance to a state.

The drafters of the Report may have been influenced by the incapacity of many states confronted with situations warranting prosecution of international crimes. The experts envisaged that the prospects of assistance, contemplated or continued, should, where possible, be used as an incentive to encourage cooperation on the part of the state concerned.[429]

Assistance may be extended by way of technical advice, such as legal advice and other technical forms of intervention, to the authorities in the state[430] to support its domestic courts in building capacity.[431] The advice extended to such states would include, for instance, practical skills and knowhow as regards investigations and

[426] See Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 at 11-16 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 May 2017).
[427] See generally *The Prosecutor v Germain Katanga* ICC-01/04-01/07-4 (6 July 2007).
[428] Article 93(10) of the Statute provides that: "Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary."
[429] See generally, art 18(2) Rome Statute and rules 52(1) and 53 of Rules of Procedure and Evidence. This kind of assistance is extended subject to certain qualifications.
[430] See Cakmak (2006) 23/1 *International Journal on World Peace* 3.
[431] See generally Howland (2000) 18 *Wisconsin International Law Journal* 419-20.

prosecution,[432] such as advice on evidence, forensic audits, and other substantive and procedural legal aspects of trials before the ICC.[433] The experts stated that this form of assistance was consistent with the legal mandate of the prosecutor of the ICC as provided in the Rome Statute.[434] Burke-White is instructive in this regard. He states that the provision of assistance to states is critical in order to combat impunity effectively.[435]

Training was identified in the Report as another possible crucial aspect of ICC assistance to states.[436] The training exercise would be geared towards helping build domestic capacity in how to address the exercise of jurisdiction effectively.[437]

In conclusion, caution must be exercised to avoid intervention by the ICC being abused by errant states wishing to take advantage of external assistance to circumvent national responsibilities to prosecute crime.

**(iii) Relationship between roles**

The Informal Expert Report recognises the potential danger which may result from the OTP becoming too closely involved in the provision of training, advice, and

[432] See art 18 Rome Statute. See also views in Wierda M "Stocktaking: Complementarity" International Centre for Transitional Justice Briefing Paper, May 2010.
[433] Consider the UN "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004" 25 January 2005 available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (date of use: 17 February 2017).
[434]See Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 at 11 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 May 2017). The training assistance would equally be subjected to certain limitations that would preserve the interests of the state concerned as well as the nationals, and of the international community as a whole.
[435] See generally the arguments in Burke-White (2008) 19 *Criminal Law Forum* 59-85. See also Bergsmo, Bekou & Jones "Complementarity and construction of national ability" 1052-70.
[436] Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 at 8-14 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 May 2017).
[437] See generally Palmer (2012) 20 *African Journal of International & Comparative Law* 13-14.

assistance to the national courts.[438] For instance, the Report recognises that it may be difficult for the OTP plausibly to criticise or question the very process it has been involved in developing and supporting.[439]

The partnership approach advocates cooperation between the ICC and states.[440] However, the approach may also be viewed as antagonistic in the sense that in certain instances the OTP may intervene to investigate and prosecute where the national court fails to act to combat international crime.

In this respect, the proposal for cooperation between the OTP and national courts can be viewed as a precursor to the concept of positive complementarity as defined by the Bureau on Stock-taking at the Kampala Review Conference seven years later.[441] It follows that the relationship between the OTP and the national courts is complicated and evidences multifarious ramifications.

### 2.1.3 Vigilance

The Informal Expert Report further suggested that vigilance operates as the converse of partnership in that the ICC must execute its legal mandate under the Rome Statute diligently. In this respect, it follows that the prosecutor must be able to gather information that will enable him or her to establish whether national jurisdiction is being exercised in consonance with the requirements of the Rome Statute.[442]

[438] Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 at 11-15 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 May 2017).
[439] Ibid.
[440] Article 17 of Rome Statute.
[441] See a more detailed discussion of the Kampala Review Conference later on in this chapter.
[442] See generally art 17 of the Rome Statute. See also Philips (1999) 10 *Criminal Law Forum* 61.

It is significant that the Report acknowledges that it does not attempt to provide a doctrinal analysis of the provisions of article 17 of the Rome Statute.[443] It nonetheless proceeds to analyse these provisions at some length.[444] The framework issues of article 17 are tackled, including 'inaction' versus 'unwillingness' and 'inability' in the context of article 17.[445]

The Report further considers the application and interpretation of the term 'genuine' in the context of legal proceedings. It observes that some uncertainty has arisen as to which term is modified by the adverb 'genuinely', that is to say, whether it modifies 'unable' (and possibly even 'unwilling'), or 'to carry out' and 'to prosecute.'[446] The Report concludes that the correct interpretation is the latter – ie, 'genuinely' qualifies 'to carry out the investigation or prosecution' and 'to prosecute'.[447] This, it explains, emerges clearly from article 17(1)(b) of the Rome Statute where the terms are more clearly distinguished by 'or' ("unwillingness or inability of the State genuinely to prosecute").[448] The drafters of the Report also discuss the elements of article 17 as the basis on which they built their proposals for positive complementarity.

In the Report the power to conduct fact-finding exercises and to secure cooperation in the context of positive complementarity is also addressed. In this regard, it addresses the extent to which the OTP's efforts to gather facts and conduct analyses to arrive at a decision on admissibility may be bolstered by an obligation on the state to

[443] See Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 at 3-4 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 May 2017).
[444] Ibid 11-15.
[445] Ibid 11-16.
[446] See generally (2005) 18 *Leiden Journal of International Law* 557-90. See also Holmes "The principle of complementarity" 41, 45.
[447] See generally El Zeidy (2008) 19 *Criminal Law Forum* 35-57.
[448] See generally *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11-274 (30 August 2011).

cooperate.[449] From the Report it appears that the cooperation regime under Part 9 of the Rome Statute is linked to an 'investigation' as set out under article 86 of the Statute,[450] and also to the powers of the prosecutor under article 54. This cooperation regime is relevant for positive complementarity from the point of view that states would cooperate to allow the ICC to contribute to their national efforts to fight impunity.

The various methodologies of fact-finding and analysis also enjoy attention in the Report. It notes that an admissibility assessment is a multi-disciplinary undertaking entailing an assessment of the context and how the relevant case is actually dealt with.[451] Further aspects of methodology outlined in the Report include: graduated measures; inferences from general context; types of evidence that are admissible; and the diversity of sources used in such fact-finding exercises.[452]

The Report also considers the criteria for assessing national proceedings. These include: contextual information; unwillingness; and inability. Under contextual information the Report outlines facts which may be relevant, including: the lack of necessary personnel, judges, investigators, and prosecutors; lack of judicial infrastructure; lack of substantive or procedural penal legislation which renders the system 'unavailable'; and a lack of access which renderers the system 'unavailable.'

[449] See generally instructive work on cooperation in Tladi D "Complementarity and cooperation in international criminal justice: Assessing initiatives to fill the impunity gap" *Institute of Security Studies* Paper 277 November 2014. See also arguments in Khan (2010) 2 *Equality of Arms Review* 14-16.
[450] Article 86 of the Rome Statute.
[451] The paper argues that assessment involves both normative dimensions and empirical dimensions. The former dimension calls for an understanding of legislation, jurisprudence, procedures, and norms.
[452] Some of the official sources mentioned include investigative and intelligence services, prosecution services, ministry of justice, ministry of foreign affairs, human rights commissions, commissions of inquiry, *ad hoc* truth commissions, ombudspersons, etc. Other sources range from political parties, open media agencies, NGOs, academic and leading experts in relevant fields of study, journalists, international organisations, Bar associations, etc.

The evidentiary considerations examined in the Report include the application of rules of evidence in Part 6; the Rules of Procedure and Evidence; the standard of proof; and the allocation of the burden of proof.[453]

In light of the preceding recommendations, the Report further recommended that the ICC and the ASP consider developing an action plan for implementing legislation as an essential foundation for an effective complementarity regime.[454]

The Report was prepared for the OTP to assist it in implementing the concept of complementarity. It suggested a need to conceptualise the relationship between the OTP and states as one characterised by cooperation rather than antagonism.[455] In the following section, the OTP's understanding of and response to the Report is addressed.

## 2.2 A 'positive approach to complementarity' by the Office of the Prosecutor

### 2.2.1 Introduction

From the practical and functional points of view, the constraints and teething troubles which characterised the operations of the new ICC soon emerged when, in 2003, the first prosecutor of the ICC, Luis Moreno Ocampo, took the oath of office.[456] At its inception, the ICC was entrusted with a number of responsibilities, both prosecutorial

[453] Office of the Prosecutor "Informal Expert Paper: The Principle of Complementarity in Practice" ICC-OTP 2003 available at www.icc-cpi.int_iccdocs_doc_doc654724.pdf (date of use: 11 May 2017) discusses, under this section, the investigations and prosecutions, genuineness, shifting the burden of proof, facilitating the satisfaction of the burden, and the practical need to gather evidence.
[454] See Informal Expert Report 22.
[455] Ibid.
[456] Ceremony for the Solemn Undertaking of the Chief Prosecutor, Statement by Luis Moreno Ocampo, 16 June 2003, available at http://www.icc-cpi.int/NR/rdonlyreas/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf (date of use: 23 February 2017).

and judicial. By the time the Rome Statute came into force in 2002, expectations were high for the profound impact the ICC could have on international criminal justice.[457]

As the ICC embarked on handling its first investigations, situations, and cases, it soon became clear that the lofty goals and expectations associated with its formation would be difficult to achieve.[458] The misalignment between the lofty expectations of the international community and the reality of the constraints on resources available to the court, provided the impetus for a re-evaluation of the strategies to be adopted by the OTP in its role within the international criminal justice system.[459] Accordingly, the OTP adopted what it termed 'a positive approach to complementarity.'[460] This approach was embodied in the policies in its various prosecutorial strategies. The OTP interpreted its legal mandate to extend beyond a reactive response to state failure, and it consequently undertook to be proactive in encouraging states and cooperating with national and international actors to ensure genuine accountability for serious crimes.[461]

The ICC prosecutor's policy papers are discussed separately to identify the specific focus on the salient features of each and how they developed chronologically. The discussion revolves around the policy papers issued in 2003 and the Prosecutorial Strategy Papers of 2006-2009, and 2009-2012.

[457] See generally Burke-White (2008) 19 *Criminal Law Forum* 59-85.
[458] Ibid.
[459] Ibid.
[460] Ocampo LM "A positive approach to complementarity" 21-32.
[461] Office of the Prosecutor "Paper on some policy issues before the office of the Prosecutor September 2003" available at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (date of use: 23 May 2017). See Alai "Measured hope: Positive complementarity and accountability for sexual violence crimes in Kenya" in *International criminal justice: The International Criminal Court and Complementarity: International Commission of Jurists Kenya Section* Paper 2014 at 58.

### 2.2.2 The 2003 Paper on Some Policy Issues before the Office of the Prosecutor

In this section, the study examines the OTP's 2003 Paper on Some Policy Issues (2003 OTP Policy Paper).[462] This 2003 Policy Paper defines a general strategy for the OTP, and in so doing highlights the priority tasks to be performed and determines an institutional framework capable of ensuring the proper exercise of the functions of the OTP.[463] This Policy Paper highlights the original vision of the OTP as regards its approach to complementarity and combating impunity. In particular, it is an attempt at articulating an approach to complementarity that led to the emergence of an idea of positive complementarity.[464]

The 2003 Policy Paper recognises that national investigations and prosecutions, where they can properly be undertaken, will normally be the most effective and efficient means of bringing offenders to justice.[465] According to the 2003 Policy Paper, this position is supported by the fact that states themselves would normally have the best access to evidence and witnesses.[466] In a sense, this sentiment expresses, at least in part, the rationale underlying complementarity. In this regard, the 2003 Policy Paper articulated the view that encouraging states to initiate their own proceedings would advance complementarity and the fight against impunity.[467] This underscored the OTP's policy of undertaking investigations only where there was a clear case of

[462]See generally, Office of the Prosecutor "Paper on some policy issues before the office of the Prosecutor September 2003" available at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (date of use: 23 May 2017).
[463] See generally Burke-White (2005) 18 *Leiden Journal of International Law* 557-90.
[464] See generally, Office of the Prosecutor "Paper on some policy issues before the Office of the Prosecutor September 2003" available at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (date of use: 24 February 2017).
[465]Ibid.
[466]See generally Takemura "A critical analysis of positive complementarity" 601-21.
[467] See Rastan (2008) 21 *Leiden Journal of International Law* 431-56.

failure to act by the state concerned.[468] According to the 2003 Policy Paper, positive complementarity, which the Policy Paper embraces, creates space for the positive involvement of the OTP in technical assistance to national jurisdictions.[469]

It is important to recall that the statements by the prosecutor in the 2003 Policy Paper formed a very important basis upon which the subsequent concept of positive complementarity was developed.[470]

As with the Panel of Experts' Report, the 2003 Policy Paper highlighted the fact that close cooperation between the OTP and all parties concerned was essential in establishing the most appropriate forum for jurisdiction to be exercised.[471]

The 2003 Policy Paper made it clear, at the time of its publication, that the OTP was already developing formal and informal networks, which included contacts with prosecutors in domestic courts.[472] This demonstrated a shift from an antagonistic stance to complementarity in the Rome Statute (as noted in Chapter 1), to a more cooperative relationship characterised by partnership in the fight against international crimes.[473]

The networking envisaged by the OTP in its policy paper is designed to encourage members of civil society to participate actively in matters of international criminal justice.[474] Civil society is encouraged, along with states, to participate more fully in

[468]See generally the discussion in Olasolo (2005) 5 *International Criminal Law Review* 121-46.
[469] See generally Burke-White (2008) 49 *Harvard International Law Journal* 53-108.
[470] See generally Fletcher & Ohlin (2006) 4 *Journal of International Criminal Justice* 428-33.
[471]Ibid.
[472] See generally Office of the Prosecutor "Paper on some policy issues before the Office of the Prosecutor, September 2003" available at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (date of use: 24 February 2017).
[473] See Stahn (2008) 19 *Criminal Law Forum* 87-113.
[474] The role of civil society in the combat against impunity cannot be gainsaid. See generally Bergsmo, Bekou & Jones (2010) 2 *Goettingen Journal of International Law* 791-811.

the activities of the ICC by reinforcing efforts at filling in the gaps occasioned by lack of adequate resources for the court.[475]

The 2003 Policy Paper provides that the OTP's external relations and outreach strategy would develop a network of relationships between the prosecutor, national authorities, multi-lateral institutions, and non-governmental organisations, among other entities. This network was designed to reinforce the resources of the ICC and to enable it to pursue effective investigations and prosecutions.[476] This would entail the court entering into agreements with states to support its responsibilities by providing the security, investigations, intelligence, and evidence necessary to support the effective administration of justice.[477]

The first Chief Prosecutor of the ICC, Luis Moreno Ocampo, stated that the ICC is not intended to replace national courts, but to operate when national structures and courts are unwilling or unable to conduct investigations and prosecutions.[478] The prosecutor further stated that

> … the effectiveness of the International Criminal Court should not be measured only by the number of cases that reach the Court. On the contrary, the absence of trials by the International Criminal Court, as a consequence of the regular functioning of national systems, would be a major success.[479]

[475] See generally Ocampo "A positive approach to complementarity" 21-32.
[476] See generally Office of the Prosecutor "Paper on some policy issues before the Office of the Prosecutor September 2003" available at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (date of use: 24 February 2017).
[477] Ibid.
[478] The first Prosecutor of the Court made this statement in the Ceremony for the Solemn Undertaking of the Chief Prosecutor: Statement by Luis Moreno Ocampo 16 June 2003 available at http://www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf (date of use: 24 February 2017).
[479] Ibid. See Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court 8 September 2003 available at http://amicc.org/docs/Ocampo9_03.pdf (date of use: 25 February 2017).

The 2003 Policy Paper emphasises the significance of states and other stakeholders supporting the role of the ICC in fighting impunity. This, underscores the importance of 'assistance' from the ICC to buttress the international criminal justice process.[480] In positive complementarity, it is understood that the assistance by the ICC seeks to encourage states to engage more actively in the process of international criminal justice by themselves investigating and prosecuting international crimes.[481]

Another prominent policy issue brought to the fore by the policy document is that of the 'impunity gap.'[482] This is, arguably, an important element in determining the parameters of the concept of positive complementarity.[483] Based on the limitations in its budget and personnel, the ICC recognises that there are constraints on its resources.[484] And for this reason, it adopts a two-pronged approach to combatting impunity.

The prosecution of those who bear the greatest responsibility for the crimes committed shall be undertaken by the ICC. This leaves lower-ranking perpetrators to be tried by their national courts.[485] The difference between the two approaches would

[480] El Zeidy (2002) 23 *Michigan Journal of International Law* 869-975. See Benzing (2003) 7 *Max Planck United Nations Year Book* 591.
[481] See the decision of the ICC in *Situation in Positive Complementarity Sudan* ICC-02/05-34-tENG PT Ch I (22 November 2006). See also Burke-White (2008) 19 *Criminal Law Forum* 59-85.
[482] See generally Office of the Prosecutor "Paper on some policy issues before the Office of the Prosecutor September 2003" available at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (date of use: 24 February 2017). See also Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court 8 September 2003 available at http://www.icc-cpi.int/NR/rdonlyres/C073586C-7D46-4CBE-B901-0672908E8639/143656/lmo_20030908_En.pdf (date of use: 25 February 2017).
[483] See Bergsmo, Bekou & Jones (2010) 2 *Goettingen Journal of International Law* 794 available at http://www.casematrixnetwork.org/fileadmin/documents/Goettingen_Journal_of_International_Law_2_2010_2_791-811.pdf (date of use: 25 February 2017).
[484] See generally, observations of the prosecutor in Office of the Prosecutor "Paper on some policy issues before the Office of the Prosecutor September 2003" available at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (date of use: 24 February 2017).
[485] Assembly of States Parties "Report of the Bureau on Stocktaking: Complementarity. Taking stock of the principle of complementarity: Bridging the impunity gap" ICC-ASP/8/51 Resumed Eighth Session 18 March 2010.

result in an 'impunity gap' if the national courts were not encouraged to take up the prosecution of the lesser offenders[486] The prosecution by national courts is largely dependent on their willingness and ability to investigate and prosecute not only low-level offenders, but also high-raking offenders.

The ICC, therefore, put in place measures to encourage national courts and provide support where possible so the lesser offenders may not escape justice under domestic jurisdiction.[487] This attitude is inspired by the fact that the ICC has limited resources and is not in a position to try all offenders effectively at the same time.[488]

In the result, the negative effect of the 'gravity threshold' rule in the Rome Statute which, arguably, has the effect of generating the impunity gap, is addressed by encouraging the states effectively to pursue and commit to justice the so-called 'lesser-ranking offenders'.[489] It is instructive to note that neither the Rome Statute nor the history of the drafting of the treaty, provides any useful guidance on what situations or cases meet the gravity threshold.[490]

In essence, the ICC prosecutor (and some members of the international community), recognised that the solution to some of the teething problems facing the court lay in

[486] See Fernandez de Gourmendi "The role of the Prosecutor" 55-61.
[487] See Benzing M "The complementarity regime of the International Criminal Court: International criminal justice between state sovereignty and the fight against impunity" available at http://www.mpil.de/files/pdf3/mpunyb_benzing_7.pdf (date of use: 25 February 2017).
[488] Perrin (2006) 18 *Sri Lanka Journal of International Law* 301.
[489] The gravity threshold is provided for in art 17(1)(d) of the Rome Statute and states that a case is inadmissibile where it "is not of sufficient gravity to justify further action by the Court." On 6 November 2014, the ICC prosecutor announced its decision not to investigate the 'Flotilla Incident' on the ground that the situation did not meet the gravity threshold for admissibility. See generally *Situation on Registered Vessels of Comoros, Greece and Cambodia* article 53(1) Report 3 6 November 2014 available at http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf (date of use 24 February 2017).
[490] De Guzman (2015) 19 *American Society of Law* 19 available at https://www.asil.org/insights/volume/19/issue/19/what-gravity-threshold-icc-investigation-lessons-pre-trial-chamber (date of use: 25 February 2017).

the ICC working in close cooperation with national courts in pursuit of effective international criminal justice.[491]

The rest of the 2003 Policy Paper is devoted to the principle of complementarity as enshrined in the Rome Statute and to the organisation and structure of the OTP.[492]

To summarise: the OTP's attitude in its 2003 Policy Paper also supports the argument that a fight against impunity at the international level goes beyond the limited legal mandate of the ICC. In effect, any effective combatting of impunity must engage the participation of the domestic courts and the international community in general.

The OTP indicated that it would be "… taking action only where there is a clear case of failure to take national action",[493] and that the ICC would be "… encouraging States to carry out their primary responsibility of investigating and prosecuting crimes."[494]

The 2003 Policy Paper set the foundation upon which the thinking for positive complementarity begins to emerge. Most of the thinking in the paper is geared towards establishing a legal regime that is more cooperative and not antagonistic to national courts.[495] The ensuing prosecution strategy paper takes this thinking a step further and it is to this prosecution strategy for the three years from 2006 to 2009 that we now turn.

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[491] See views expressed by Khan (2010) 2 *Equality of Arms Review* 14-16.
[492] For structure of the ICC and OTP of the ICC see "Structure of the ICC" ABA-ICC Project at https://www.aba-icc.org/about-the-icc/structure-of -the-icc/ (date of use: 25 February 2017).
[493] See the prosecutor's statements in Office of the Prosecutor "Paper on some Policy Issues before the Office of the Prosecutor September 2003" available at http://www.icc-cpi.int (date of use: 12 May 2016).
[494] See generally, Office of the Prosecutor "Policy papers" available at http://www.icc-cpi.int (date of use: 7 October 2017).
[495] See generally, Marshall "Prevention and complementarity in the International Criminal Court: A positive approach" available at http://www.wcl.american.edu/hrbrief/17/2marshall.pdf (date of use: 24 February 2017).

### 2.2.3 The Office of the Prosecutor: Prosecutorial Strategy 2006-2009

The consistency of the new approach by the ICC prosecutor can be seen in the policy position adopted almost three years after the 2003 Policy Paper in the OTP's 'Prosecutorial Strategy Paper 2006-2009'.[496] It is a far shorter report than its 2003 counterpart.

It is important to examine the 2006-2009 Prosecutorial Strategy Paper (2006-2009 Strategy) in that it succinctly lays a foundation for the OTP's 'Prosecutorial Strategy Report of 2009-2012' which, as will be seen, is bolder in introducing the concept of positive complementarity.[497]

Of the five strategic objectives of the OTP between 2006 and 2009, the fifth objective is most closely linked to positive complementarity.[498] This objective provides that the court will establish forms of cooperation with states and organisations to maximise the OTP's contribution to the fight against impunity and the prevention of crime.[499] The cooperation alluded to in the fifth objective is, arguably, the most critical component of the policy concept of positive complementarity,[500] in that it seeks to foster cooperation between the ICC and the states in a concerted effort to combat

[496] Office of the Prosecutor "Report on 14 September 2006" available at http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf (date of use: 23 May 2017).
[497] Ibid. See Stahn C "Taking complementarity seriously" 233-82.
[498] The OTP Prosecutorial Strategy is part of the court's Strategic Plan. The five strategic objectives are: "(a) to further improve the quality of prosecution, aiming to complete two expeditious trials; (b) to conduct four to six new investigations of those who bear the greatest responsibility in the Office's current or new situations; (c) to gain the necessary forms of cooperation for all situations to allow for effective investigations and to mobilize and facilitate successful arrest operations; (d) to continuously improve the way in which the Office interacts with victims and addresses their interests; and (e) to establish forms of cooperation with states and organizations to maximize the Office's contribution to the fight against impunity and the prevention of crimes."
[499] See Payam (2005) 99 *American Journal of International Law* 403, 413.
[500] See the court's observations in *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-139 (12 December 2011) available at https://www.icc-cpi.int/pages/record.aspx?uri=1287184 (date of use: 25 February 2017).

international crime. This cooperation is an essential element of positive complementarity.

In its 2006-2009 Strategy, the OTP underscored the important role states play in the realisation of the goals of the concept of positive complementarity by "…emphasizing that according to the Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories."[501]

The OTP, in its 2006-2009 Strategy, for the first time officially pronounced what came to be known as: "A positive approach to complementarity"[502] in which it declared that the OTP "encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation."[503] The OTP thus pursued a policy of encouraging genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation but without involving the Office directly in capacity building or financial or technical assistance.[504] The paper unequivocally states that, "… the Office has adopted a *positive approach* to complementarity…"[505] In this regard, this policy is one that the OTP took seriously as one of its strategic pillars in combatting impunity.

[501] See Hall "Positive complementarity in action" 1017.
[502] Office of the Prosecutor "Report on Prosecutorial Strategy 14 September 2006" 3 available at http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf (date of use: 23 May 2016). See also Ocampo LM "A postive approach to complementarity" 23.
[503] Gioia "Reverse cooperation" 75-102. See also on the failure of state cooperation, Coalition for the International Criminal Court "State Cooperation: The weak link of the ICC" available at http://www.coalitionfortheicc.org/blog/?p=588&langswitch_lang-en (date of use: 25 February 2017).
[504] The international networks vary in mandate, including capacity building, crime fighting, legal experts, etc. See generally Gallmetzer (2010) 8 *Journal of International Criminal Justice* 952, 956.
[505] Emphasis supplied to demonstrate that this is in fact a policy that had already been adopted, as opposed to one that is only being proposed. See Office of the Prosecutor "Report on Prosecutorial Strategy 2006-2009" 14 September 2006 available at http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy_20060914_English.pdf (date of use: 23 May 2016).

The prosecutor, therefore, construed his legal mandate to include a mutually reinforcing system of international criminal justice in which both the domestic and international jurisdictions were interdependent and acted as partners in limiting impunity.[506]

Under the 2006-2009 Strategy, the OTP monitored situations on four continents, carried out investigative activities in four situations and eight cases, applied for and obtained seven new warrants of arrest and one summons to appear, completed confirmation hearings in four cases – *Thomas Lubanga Dyilo*; *Germain Katanga & Mathieu Ngudjolo Chui*; *Jean-Pierre Bemba*; and *Bahr Idriss Abu Garda* – and commenced trial proceedings in the *Lubanga* case.[507] These four situations and eight cases are significant in that they provided an opportunity for the court to consider legal issues that had a bearing on prosecutorial policy which reflected a positive approach to complementarity.[508]

It should be noted, further, that it was during this period that a number of key developments impacting on positive complementarity occurred.[509] The court issued the Regulations defining its structure and functioning and the main policies of the OTP governing: positive complementarity; the selection of cases; gravity; interests of justice; focused investigations and prosecutions; victims; and human resources and management were consolidated.[510]

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[506] Ocampo "A postive approach to complementarity" 23.
[507] See generally, Office of the Prosecutor "Prosecutorial Strategy 2009-2012" Executive Summary at 2 available at http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf (date of use: 15 October 2017).
[508] See Bekou (2012) 10/3 *Journal of International Criminal Justice* 677.
[509] Ocampo "A positive approach to complementarity" 23.
[510] See Office of the Prosecutor "Report on Prosecutorial Strategy 14 September 2006" available at http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf (date of use: 23 May 2016). See also, Burke-White "Reframing positive complementarity" 341-60.

In conclusion, it may be argued that the activities of the OTP during the period 2006-2009 laid the foundation for the formulation of the ensuing Prosecutorial Strategy Policy Paper for the period 2009-2012. In the following section, the study analyses this Prosecutorial Strategy Policy Paper.

### 2.2.4 The Office of the Prosecutor's Prosecutorial Strategy 2009-2012

The OTP's Prosecutorial Strategy Policy Paper 2009-2012 (2009-2012 Strategy) was issued in furtherance of the principles and aims of the Rome Statute.[511] The paper underscores that it remains based on the principles defined by its predecessor, the 2006-2009 Strategy. The 2006-2009 Strategy was largely based on 'a positive approach to complementarity', focused investigations and prosecutions, and maximising impact.[512]

The interests of the victims of the crimes under the Rome Statute received the attention of the OTP. This can be seen in the 2009-2012 OTP Strategy where a fourth principle is articulated– addressing the interests of the victims. The five objectives of the 2009-2012 Strategy were aligned to the strategic principles for the same period. The 2009-2012 Strategy established five interrelated objectives. The OTP was to

> (a) continually improve the quality of prosecutions, completing at a minimum three trials, starting at least one new trial, and efficiently litigating in appellate proceedings;
> (b) continue ongoing investigations in seven cases, conduct up to four new investigations of cases within current or new situations and be ready to start another investigation at short notice;

[511] See Office of Prosecutor "Report on Prosecutorial Strategy 1 February 2010" available at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/Office of the ProsecutorProsecutorialStrategy20092013.pdf (date of use: 23 February 2017).
[512] See Office of Prosecutor "Report on Prosecutorial Strategy 14 September 2006" available at http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf (date of use: 23 May 2016).

> (c) conduct up to ten preliminary examinations in relation to currently examined or new situations;
> (d) continue to enhance cooperation with States and relevant actors, in particular for the execution of arrest warrants issued by the Court; and
> (e) maximize the Office of the Prosecutor's contribution to the fight against impunity and the prevention of crimes.[513]

This prosecutorial strategy takes into account the experience and lessons learned by the OTP as documented in the three-year reports spanning 2003-2006 and 2006-2009.[514]

The policy paper emphasises the significance of cooperation between the ICC and various actors and stakeholders in the international criminal justice system.[515] It provides that the court will improve communication with diverse actors with the aim of enhancing international justice, while respecting institutional mandates and independence.[516] The OTP undertakes, in the report, to work with states and international, regional, thematic, and judicial organisations to, inter alia, promote national activities including the adoption of implementing legislation and the promotion of domestic proceedings.[517] This is important to our analysis as it serves as a pointer to one of the characteristics of the concept of positive complementarity, namely, cooperation.[518]

The OTP also undertook to work with civil society in order to, among other things, promote national activities geared towards implementing the Rome Statute, and to

[513] See generally Bekou "In the hands of the state" 830-52.
[514] Office of the Prosecutor "Report on Prosecutorial Strategy 2009-2012" para 14 available at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/Office of the ProsecutorProsecutorialStrategy20092013.pdf (date of use: 15 October 2017)
[515] Office of Prosecutor "Report on Prosecutorial Strategy 1 February 2010" available at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/Office of the ProsecutorProsecutorialStrategy20092013.pdf (date of use: 23 February 2017).
[516] The paper provides that political leaders, conflict managers, militaries, civil society, NGOs, academics and others will play a key role to ensure the impact of the OTP at local, national and international levels.
[517] Office of the Prosecutor "Report on Prosecutorial Strategy 2009-2012" para 7 available at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/Office of the ProsecutorProsecutorialStrategy20092013.pdf (date of use: 15 October 2017).
[518] See Cassese "The rationale for international criminal justice" 1664-1684.

encourage the cooperation of states and all stakeholders.[519] The promotion of national activities and the encouragement of cooperation are of considerable relevance to the concept of positive complementarity.[520]

The OTP sought further to develop the participation and protection of victims and to engage them in the interests of justice.[521] Another suggested characteristic of positive complementarity is seen in the undertaking by the OTP to work with external experts including academics, practitioners, and members of policy institutes, with the aim of developing a framework for the implementation of the Rome Statute and providing advice on specific projects.[522] In this way the OTP would be coordinating various technical experts to encourage and support national jurisdictions.[523]

The involvement of the ICC in other activities that reinforce the application of positive complementarity is evidenced in the OTP's undertaking to work with educational projects run by states, international and regional organisations, NGOs, academics, policy institutes, teachers, and students to integrate court issues in education curricula at all levels.[524]

The role of private donor foundations in the international criminal justice system in general, and in positive complementarity in particular, cannot be gainsaid. The 2009-2012 Strategy recognises this by providing that the OTP shall work with private donor foundations with a view to supporting international criminal justice activities and national activities to end impunity and prevent crimes. In a similar vein, the OTP

[519]See discussion in Akhavan (2003) 97 *American Journal of International Law* 712.
[520] Bekou & Shah (2006) 6 *Human Rights Law Review* 499-544.
[521] Salvatore (2010) 8/1 *Journal of International Criminal Justice* 137. See also *Situation in Darfur* Prosecutor's Response to Cassese's Observation on issues concerning the protection of victims and the preservation of evidence in the proceedings on Darfur pending before the ICC, 11 September 2006. See further, Van Boven "Victim's rights and interests" 895.
[522]See generally Bacio (2007) 5 *Journal of International Criminal Justice* 421-440.
[523] Lijun (2003) 2/2 *Chicago Journal of International Law* 599.
[524]See Brubacher (2004) 2 *Journal of International Criminal Justice* 71-95.

planned to work with the media in order to promote greater understanding of the role and operations of the ICC.[525] The media plays a big role in supporting positive complementarity initiatives by creating greater awareness of and education on the relevant programmes.[526]

In the 2009-2012 Strategy the OTP attempted to distinguish the two forms of complementarity by stating that:

> [T]his principle of complementarity has two dimensions: (I) the admissibility test, i.e. how to assess the exercise of national proceedings and their genuineness, which is a judicial issue; and (ii) the positive complementarity concept, i.e. a proactive policy of cooperation aimed at promoting national proceedings.[527]

In the latter respect, the ICC encourages national jurisdictions to engage in the fight against impunity.[528] Under the positive complementarity scenario, the court should provide support to domestic initiatives by helping to build national capacity.[529] This is done in conjunction with other national and international actors. The key areas of assistance by the ICC would be in the area of investigation and prosecution of international crimes. Such assistance would be extended to states that are genuinely willing to investigate and prosecute the crimes in question. Other areas that may attract assistance, according to the OTP, would be the provision of information, technical support in the promulgation and implementation of relevant domestic legislation, as well as building a functional and effective domestic judicial system.

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[525] Office of Prosecutor "Report on Prosecutorial Strategy 1 February 2010" available at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/Office of the ProsecutorProsecutorialStrategy20092013.pdf para 8 (date of use: 23 February 2017).
[526] See Kyriakakis (2008) 19 *Criminal Law Forum* 115-51.
[527] Office of Prosecutor "Report on Prosecutorial Strategy 1 February 2010" available at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/Office of the ProsecutorProsecutorialStrategy20092013.pdf paras 8 and16 (date of use: 23 February 2017).
[528] See El Zeidy (2002) 23 *Michigan Journal of International Law* 869-975.
[529] See Takemura "A critical analysis of positive complementarity" 601-21 available at http://www.defensesociale.org/warandpiece/HITOMI%20TAKEMURA.pdf (date of use: 25 February 2017).

The report provides that a positive approach to complementarity means that the OTP will encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance.[530] As shall be seen later in this chapter, this statement reflects the definition of positive complementarity as presented by the Bureau on Stock-taking of the Rome Statute at the Kampala Review Conference of 2010.[531]

It should be noted that the 2009-2012 Strategy ascribes this definition to a 'positive approach to complementarity' and not directly to the term 'positive complementarity' as was done by the Bureau on Stock-taking of the Rome Statute.[532] It is submitted that that the OTP's report used the terms 'positive approach to complementarity' and 'positive complementarity' interchangeably.[533]

This notwithstanding, the positive approach to complementarity adopted by the OTP as outlined in the 2009-2012 Strategy involves four important elements.

Firstly, the approach includes providing information collected by the OTP to national courts where that information has been requested by the state under article 93(10) of the Rome Statute. This article provides:

> (a)The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.
> (b)(i)The assistance provided under subparagraph (a) shall include, *inter alia*:
> a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or trial conducted by the Court; and

[530]See generally Clark (2010) 2 *Goettingen Journal of International Law* 689-711.
[531]The 2010 Kampala Review Conference adopted this definition of positive complementarity.
[532] See Burke-White & Kaplan (2009) 7 *Journal of International Criminal Justice* 257-79.
[533] See Donlon F "Positive complementarity in practice" 920-54.

b. The requesting of any person detained by order of the Court;
(ii)In the case of assistance under subparagraph (b) (i) a:
a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;
b. If the statements, documents or types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.
(c)The Court may, under the conditions set out in this paragraph, grant a request for assistance, under this paragraph, from a State which is not a Party to this Statute.

This information will not be provided by the OTP as a matter of course, but is subject to certain conditions being met.[534] These conditions include the existence of a credible local system for the protection of judges or witnesses, and other security-related caveats.[535] Another condition is the sharing of the database of non-confidential material or crime patterns,[536] largely to assist with investigations and so improve the chances of effective prosecution.

The second aspect of this approach entails calling upon officials, experts, and lawyers from situation countries to participate in OTP investigative and prosecutorial activities, taking into account the need for their protection.[537] Those experts and lawyers should also be invited to participate in a network of law enforcement agencies (LENs) [538] coordinated by the OTP. The OTP may also share expertise and training on investigative techniques or questioning of vulnerable witnesses with the LENs.[539] This contributes to national efforts at building expertise and capacity by empowering the

[534] See Schabas "Prosecutorial discretion and gravity" 229-46.
[535] Paragraph 17(a) "Report on Prosecutorial Strategy 2009-2012" available at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/Office of the ProsecutorProsecutorialStrategy20092013.pdf (date of use: 15 October 2017).
[536]Ibid.
[537]Ibid para 17(b).
[538] LEN is a law-enforcement network project that is a network of specialised organisations such as the Interpol and the national law enforcement agencies that concern themselves with international crimes.
[539]See observations by the court in *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* 1CC-01/11-01/11-1 PT Ch I (27 June 2011).

states effectively to investigate and prosecute cases within their jurisdiction. In this way it helps to promote the policy of positive complementarity.[540]

The third intervention by the OTP would be to provide information about the judicial work of the OTP to persons involved in political mediation, for instance, to diplomats. In this way it is envisaged that foreign special envoys would be in position to support national and/or regional activities which complement the work of the OTP and promote the effective administration of international criminal justice.[541]

Finally, the approach adopted by the OTP would act as a catalyst for various stakeholders and donor conferences to promote support for relevant accountability efforts.[542]

The 2009-2012 Strategy of the OTP sought to reinforce efforts by domestic courts to combat impunity within the framework of the international criminal justice system. What is incontestable is that the ICC has tended to adopt a more cooperative strategy in which various stakeholders are actively engaged in tackling the challenges raised by the fight against impunity.[543]

The rest of the prosecutorial strategy report addresses other pertinent matters which are not directly relevant to positive complementarity and, as such, will not be further considered here.

Before concluding this chapter, the study examines the practice of self-referral in the context of the Rome Statute. This practice introduces a twist in the understanding of

[540] See Stahn (2010) 23 *Leiden Journal of International Law* 311-18.
[541] Office of the Prosecutor "Report on the Prosecutorial Strategy Paper 2009-2012" para 17(c) available at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/Office of the ProsecutorProsecutorialStrategy20092013.pdf (date of use: 15 Ocober 2017).
[542] Ibid para 17(d).
[543] See generally, Kleffner (2003) 1 *Journal of International Criminal Justice* 86-113.

the principle of complementarity and so calls for some analysis in the formation of a basis on which to contextualise the concept of positive complementarity.

### 2.3 Self-referrals

In this section, the study examines the characteristics of state 'self-referrals' and the implications they hold for the principle of complementarity. The analysis seeks to show that the principle of complementarity exhibits certain loopholes that need to be addressed and hence the concept of positive complementarity becomes an issue of concern.[544]

The Rome Statute does not provide for 'self-referral' in its texts. The OTP, however, in its early years of operation, adopted this rather controversial strategy of soliciting self-referral of cases by states to the ICC.[545] Self-referral occurs when a state refers its own situation to the ICC and effectively 'waives' complementarity.[546]

However, article 13(a) of the Rome Statute has been interpreted to mean that the ICC may activate referral from a state party to the Statute.[547] Article 13(a) provides for this trigger mechanism for referral by the government of a state in whose territory the crime appears to have been committed. Article 13(a) of the Rome Statute provides that:

> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A Situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;…

[544] See Akande D "Darryl on self-referrals: Is the International Criminal Court really a Court of last resort?" *European Journal of International Law Blog* available at www.ejiltalk.org/darryl-robinson-on-self-referrals-is-the-international-criminal-court-of-last-resort/ (date of use: 26 February 2017).
[545] See generally Muller & Stegmiller (2010) 8/5 *Journal of International Criminal Justice* 1267-94.
[546] See generally Kress (2004) 2 *Journal of International Criminal Justice* 944-8. See, too, the discussion by Takemura "A critical analysis of positive complementarity" 601-21.
[547] Pisani *System of the International Criminal Court* 84-7.

The practice is controversial because it has largely been the prosecutor of the ICC who has solicited the self-referrals despite the fact that in terms of article 13(a) of the Rome Statute, it is a state party which, of its own accord, refers the matter to the ICC.[548]

In instances of self-referral, the ICC and the territorial state – incapacitated, for instance, by mass crimes – may agree that a consensual division of labour is the most logical and effective approach.[549] It is undeniable that groups bitterly divided by conflict may oppose prosecutions at each other's hands and yet agree to a prosecution by the ICC which is perceived as impartial.[550] In this type of situation self-referral would be the most appropriate approach.

Cases have been brought before the ICC on self-referral by the Central African Republic,[551] the Democratic Republic of the Congo (DRC),[552] and Uganda.[553]

The Cote d'Ivoire situation, although not an instance of 'self-referral', nonetheless adds an interesting dimension to the understanding of the notion of 'self-referral' in the context of the ICC system. The President of Cote d'Ivoire, Allasane Outtara,

[548] See generally, Nouwen "The law and politics of self-referrals" 255-71 available at http://www.law.cam.ac.uk/faculty-resources/summary/the-law-and-politics-of-self-referrals/10232 (date of use: 26 February 2017). See also views expressed about self-referral in Gaja "Issues of admissibility" 49-52.
[549] See generally Gaeta (2004) 2 *Journal of International Criminal Justice* 949-52.
[550]See generally, Marshall KA 'Prevention and Complementarity in the International Criminal Court: A Positive Approach' available at http://www.wcl.american.edu/hrbrief/17/2marshall.pdf (date of use: 27 May 2017).
[551] See *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-424 PT Ch II (15 June 2009).
[552] See generally Stahn (2010) 23 *Leiden Journal of International Law* 317. See also Press Release, "Prosecutor of ICC receives referral of the Situation in the Democratic Republic of Congo" ICC-OTP-20040419-50 19 April 2004.
[553] See Press Release "President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC" ICC-20040129-44.

wrote to the prosecutor of the ICC requesting that he initiate investigation into core crimes allegedly perpetrated in Cote d'Ivoire since 28 November 2010.[554]

An important and unique point worth noting is that Cote d'Ivoire, as at the time of its request to the prosecutor, was not a state party to the Rome Statute. Cote d'Ivoire had, nonetheless, by virtue of issuing a request to the prosecutor under article 12(3),[555] consented to the jurisdiction of the ICC. Unlike the conventional self-referral, the President of Cote d'Ivoire framed his request by stating that this was not a situation in which the state was making a 'self-referral' under article 13(a) of the Rome Statute as had been the case with Uganda, the Democratic Republic of Congo, and the Central African Republic.[556] Instead, the President asked the prosecutor of the ICC to initiate a *proprio motu* investigation as provided for under article 13(c) of the Rome Statute. In effect, the President's letter invoked article 15 of the Rome Statute. To this extent the Ivorian situation introduces a new dimension to self-referrals.

The issue of unwillingness, therefore, falls away as the ICC may not concern itself with 'unwillingness' in that no dispute exists since the state itself referred the matter to the court.[557] It has been argued that a self-referral by a state automatically establishes that a state is unwilling and unable genuinely to investigate or prosecute,

[554] See *Request for Authorization of an Investigation pursuant to Article 15,* Situation in the Republic of Cote D'Ivoire, Pre-Trial Chamber III, 23 June 2011, No. ICC-02/11. President Alassane Outtarra wrote letter dated 4 May 2011 to Prosecutor of the ICC confirming his wish for OTP to conduct independent and impartial investigations into the most serious crimes committed on the entire Ivorian territory. See also Office of the Prosecutor Weekly Briefing 11-16 May 2011 available at https://www.icc-cpi.int/NR/rdonlyres/3836B9AF-B0DC-4F94-A4A8-4115E95AE76E/283329/OTPWeeklyBriefing_1116May201187.pdf (date of use: 26 May 2017).

[555] Update to Chapter 4 art 12(3) of the Rome Statute provides that: "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

[556] *Situation in the Republic of Cote d'Ivoire* ICC-02/11 available at https://www.icc-cpi.int/cdi (date of use: 1 June 2017).

[557] Bernard (2011) 1/19 *International Journal of Humanities and Social Science* 203-16.

regardless of subsequent events.[558] It has also been noted, however, that in practice the court has recognised changed circumstances with respect to a self-referral already serving before it.[559]

In the context of 'self-referrals', the fact that the case is admissible upon referral does not necessarily render it admissible in perpetuity. When circumstances change materially with regard to the case, the court would hold that the self-referred case is no longer admissible.[560] This is clearly demonstrated by the facts and decision of the Pre-Trial Chamber in the *Lubanga* case.[561] In that case the ICC found that at the time of the self-referral the state of the Democratic Republic of the Congo was indeed unable genuinely to investigate or prosecute the offenders in question.[562] Self-referrals can be said to exclude a challenge to complementarity as the admissibility test applies to cases and not situations. In this regard it is possible for one case in a situation to be admissible, while another case in the same situation is inadmissible. A striking example of this is the Libyan situation where the *Gaddafi* case was considered admissible, while the *Al-Senussi* case was ruled inadmissible. See the discussion in the previous chapter.

However, the ICC later noted that, with time, the Democratic Republic of the Congo judiciary had acquired sufficient capacity to be able to issue warrants of arrest for the accused.[563] The Pre-Trial Chamber of the ICC subsequently rejected the assertion of jurisdiction by the Democratic Republic of the Congo, but not on ground of unwillingness or inability. The point of capacity of the state was more important in

[558] Keller (2010) 8 *Santa Clara Journal of International Law* 221.
[559] See generally *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07-1497 (25 September 2009).
[560] See Stegmiller (2009) 9 *International Criminal Law Review* 547-65.
[561] *Prosecutor v Lubanga* ICC-01/04-01/06-772A Ch (14 December 2006).
[562] Ibid.
[563] See Bekou (2008) 8 *Human Rights Law Review* 345-63.

this regard. The court argued that no plausible justification existed to discuss unwillingness or inability.[564] It is submitted that as the state itself had referred the situation to the court, the question of an admissibility challenge on the basis of 'willingness' or 'inability'' became moot, and was automatically rendered redundant.

In similar vein, in the Ugandan case of self-referral the ICC did not consider that Uganda had indeed waived her right to challenge admissibility.[565] In fact, the issue of admissibility was raised at a later stage. When the unsigned peace pact was entered into with Kony's Lord's Resistance Army, the circumstances changed materially and rendered the admissibility of the cases before the ICC unsustainable.[566] However, Uganda argued that Kony had not signed the agreement and that the legislation to domesticate prosecution before the High Court of Uganda would only come into effect upon Kony signing the pact.[567] The ICC observed in its ruling that Uganda's argument seemed internally contradictory. Uganda nonetheless did not subsequently challenge admissibility.[568]

In all the preceding matters before the ICC it can be deduced that the OTP did not view complementarity merely as a question of admissibility, but ascribed to it a much broader context in which its discretion would be implemented with the overall object of fighting impunity in the international plane.[569] Indeed, a remarkable aspect of the

[564] See Smith (2008) 8 *International Criminal Law Review* 331-52.
[565] *Situation in Uganda* ICC-02/04-53 PT Ch II 27 September 2005. Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005.
[566] *Prosecutor versus Kony* ICC-02/04-01/05 (29 Feb 2008) AT 5.
[567] See *Prosecutor v Kony* ICC-02/04-01/05-377 (10 March 2009).
[568] Ibid.
[569] See Kaplan (2009) 7 *Journal of International Criminal Justice* 257-79. See also Gaja "Issues of admissibility" 49-52.

OTP's strategy of positive complementarity is that, in the context of self-referrals, it was never contemplated by those responsible for the establishment of the ICC.[570]

### 2.4 Conclusion

In conclusion, the ability and success of the OTP to implement the positive approach as contained in its prosecutorial strategy policy papers may turn out to be a challenge.

The legal basis for the OTP to engage in efforts for domestic prosecution may be challenged on the ground that the ICC has a legal mandate to assess admissibility compliance and not to involve itself in encouraging states to comply with the Statute requirements.[571] The latter exercise, it is submitted, may prove problematic when the admissibility of a case is challenged in a matter before the court. There is nothing in the Rome Statute that would prohibit the prosecutor from exercising this function.[572]

Against this background, the next section examines the definition of positive complementarity.

## 3 The definition of positive complementarity: A normative challenge

Any attempt at a definition of the concept of positive complementarity will of necessity raise normative questions. Other than the references to 'complementary' in the Preamble and in article 1 of the Rome Statute, there is no definition or even mention of the term 'positive complementarity' in any of the Statute's provisions. Complementarity has been conceptualised as entailing two separate dimensions. The

[570] See generally Politi "Reflections on complementarity" 3.
[571] See generally El Zeidy (2006) 19 *Leiden Journal of International Law* 741-51.
[572] See generally the arguments presented in Burke-White (2008) 19 *Criminal Law Forum* 59.

first dimension is the admissibility test, while the second is 'positive complementarity'.[573]

The concept of positive complementarity does not answer, as do most settled legal principles, to definitive elements, legal parameters, or a definitive scope that would enable us to define it with exactitude. Its normative character remains elusive but the study seeks to pin down key characteristics of the concept.[574] The normative justification for positive complementarity is the subject of considerable discourse in existing literature.[575]

The concept of positive complementarity is the idea that the ICC and, notably, the prosecutor and the OTP, should work to engage national criminal courts in prosecutions, using various methods to encourage states to prosecute international criminal cases domestically whenever possible.[576]

It is submitted that the ultimate goal of a policy of positive complementarity is to strengthen the capacity of national criminal courts. This arguably will, in turn, have a significant positive impact on the promotion and restoration of the rule of law and thus the prevention of future atrocities.[577] In retrospect, it has already been noted that this policy is geared towards enhancing concerted international efforts at limiting impunity.[578]

[573] See Pisani *System of the International Criminal Court* 129.
[574] See generally Cross & William 2010 *Human Rights Law Review* 344; See also Takemura "A critical analysis of positive complementarity" 601-21.
[575] See Burke-White (2008) 19 *Criminal Law Forum* 59.
[576] See Gioia "Reverse cooperation" 75-102.
[577] See generally Bassy G "Proactive complementarity" 52-67. See also Burke-White 2008 *Harvard International law Journal* 53-108.
[578] See Stahn (2008) 19 *Criminal Law Forum* 87-113.

As a matter of normative argument, positive complementarity falls short of meeting criteria in established definitive elements, parameters, or a definitive scope that would succinctly render a clear, unequivocal definition of the term.[579]

According to Burke-White, positive complementarity – what he refers to as pro-active complementarity – is not expressly regulated, but it is embedded in the structure of complementarity in the Rome Statute.[580] This does not, however, appear to provide a more succinct explanation of the term positive complementarity.

### 3.1 The concept of 'positive' complementarity

Under this section, the study analyses the concept of positive complementarity as presented in various scholarly works. This analysis is critical in that it will provide a basis for the analysis of the approaches advanced by various scholars on the concept of positive complementarity.

The discussion, in turn, provides a basis for a framework to be developed in this study. This is of particular significance in developing the legal and institutional framework based on the proposal for the establishment of an Office of the Coordinator for Positive Complementarity.

Stahn states that complementarity has been claimed to have many faces and has raised a paradox.[581] He says that complementarity has traditionally been theorised on the basis of a distinction between 'classical' and 'positive' complementarity.[582] The normative question posed is: To what extent does the classification of

[579] See generally Stahn "Taking complementarity seriously" 233-82.
[580] See generally Burke-White 2008 (1) *Harvard International Law Journal* 49.
[581] See generally Stahn "Taking complementarity seriously" 233-82.
[582] Ibid.

complementarity as 'classical' or 'positive' define the normative characterisation of positive complementarity? It is submitted this classification will ultimately derive its validity from the interpretation of the relevant provisions of the Rome Statute.[583] The term 'classical', for instance, does not say much beyond describing that it was the original concept before the emergence of another model of complementarity, namely, positive complementarity.[584]

Burke-White argues for a change in the role of the ICC by practising the policy of 'proactive complementarity' by way of encouraging domestic courts to undertake national prosecutions.[585] In effect, he advocates the shifting of the responsibility to prosecute offenders from the ICC to national courts.[586] He further examines the legal mandate of the ICC to implement the policy of pro-active complementarity.[587] To this extent Stahn attempts to develop a normative justification for proactive complementarity.

According to Stahn, the jurisdiction of the ICC and the national authority may complement each other by interacting in a 'positive' way, including engaging in activities that render mutual assistance. He argues that this 'positive' dimension is not fully covered by the threat-based vision of complementarity.[588]

Against this background, positive complementarity is viewed as a model that promotes a constructive relationship grounded on 'partnership' and 'dialogue' between the ICC and states, as opposed to the antagonistic approach inherent in the

[583] See arts 17 and 53 of the Rome Statute.
[584] See generally Stahn "Taking complementarity seriously" 233-82.
[585] See generally Burke-White (2008) 49 *Harvard International Law Journal* 53-108.
[586] Ibid 59-85.
[587] Ibid.
[588] See generally Stahn "Taking complementarity seriously" 233-82.

'classic' vision.[589] The positive approach to complementarity thus encourages genuine national proceedings where possible, particularly where the domestic courts are willing but perhaps unable to prosecute due to constraints such as inadequate capacity.[590]

In the preceding respect, positive complementarity is viewed more as a legal tool to strengthen international criminal jurisdiction by strengthening domestic jurisdiction.[591] It takes complementarity back to the states so they may effectively control the process of international criminal justice within their respective national territories. The process should also involve other stakeholders – including civil society and international, regional, and national organisations.

Stahn also perceives positive complementarity from a managerial perspective.[592] In that regard he argues that positive complementarity is not only confined to strengthening domestic jurisdiction, but is a 'managerial' concept that is instrumental in organising the common responsibility of both national courts and the ICC by ensuring a division of labour and burden-sharing between the two entities.[593] The comparative advantages available to each respective jurisdiction play a key role in determining the allocation of responsibilities based on principles.[594]

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[589] See generally Takemura "A critical analysis of positive complementarity" 601-21.
[590] Ibid.
[591] This reflects the definition advanced in the "Discussion Paper on Positive Complementarity" presented by South Africa and Denmark, where the concept is defined it as "… describing all actions and activities aimed at supporting national jurisdictions in meeting their obligations under the Rome Statute, including related activities aimed at strengthening the rule of law." See generally, Discussion Paper submitted by Denmark and South Africa "Bridging the impunity gap through positive complementarity' 6 November 2009 at 24. That definition proved to be so broad and was latter narrowed down in the Report of the Bureau on Stock-taking which defined positive complementarity as "all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trails of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance."
[592] For an elaboration of these arguments see Stahn "Taking complementarity seriously" 233-82.
[593] Ibid.
[594] Ibid.

The proposition by Stahn that positive complementarity is a managerial concept, is problematic from a normative point of view on two important levels.[595] The first level is that the statement presupposes that legal instruments exist for ensuring effective management systems. Secondly, but flowing from the argument on the first level, is that it does not concern itself with an evaluation of the effectiveness of the so-called management system. Consequently, this only helps to generate confusion about what exactly positive complementarity as a managerial concept entails.

It is necessary to exercise caution in the use of the word 'positive' as it opens a 'Pandora's box' leading to normative ambiguity. The absence of a universally acceptable definition of the concept of positive complementarity has the potential to create ambiguity. It thus creates confusion when one uses the terms 'proactive', 'positive' or 'negative' complementarity. This raises a need to clarify the normative features of complementarity in general and positive complementarity in particular.

Burke-White,[596] for his part, argues that 'pro-active' complementarity is not expressly regulated but is embedded in the structure of complementarity in the Rome Statute.[597] It is submitted that the two terms signify the same concept and distinguishing them, is more semantic than actual.[598]

Burke-White recognises that some commentators have used the term 'positive complementarity' to refer to a policy concept similar to his 'pro-active complementarity'. He argues that pro-active complementarity better reflects the nature of the policy and can be distinguished from 'passive complementarity' which,

[595] Ibid.
[596] See generally the series of works in which Burke-White attempted a spirited advocacy for proactive complementarity: Burke-White (2005) 18 *Leiden Journal of International Law* 557- 90; Burke-White (2008) 49 *Harvard International Law Journal* 53-108; Burke-White (2008) 19 *Criminal Law Forum* 59-85; and finally, Burke-White & Kaplan (2009) 7 *Journal of International Criminal Justice* 257-79.
[597] See Burke-White 2008 (1) *Harvard International Law Journal* 49.
[598] Compare with the works, for instance, in Nouwen *Complementarity in the Line of Fire* 11-45.

according to him, is the approach the ICC has taken.[599] This argument is, however, open to question.

Some may as well argue that the proposition adopted by Burke-White is a reflection of the OTP's vision of positive complementarity.[600] But caution ought to be exercised with that line of argument as it loses track of the critical elements Burke-White raises to justify the use of the term 'proactive' as opposed to 'positive'. Some of these elements could simply be summarised as normative constituents of proactive complementarity.

Based on the preceding analysis, it could be argued that positive complementarity and classical complementarity are founded on different premises. However, the arguments advanced by Nouwen regarding the plausibility or otherwise of the concept of positive complementarity are very interesting. She appears to take a radically different approach to whether positive complementarity can indeed stand as a term.[601] Nouwen argues that complementarity has been living a double life: on the one hand, from a legal point of view it is a technical admissibility rule provided for in the Rome Statute and governing how the ICC may proceed with the investigation or prosecution of a case within its jurisdiction;[602] on the other hand, complementarity presents as a 'big idea' resulting from the work of writers, diplomats, activists, and legal practitioners.[603]

To begin with, Nouwen's argument, above, does not dismiss complementarity as a 'big idea' stemming merely from the arguments of a certain class of people, but recognises that although it bears little resemblance to the admissibility rule,

[599] See generally Payam (2005) 99 *American Journal of International Law* 403, 413.
[600] See Robinson (2010) 22/3 *Criminal Law Forum* 67-102; Perrin (2006) 18 *Sri Lanka Journal of International Law* 301.
[601] See Nouwen *Complementarity in the Line of Fire* 11.
[602] Ibid.
[603] Ibid.

complementarity as a 'big idea' includes 'responsibilities' and even obligations for states.[604] She contends that the advocates for complementarity as 'a big idea' seek to promote a normative agenda beyond the confines of the Rome Statute.[605]

The arguments above, by Nouwen, raise a normative challenge. Firstly, these lines of argument create considerable difficulty in ascertaining the justification for the policy concept in terms of which Nouwen identifies complementarity as the 'big idea'.[606] Secondly, they introduce confusion in that they fail actually to establish the normative existence of complementarity as 'a big idea'.

It is, moreover, argued that the reference to 'complementarity' as the policy of positive complementarity, is misleading, and that in effect the policy comes down to a form of cooperation which requires the ICC to facilitate domestic proceedings rather than the states assisting in the proceedings of the court.[607]

It has been argued that a policy of assisting domestic jurisdiction is not inherent in complementarity. On this reasoning, it is not surprising that Nouwen elects to use the term complementarity as a 'big idea'[608] rather than positive complementarity.

Positive complementarity has not yet received juridical endorsement from the ICC judges[609] which continues to make the exact normative value and application of the concept uncertain.

Burke-White attempts to address the gap between the mandate of the ICC and the limited financial and other resources available to it in light of lofty societal

[604]Compare with the arguments in Kaplan (2009) 7 *Journal of International Criminal Justice* 257-79.
[605] In light of Nouwen's argument it is instructive to look at Gioia "Reverse cooperation" 75-102.
[606] See arguments in Nouwen "The law and politics of self-referrals" 255-71.
[607]See Nouwen *Complementarity in the Line of Fire* 97.
[608]Nouwen prefers the use of the term "complementarity as a 'big idea' in her works, electing to stay clear of the use of positive complementarity, and discussing it as a misnomer.
[609] In all matters in which the court has made a determination there has so far been no definition of positive complementarity advanced by any of the judges.

expectations.[610] These are coupled with political challenges facing the court. He argues that the ICC must cooperate with national courts to encourage them to investigate and prosecute crimes domestically.[611]

The normative difficulty introduced by the foregoing frame of argument is that it presupposes a static or rigid supply of resources to the court. The argument would have been more problematic had it operated on the assumption that national jurisdictions would naturally be cooperative. This assumption, however, fails plausibly to account for the possibility that national courts may refuse to cooperate with the ICC. In the absence of cooperation Nouwen's argument collapses.

It is submitted that Stahn's classification and his distinction between classic and positive complementarity provide fairly justifiable grounds for the establishment of the concept of positive complementarity – the positive form is a departure from the jurisdictional rigidity that has characterised classic complementarity.[612]

To summarise: the concept of positive complementarity still attracts differing perspectives and interpretations. There is no settled definition from the exiting literature analysed. There appears to be a multi-facetted approach to explaining what the concept of positive complementary means. In all these arguments, however, it emerges that positive complementarity is a radical departure from the basic elements of classic complementarity.

[610] See Burke-White (2008) 19 *Criminal Law Forum* 59.
[611] Ibid.
[612] Stahn (2008) 19 *Criminal Law Forum* 87-113. See also Stahn "Taking complementarity seriously" 233-82.

### 3.2 Legal foundations of positive complementarity

Complementarity, in its traditional sense as applied in the context of the Rome Statute, has been used to defend specific interests whether by a state or by the ICC itself.[613] This is against the background that the jurisdiction of the ICC and that of national courts are largely perceived to be diametrically opposed or competing concepts, giving rise to an antagonistic attitude between the state and the ICC.[614]

There is virtually no jurisprudence on positive complementarity. Interestingly, in the case of *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*[615] the Libyan government's legal team argued that:

> ... Libya invites the Court to embrace the concept of positive complementarity in a manner which gives full effect to the object and purpose of the Statute and the spirit of complementarity by allowing the Libyan Government time to complete its domestic proceedings relating to Abdullah Al-Senussi subject to monitoring and the acceptance of assistance or fulfilment of other express initiatives and obligations.[616]

The submission continued

> …this case provides a unique opportunity to embrace the concept of positive complementarity in a manner which gives full effect to the object and purpose of the Statute and the spirit of complementarity by allowing the Libyan Government time to complete its domestic proceedings relating to Abdullah Al-Senussi subject to monitoring and the acceptance of assistance or the fulfilment of other express initiatives and obligations.[617]

[613] See generally Burke-White (2002-2003) 24 *Michigan Journal of International Law* 1-24.
[614] See generally Stahn "Taking complementarity seriously" 233-82.
[615] See generally *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01-/11-01/11 2013.
[616] Ibid at 90.
[617] Ibid at 91.

The concept of positive complementarity engenders new normative considerations which have not yet found a settled common ground among scholars and practitioners of international criminal law. This argument is echoed in the further submission by the Libyan-government team that:

> There is no explicit reference to this concept [of positive complementarity] in the Statute, nor was it canvassed during the negotiations on complementarity, which instead focussed on developing acceptable ways to regulate jurisdictional disputes between the International Criminal Court and active national jurisdictions.[618]

The submission continues that:

> However, the Statute foreshadows the formal implementation of positive complementarity initiatives by reason of its powers to regulate the admissibility proceedings as it deems appropriate pursuant to rule 58(2), providing that this does not occasion 'undue delay'.[619]

It is, moreover, argued that 'the formal implementation of positive complementarity initiatives would enhance the certainty of any final disposition of the Article 19 challenge.'[620] By ensuring the implementation of positive complementarity initiatives, the elements would be settled and that would provide the courts with a predictable basis for adjudication on matters involving the concept and, more particularly, admissibility issues under article 19. What is indeed surprising is that in response to the application by the government of Libya which articulated the concept of positive complementarity, Counsel for Al-Senussi made no mention of positive complementarity, as if to suggest it unworthy of attention.[621]

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[618] Ibid. See *Prosecutor v Said Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11-1 PT Ch I (27 June 2011).
[619] Ibid.
[620] Ibid.
[621] Ibid.

It is instructive to note that in rendering its decision declaring the case inadmissible, Pre-Trial Chamber I did not cite positive complementarity as a ground for its decision but rather arrived at its decision based strictly on the admissibility rules as set out in article 17. However, it is argued that the submissions by the government of Libya presented very forceful arguments for the implementation of positive complementarity.

The preceding submissions underscore the need for a coherent legal and institutional framework for the implementation of positive complementarity. What further emerges is that the normative identity of positive complementarity remains largely elusive.

Accordingly, the 'positive' dimension of complementarity begins to emerge. The organs of the ICC invoke positive complementarity to justify the constraints in the court's resources and the policy of empowerment of the domestic jurisdiction of the states involved.[622] Prevention of the occurrence or recurrence of impunity becomes an important effect of the policy of positive complementarity as it fosters greater participation in the international criminal justice process by states, civil society, and other international, regional and national stakeholders.[623]

In conclusion, the various works consulted fail to come up with a uniform interpretation of the concept of positive complementarity. However, in light of what different writers and scholars present, this study proceeds to analyse the important features of positive complementarity.

[622] See generally Newton (2001) 167 *Military Law Review* 45.
[623] Terracino (2007) 5 *Journal of International Criminal Justice* 431. See also Benvenuiti "Complementarity" 21-50.

## 4 Features of positive complementarity

Stahn identifies four important distinguishing features of positive complementarity as: burden-sharing; horizontality; comparative advantages; and encouragement of domestic jurisdiction.[624]

The first feature – burden-sharing – pertains to the role of the ICC in facilitating the sharing of common responsibilities with domestic courts.[625] In this light the ICC is viewed as an entity which works in cooperation and partnership with the domestic courts to combat impunity and effect prevention measures.[626] The ICC is then no longer viewed as antagonistic to the national courts, but rather as a 'partner' in the common fight against international crimes.

The second prominent feature is the 'horizontal' relationship which entails dialogue and cooperation between the ICC and states to strengthen domestic capacity to fight impunity.[627] This vision is diametrically opposed to the vertical, threat-based model which defines the classical version of complementarity. This feature reflects flexibility on the part of the ICC in order to accommodate the specific circumstances obtaining in each given case or situation. It is, therefore, a radical departure from the rigid framework characterising the classic model of complementarity.

Stahn further argues that the two forms of complementarity differ in their understanding of responsibility, forum of justice, and interaction between national

[624] See generally Stahn "Taking complementarity seriously" 233-82.
[625] Ibid.
[626] See Stahn (2008) 19 *Criminal Law Forum* 87-113.
[627] Ibid.

courts and the ICC.[628] The normative and problem-oriented vision of the relationship between both the domestic and ICC jurisdiction is the third feature of positive complementarity – comparative advantage.[629] Under this framework, the guiding factor in determining the most appropriate forum for a specific case is the comparative advantage available to each forum.

Lastly, positive complementarity seeks to generate incentives and opportunities in order to encourage domestic courts to undertake genuine investigations and prosecutions and so effectively combat impunity.[630] This underscores the fact that the importance of positive complementarity goes beyond the mere preservation of the primacy of national jurisdiction.

Having outlined the key features of positive complementarity as proposed by Stahn, the study now considers whether or not a legal foundation for positive complementarity is to be found in the Rome Statute. To do this it is necessary to test Stahn's arguments against the provisions of the Rome Statute.

The theoretical framework advanced by Burke-White ultimately rests on the argument that impunity is better arrested by shifting the burden of prosecution back onto national jurisdiction.[631] This position is the essence of classic complementarity. He further argues that nothing in article 17 of the Rome Statute prohibits the prosecutor from following a policy of proactive complementarity.[632] And that nothing in the rest of the Statute would legally restrict the OTP from encouraging national courts to

[628] Stahn (2005) 99 *American Journal of International Law* 421- 31.
[629]See generally Stahn (2005) 3/3 *Journal of International Criminal Justice* 695.
[630]Ibid. Stahn considers this as an additional rationale for the principal aim of positive complementarity namely preservation of domestic jurisdiction.
[631]See generally Burke-White (2002-2003) 24 *Michigan Journal of International Law* 1-24.
[632] Article 17 of the Rome Statute.

prosecute domestically.[633] It is submitted that a test for the normative justification of proactive complementarity remains inconclusive.

As a strategy for encouraging national governments to undertake their own prosecutions of international crimes, it has been suggested that positive complementarity would allow the ICC to act as a catalyst for national judiciaries to fulfil their obligations to prosecute international crimes.[634] Arguably, such a strategy would encourage national jurisdictions actively to fulfil their mandate under the Statute – although, as there are no statistics available to support the argument, this assumption, too, must be approached with some circumspection.

According to Burke-White, the 'impunity gap' arises where an international forum prosecutes only those most responsible for international crimes, leaving lesser offenders a degree of impunity.[635] He argues that proactive complementarity can help close this gap by encouraging domestic prosecutions of international crimes, including those that may not meet the gravity threshold for prosecution by the ICC.[636] This line of reasoning, too, has inherent constraints. It presupposes that domestic courts have sufficient capacity to deal effectively with lesser offenders – an assumption not justified in many national courts. Suffice it to note that positive complementarity is more than mere encouragement; it also entails empowering the states concerned.

In light of the preceding, although Burke-White covers crucial aspects of the emerging concept of positive complementarity, he does not pay sufficient attention to the legal framework of the concept. It is submitted that Burke-White has to date not

[633] See Burke-White (2008) 19 *Criminal Law Forum* 59-85.
[634] Ibid.
[635] See generally Burke-White & Kaplan (2009) 7 *Journal of International Criminal Justice* 257-79.
[636] Ibid.

dealt exhaustively with the institutional and legal framework of positive complementarity, and his work evidences a measure of normative confusion, for example, his use of 'proactive' in addressing positive complementarity

In similar vein, it can be argued that positive complementarity exhibits some horizontal features.[637] This normative claim remains obscure when it comes to ascribing legal or conceptual significance to the term 'horizontal'. Presumably, horizontal is used to explain an 'equal bargaining status' framework between the ICC and national courts. But this, again, cannot be a realistic normative argument in light of the preceding argument.

The 'classic' vision of complementarity is of a vertical, threat-based concept in which there is an interplay of antagonism between the domestic jurisdiction of the state and the international jurisdiction of the ICC.[638] Here, classic complementarity is viewed as fostering deterrence and accountability and thereby enhancing compliance by domestic courts.[639] It follows that in this framework the state is likely to have the capacity to provide an enabling environment for the exercise of domestic jurisdiction over international crime.

It is submitted that the attempt by Burke-White, in his various writings, to identify a distinction between proactive and positive complementarity requires greater normative clarity.[640]

In the final analysis, it is argued that both proactive complementarity and positive complementarity refer essentially to one and the same notion. Any perceived

[637] See generally Stahn (2005) 3 *Journal of International Criminal Justice* 709.
[638] See Stahn "Taking complementarity seriously" 233-82.
[639] See generally Stahn (2008) 19 *Criminal Law Forum* 87-113. See also Schabas "The rise and fall of complementarity" 150-64.
[640] See Burke-White "Reframing positive complementarity" 341-60. See also Burke-White (2008) 19 *Criminal Law Forum* 59.

distinction should, therefore, be subsumed into a single overriding concept – positive complementarity.

## 5 Positive complementarity in the Rome Statute

Does positive complementarity derive its validity from the Rome Statute? This is the question addressed in this section. It is argued that certain core legal features can be ascribed to the concept of positive complementarity and are rooted partly in the classic complementarity regime and partly in the provisions of the Rome Statute.[641]

In this context, positive complementarity is distinct from the 'classic' concept of complementarity which is the admissibility principle embedded in article 17 of the Rome Statute. In essence, it has been argued that the development of the concept of positive complementarity is largely the result of a liberal interpretation of the Statute by the ICC prosecutor.[642]

Nothing in the Rome Statute expressly regulates positive complementarity. However, articles 17, 53, 54(1) (b) and 93(10) of the Statute are instructive in establishing to what degree positive complementarity is actually provided for in the Rome Statute. Paragraphs 4, 6 and 10 of the Preamble to the Rome Statute are equally important in providing a legal basis for positive complementarity in the Rome Statute. The essence of these provisions is to improve effective prosecution and international cooperation, with the overall objective of effectively combating impunity.

One critical assertion by Stahn which invites analysis is that 'positive complementarity' is not only a policy invention, but an inherent concept in the

[641] See Stahn "Taking complementarity seriously" 233-82.
[642] See generally Hewett (2006) 31 *Yale Journal of International Law* 276.

Statute.[643] This argument effectively challenges the view that 'positive' complementarity is based exclusively on the desire to ensure the empowerment of domestic jurisdiction.[644] But Stahn goes on to caution that complementarity is nonetheless under-theorised in the Rome Statute. From this argument one may infer that certain provisions in the Rome Statute specifically provide for a positive complementarity regime.[645]

Both classic and positive complementarity ultimately derive their legitimacy from the Rome Statute. Further, the inadequate articulation and meaning of both concepts has been laid at the door of the drafters of article 17 of the Statute.[646] It has been argued that classic complementarity, which flows from the Rome Statute, is grounded on a vertical model defining the relationship between the ICC and national courts. The argument further maintains that human behaviour is controlled by a well-managed system which invokes checks and balances to address shortcomings in the jurisdiction of national courts.[647]

These propositions introduce arguments as to the hierarchical assumptions regarding a 'vertical' relationship which implies that superior jurisdiction is conferred upon the ICC to oversee the inferior jurisdiction enjoyed by national courts.[648] This assumption is arguably consistent with the Rome Statute model.[649] It is submitted, however, that the checks-and-balances argument also lacks objectivity and is in fact equally

[643]See Stahn (2010) 23 *Leiden Journal of International Law* 311-18.
[644]Ibid.
[645] Article 17 of the Rome Statute.
[646] See Nouwen *Complementarity in the Line of Fire* 11. See further Burke-White (2008) 19 *Criminal Law Forum* 59.
[647]See El Zeidy (2002) 23 *Michigan Journal of International Law* 869.
[648] See Perrin (2006) 18 *Sri Lanka Journal of International Law* 301.
[649] Articles 17 and 53 of the Rome Statute.

subjective in that empirical justification is largely wanting. To this extent the 'vertical features' argument is unconvincing.[650]

It is only in certain instances that the Rome Statute empowers the prosecutor of the ICC to carry out certain actions that would be regarded as constituting positive complementarity.[651] The study now examines what the Rome Statute provides as the foundations for the powers of the prosecutor pursuant to the policy of positive complementary.[652]

The question of 'shared responsibility' is an important argument advanced by Stahn.[653] He argues that the critical element in the international system of justice grounded on the Rome Statute is the notion of 'shared responsibility'.[654] Stahn argues that although the concept of shared responsibility was not expressly addressed by the drafters on the Statute, it is nonetheless reflected in different provisions in the Statute.[655]

It is deliberately elected to discuss this point under this section because of the persuasive arguments Nouwen presents on this issue. This is because Nouwen, who appears to advocate the use of the 'big idea', nonetheless analyses the Rome Statute in detail with regard to positive complementarity.[656] She argues that the Statute explicitly provides the ICC prosecutor with powers only in some identified aspects of positive complementarity.[657]

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[650] See arguments in Stahn (2005) 3 *Journal of International Criminal Justice* 695-720.
[651] See Danner (2002) 97 *American Journal of International Law* 510, 543.
[652] See Jallow (2005) 3 *Journal of International Criminal Justice* 145.
[653] See generally Schabas WA "The rise and fall of complementarity" 150-64.
[654] Ibid.
[655] Ibid.
[656] See Holmes "The principle of complementarity" 41, 45. See also Nouwen *Complementarity in the Line of Fire* 11.
[657] See Nouwen *Complementarity in the Line of Fire* 98.

Under article 15(2) of the Statute the OTP is empowered to seek additional information from a state when considering whether to open up investigations with a view of alerting a state of the looming prosecutions.[658] These actions by the OTP are understood to generate the 'fear' or awareness in the state concerned that the OTP is determined to proceed, and arguably would serve as a catalyst for domestic investigation and prosecution in a bid to avoid intervention by the ICC. This could be termed a sovereignty-protectionist argument.[659] It is, however, debatable whether such actions, in the ordinary course of events, would naturally lead to national action in terms of expedited investigations or prosecution. The argument must be examined in the light of article 18 of the Rome Statute which gives primacy to national courts as regards domestic investigations and prosecutions.

It is argued that the Rome Statute defines the interaction between the ICC and states through the mechanism of duties – as opposed to the rights and privileges in primacy of jurisdiction.[660] Stahn argues that neither the ICC nor the states enjoy primacy of jurisdiction *per se*.[661] In this respect they share concurrent jurisdiction or parallel responsibility founded on a division of duties. He then argues that the resulting system of international justice is structured and based on four key elements, namely, mutual cooperation; forum allocation; vertical and horizontal dialogue; and, finally, incentive-based compliance.[662] The normative dimension of the interaction between

[658] See Rodman (2009) 22 *Leiden Journal of International Law* 96-126.
[659] See Damaska (2009) 14 *University of California Los Angeles Journal of International Law & Foreign Affairs* 19, 32.
[660] Stahn (2008)19 *Criminal Law Forum* 87-113.
[661] Ibid.
[662] It should be noted that under the Rome Statute, unlike 1994 ILC Draft Model Statute, admissibility is no longer a discretionary principle, but a mandatory legal framework which determines the allocation of competencies and dispute settlement mechanism for establishing the proper exercise of jurisdiction by all stakeholders, including the court, states, etc.

the state and the court is less articulated and less developed in the context of the Rome Statute.[663]

The normative challenge in the above propositions is that they portray the ICC as an institution that propagates advocacy catalysing the national criminal courts to take up their national responsibilities to investigate and prosecute. This poses serious normative difficulties for justifying positive complementarity. Normative difficulties, because, the very existence of the OTP and the ICC as a whole, is inspired by their complementary roles in pursuing investigations and prosecuting international crimes within well-defined judicial parameters under article 17 of the Statute.

To trigger such support from the court, the state concerned must prompt the ICC by means of an express request for assistance as provided under the Statute.[664] There is no basis in the Statute for the ICC to initiate the process of assistance. In a similar vein, it could be argued that nothing in the Statute prevents the court from initiating assistance.

According to Stahn, the potential of complementarity to create a broader culture of accountability and prevent mass atrocities constitutes one of the prerequisites for the long-term impact and success of the court.[665] In this context, it has been proposed and argued that complementarity is a tool in itself for purposes of ensuring compliance with international criminal rules. It is argued that it works through a 'carrot and stick' strategy.[666]

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[663]See generally Sedman "Prosecution of ordinary crimes" 259-65.
[664] See generally the discussion in Olasolo (2005) 5 *International Criminal Law Review* 121-46.
[665] The impact of complementarity is explained in the resulting culture of fear of intervention into state sovereignty and thus implants a preventative attitude that ultimately contributes towards the fight against impunity.
[666]See generally Stahn et al (2005) 99 *American Journal of International Law* 421-31.

Accounts and propositions presented by some advocates of positive complementarity include much more than merely providing information and other forms of judicial assistance. The technical assistance and capacity building of the national state, in general, are all critical elements of the concept of positive complementarity but are not unequivocally covered under the Statute.

However, in the early years of the ICC the weaknesses and limitations of the classic model of complementarity manifested in a number of ways.[667] The classic model proved to be rigid in that it did not afford the court the flexibility to confront impunity by other viable means. This is seen in situations such as those that arose in Kenya, Darfur, and Colombia. However, this argument could be countered by asserting that the ICC is a creature of statute and, therefore, its operations must be confined within the mandate provided under the empowering Rome Statute.

## 6 2010 Kampala Review Conference on Stocktaking of the Rome Statute

### 6.1 Introduction

In this section, pertinent aspects of the proceedings of the 2010 Kampala Review Conference (KRC) are discussed. [668]

Seven years after the Statute entered into force, the first Review Conference of the Rome Statute was finally convened from 30 May 2010 to 11 June 2010 in Kampala.[669]

[667] See Stahn (2008) 19 *Criminal Law Forum* 87-113.
[668]See a series of documents including: Review Conference of the Rome Statute, Complementarity, Resolution RC/Res 6 8 June 2010. See also "Report of the Bureau on Stocktaking of the Principle of Complementarity: Bridging the Impunity Gap" ICC-ASP/8/51 Resumed Eighth Session 18 March 2010. See further Review Conference of the Rome Statute Draft Resolution on Complementarity ICC-ASP/8/Res.9 Annex VII 8 June 2010. Also see generally Review Conference of the Rome Statute "Focal Points" compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute crimes RC/ST/CM/NF. 2 30 May 2010.

The KRC was engaged in a stocktaking exercise designed to assess and evaluate the successes and failures of the ICC during its first years of operation in light of the Rome Statute.[670] This provided an opportunity to evaluate and reflect on the progress of the court as well as an assessment of the international criminal justice system under the Rome Statute.

This discussion is important in the context of our study because the proposals of the Bureau on Stocktaking relating to complementarity mark a critical tipping point in the recognition of the concept of positive complementarity by members of the Assembly of States Parties (ASP).[671] The adoption of the resolution on complementarity by the KRC gave renewed significance and credence to the concept of positive complementarity.[672]

The principle of complementarity was one of the items on the KRC agenda. The concept of positive complementarity, in particular, was debated[673] at length before and during the plenary session of the KRC. The delegates raised an assortment of propositions and arguments around the status of positive complementarity.

[669]Over 4 600 international experts attended the Review Conference. Other dignitaries included two UN Secretaries-General, diplomats, and even heads of state. The victims of atrocities too were in attendance, as were members of civil society.
[670] Clark (2010) 2 *Goettingen Journal of International Law* 689-711.
[671] See ICJ Kenya Chapter "ICC Review Conference ends with political honesty on crimes of aggression in Uganda" available at http://www.icj-kenya.org/index.php/more-news/310-icc-review-conference-ends-with-political-dishonesty-in-uganda (date of use: 27 February 2017).
[672] See Blaak (2010) 2 *Equality of Arms Review* 10-13.
[673]Ibid.

## 6.2 The lead-up to the Kampala Review Conference

Complementarity was one of the four topics set for review at the KRC. South Africa and Denmark were the focal points for the review document that provided detailed discussion on positive complementarity.

The KRC reasserted the conviction of the international community to support a multilateral justice system that seeks to end impunity for the most serious crimes that shock the conscience of mankind.[674]

The Eighth Session of the ASP witnessed the inclusion of the issue of complementarity in the list of matters for the stocktaking exercise. This basically set the foundation for the deliberations of the Resumed Eighth Session of the ASP, which is discussed in the following section of this study.

## 6.3 Report of the Bureau on Stocktaking: Complementarity

In this section the Report of the Bureau on Stocktaking is analysed with specific reference to its recommendations on the principle of complementarity.[675] This is an important part of the discussion as it contributes to our understanding of complementarity.

The Report notes that the jurisprudence of the ICC is rapidly developing and the culture of impunity is receding thanks to those suspected of having committed international crimes being brought to justice. The Report in effect provides a

[674] See generally Clark (2010) 2 *Goettingen Journal of International Law* 689-711.
[675] Assembly of States Parties "Report of the Bureau on Stocktaking: Complementarity. Taking stock of the Principle of Complementaity: Bridging the Ipunity Gap" ICC-ASP/8/51 Resumed Eighth Session 18 March 2010 available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf (date of use: 27 February 2017).

background to a discussion of the principle of complementarity at the KRC. In so doing the Report emphasises that the core mandate and function of the ICC is a judicial one and that it should not be mistaken for a development agency.[676]

The Bureau notes that at the time of its Report three of the four situations before the ICC were self-referrals. This epitomises states' lack of action in conducting genuine domestic proceedings.[677] The Report further links such inaction to the inability to conduct genuine proceedings in the states concerned.[678] A further challenge to genuine domestic proceedings was identified as 'unwillingness to conduct such proceedings', due to, for instance, political interference with the judiciary.

In that regard, the ICC does not replace national proceedings and is a court of last resort.[679] The Report states that the ICC determines the admissibility of a case before it through a judicial assessment, and proceeds to explain the process of such assessment.[680] The Report then addresses complementarity in practice and the impunity gap.

An important part of the Report addresses the improvement of the readiness of national states through positive complementarity. Under this section the Report notes that positive complementarity can take many forms. The Report states that

> positive complementarity refers to all the activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations

[676] Ibid at 2.
[677] See generally Bergsmo, Bekou & Jones (2010) 2 *Goettingen Journal of* International Law 791-811.
[678] Ibid.
[679] Assembly of States Parties "Report of the Bureau on Stocktaking: Complementarity. Taking stock of the Principle of Complementaity: Bridging the Ipunity Gap" ICC-ASP/8/51 Resumed Eighth Session 18 March 2010 available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf (date of use: 27 February 2017).
[680] Ibid.

> and trials of crimes included in the Rome Statute without involving the International Criminal Court in capacity building,[681] financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.[682]

It further states that the actual assistance envisaged in the definition above, should be delivered through cooperative programmes between states themselves, as well as through a network of international and regional organisations and civil society.[683] The Report then proposes that, under positive complementarity, support can be given to states by offering technical assistance, capacity building, the development of physical infrastructure, and assistance with legislation.[684]

It is explained in the Report that assistance with legislation includes the drafting of the appropriate legislative framework and assistance in overcoming domestic hurdles that impede the adoption of such legislation. The Report suggests other forms in which legislative assistance may be extended, such as the ratification of pertinent legal instruments.[685] The state may have technical difficulties in interpreting the international instrument to be ratified. In such instances, the assistance would entail not only tendering expert advice, but also providing actual drafting assistance to generate an appropriate domesticating legal instrument.

The second form of intervention is technical assistance and capacity building of the national jurisdiction, in particular addressing the judicial system.[686] It outlines

[681] See generally Proceedings of the Kampala Review Conference on the Rome Statute, by the Focal points (Denmark and South Africa) outlined examples of projects aimed at strengthening domestic jurisdictions to deal with article 5 crimes RC/ST/CM/INF.2 30 May 2010 available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-CM-INF.2-ENG.pdf (date of use: 29 May 2017).
[682] Paragraph 16 of the Report of the Bureau at Eighth Resumed Session.
[683] Ibid para 17.
[684] Ibid.
[685] Ibid.
[686] Ibid.

examples of such assistance as including, inter alia, training of police, investigators, and prosecutors. It also gives examples of capacity building for witness and victim protection programmes, forensic expertise, training of judges, training of defence counsel, etcetera. This category of assistance may take the form of supplying specialised judges and prosecutors with expert background knowledge and experience to assist national courts. These forms of assistance are crowned by fostering cooperation between the state and external institutions or other states, in mutual legal assistance in criminal issues.

Thirdly, and finally, assistance may take the form of development of physical infrastructure to support the operations of national institutions.[687] This aims at providing facilities that meet internationally acceptable standards including courtrooms and detention facilities such as prisons.

The preceding three categories of assistance that may be extended to states, underpin the essence of positive complementarity. The Report proceeds to discuss a wide range of other issues relevant to the effective administration of international criminal justice.

In examining the role of the ICC in these activities, it is pointed out in the Report that such intervention should not entail additional resources for the ICC, nor should the court become a development organisation or an implementing agency.[688]

In summary, the Report recommends steps that could be taken to advance the principle of complementarity through positive complementarity at the domestic level. One of the important recommendations of the KRC is that all stakeholders should strengthen the principle of complementarity by encouraging national proceedings where relevant as a means of bridging the impunity gap.

[687] Ibid.
[688] Ibid para 42.

The Bureau further recommended that a report on positive complementarity be compiled by the state parties and that this be presented to the ASP for further attention. Allied to the preceding point, the Bureau recommended that state parties consider further measures at national level in cooperation with the ICC – for example, other forms of assistance under the heading of positive complementarity.[689] Further, apart from setting up a designated function within the Secretariat of the ASP, the Bureau and ASP should continue to engage with stakeholders in the international community on the most effective means of combating impunity at domestic level through positive complementarity.

It is instructive to note that certain states questioned the tenability of the definition of positive complementarity as presented by the Bureau on Stocktaking of the Rome Statute. Notwithstanding the apparent consensus on the use of the term positive complementarity throughout the review session, Germany and Spain interrogated the legal foundation of the concept.

In effect, the normative relevance of the concept of positive complementarity was called into direct question. The perceivable facets of this concept were subjected to close scrutiny.

To highlight the apparent lack of consensus on the definition of the concept of positive complementarity, it is important to examine the positions adopted by different states. The Spanish delegation, for instance, interestingly, suggested that the set of initiatives or activities included under positive complementarity might as well be simply referred to as 'technical assistance'.[690] Similarly, the German representatives indicated,

[689] Ibid.
[690] See generally, Bergsmo, Bekou & Jones (2010) 2 *Goettingen Journal of International Law* 794 available at http://www.casematrixnetwork.org/fileadmin/documents/Goettingen_Journal

sceptically, that the term positive complementarity lacked legal basis within the context of the provisions of the Rome Statute, and that it only "served to confuse judicial capacity building with the principle of complementarity as laid down in Article 17 of the Rome Statute."[691]

The two preceding arguments by Germany and Spain are indeed persuasive challenges to the justification of the concept of positive complementarity and reflect the depth of uncertainty surrounding the normative status of the concept.

Before the resolution on complementarity was adopted at the start of the Resumed Eighth Session, France, Germany and Italy queried whether a resolution was required at all.[692] They further expressed their fear that the resolution would create additional obligations or have budgetary implications for the ICC and member states. After further deliberations, however, the resolution was finally passed by consensus.[693] The resolution then proceeded to the Review Conference level for further debate by the delegates in attendance.

In conclusion, it will be recalled that the Report of the Bureau of the ASP made recommendations to the state parties on the policy of positive complementarity, which, in turn, formed the basis for the deliberations at the KRC. During its Resumed Eighth Session, the ASP adopted the Report of the Bureau titled 'Taking stock of the principle of complementarity: Bridging the impunity gap' and the accompanying draft resolution. This then proceeded to the Review Conference for further debate and adoption by the Conference.

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_of_International_Law_2010_2_791-811.pdf (date of use: 29 June 2017). Technical assistance includes, inter alia, training of investigators, judges, and counsel.

[691] Ibid.

[692] Ibid.

[693] ICC "Report on the Resumed Eighth Session of the Assembly of States Parties" held in New York, 22-25 Mar 2010.

At the KRC, the delegates deliberated extensively on the meaning of the term 'positive complementarity'.[694] In the following section, the study explores the participation of some of these delegates.

### 6.4 Resolution adopted by the Review Conference

A panel debate on complementarity was held at the KRC on 3 June 2010. On 8 June 2010 the Conference, at its 9th Plenary Session, adopted the resolution on complementarity. This resolution recognised the need for additional measures to be taken at the domestic level to combat impunity. This links well the fourth paragraph of the Preamble to the Rome Statute which provides that: "[A]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."[695]

The KRC resolved, among other things, to reaffirm its commitment to the Rome Statute. It recognised that the primary responsibility for investigating and prosecuting the most serious crimes of international concern, rests with the state parties, and that additional measures are required at the national level to improve international assistance in this regard.[696] It was also noted that state parties must take effective domestic measures to implement the Statute within their national law.

The primary responsibility of the state to exercise national jurisdiction over the most serious crimes of international concern was re-emphasised at the KRC, as was the need to maintain constant interaction, mutual assistance, and the sharing of resources

[694] See generally, Bergsmo, Bekou & Jones (2010) 2 *Goettingen Journal of International Law* 794 available at http://www.casematrixnetwork.org/fileadmin/documents/Goettingen_Journal_of_International_Law_2__2010__2__791-811.pdf (date of use: 29 May 2017).
[695] The Rome Statute.
[696] Ibid.

and vital information between the stakeholders and various actors that would reinforce efforts at combating impunity.[697]

Moreover, the Secretariat of the ASP was requested by the Bureau to facilitate the exchange of vital information between the state parties, the ICC, civil society, international and regional organisations, and other stakeholders, with the overall aim of reinforcing the effectiveness of parties' domestic jurisdiction.[698]

Significantly, the developments at the KRC witness not only renewed emphasis on positive complementarity, but also a shift in the application of the term 'positive complementarity'. This shift was exemplified by the general consensus among state parties at the Conference for the ICC to depart from direct involvement in national capacity building, and rather to act as a catalyst for the national criminal justice process. [699] The participation of civil society in the promotion of positive complementarity, and more particularly emphasising its role in capacity building, were underscored.[700]

A significant achievement of the KRC was the adoption of a definition of positive complementarity. Positive complementarity was defined as including

> … all activities / actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance.[701]

[697] Ibid.
[698] Ibid.
[699] Ibid.
[700] See Human Rights Watch "Civil Society Declaration on Africa and the Review Conference of the Rome Statute of the International Criminal Court" 24 May 2010 available at https://www.hrw.org/news/2010/05/24/civil-society-declaration-africa-and-review-conference-rome-statute-international (date of use: 16 September 2017).
[701] See generally Review Conference of the Rome Statute Draft Resolution on Complementarity ICC-ASP/8/Res.9 Annex VII 8 June 2010.

One of the difficulties posed by this definition is that it is subject to broad interpretation – for example, where it refers to 'all activities'. This generalisation is dangerous as it complicates the precise conceptualisation of the elements in the definition. The term 'activities' mentioned in the KRC's definition of positive complementarity are not identified with the result that definition lacks the exactitude which characterises normative precision.

## 6.5 Conclusion

In the final analysis, the resolution on complementarity was adopted by consensus at the Review Conference. The definition of positive complementarity was adopted without any new legal obligation being introduced or imposed. As a consequence, no legal or institutional framework was formulated in the resolution to back the definition up, nor was there any indication of doing so in the future. This created a normative gap which will have to be addressed in that it signals a normative challenge with regard to the enforceability of the concept.

The KRC nonetheless underscored the participating states' recognition of the significance of complementarity in the international criminal justice process.[702] It is submitted that this recognition must be followed by processes to initiate appropriate institutional and legal frameworks to give the concept greater effect.

It is important to outline some of the challenges to the successful realisation of the benefits of complementarity. The KRC noted that lack of operational capacity in national states was a formidable impediment to the exercise of positive

[702] Complementarity is still viewed as one of the key pillars of the operation of the ICC and the international criminal justice system anchored in the Rome Statute.

complementarity.[703] Other drawbacks that were noted include: lack of adequate social infrastructure; weak economies; absence of confidence in certain judicial structures; etcetera. From a legal point of view, it was noted that national implementing legislation to domesticate the Rome Statute was either lacking altogether in some cases, or simply ineffective or inadequate in others.[704]

From a normative perspective, it is critical to caution that the mandate of the ICC should not be seen to deviate from the judicial role outlined in the Statute and intrude on actions that are ordinarily the responsibilities of development agencies in the capacity building agenda.

Ultimately, one must ask whether the KRC in fact presented any conclusive normative justification for the concept of positive complementarity. It is argued that no such concrete conclusion was arrived at. The definition was characterised by loose ends that defy normative exactitude. The normative analysis of positive complementarity reveals that a legal framework is yet to be fully developed to allow for the establishment of an enforceable regime of positive complementarity. Against this background, the study undertakes an analysis of the appropriate legal and institutional framework in the following chapter.

## 7 The Greentree process

### 7.1 Introduction

In addition to the KRC, other international fora have addressed the issue of the implementation of the principle of complementarity and the concept of positive

[703]Report on the proceedings of the 2010 Kampala Review Conference.
[704]Ibid.

complementarity. One of these fora – popularly known as 'the Greentree process' – was a series of meetings, co-hosted by the International Center for Transitional Justice (ICTJ), Denmark, and South Africa at Greentree Estate in Manhasset, New York, United States.[705].

The Greentree process sought to address positive complementarity by bringing together high-level actors in international criminal justice, rule of law assistance, and the development sector with the overall aim of exploring the most effective ways and means of implementing the principle of complementarity.[706] The aftermath of the KRC, therefore, inspired the desire to consider how the enhancement of national capacity, engendered by positive complementarity, could be achieved. This brings into discussion a determination of what needs assessment process could help achieve enhancement of national capacity.

As we delve into considering what was involved in the Greentree process, it is critical to point out that a number of impediments exist, with respect to establishing a coherent 'needs assessment' regime, chief among which is the virtual absence of accurate and contemporary data on the justice sytems in the countries engaged in post-conflict rehabilitation and reconstruction.

Apart from the concern discussed in the preceding paragraph, it has been suggested that the Greentree process meetings have succeeded in bridging the gap between two school of thought: on the one hand, those who maintain that addressing atrocities and Statute crimes through development assistance is too sensitive; and on the other, those

[705] See generally O-Brien P "Supporting complementarity at the national level: An integrated approach to the rule of law" Dinner remarks, Greentree Estate, 7 December 2011 available at http://legal.un.org/ola/media/info_from_lc/POB%20Greentree%2011.pdf (date of use: 8 March 2017).
[706] Over 60 participants were brought together by the ICTJ. They represented senior officials of the ICC, state parties and non-state parties, practitioners in the rule of law arena, development agencies, actors within the United Nations system, NGOs and other civil society actors, and other stakeholders from national jurisdictions.

who reason that fighting impunity for international crimes is a question of reinforcing more prosecutions by the ICC.[707]

## 7.2 The first Greentree process retreat, 2010

### 7.2.1 The purpose of the meeting

The first retreat in the Greentree process was held between 28 and 29 October 2010 at Greentree Estate and deliberated on 'Complementarity after Kampala: The way forward'.[708] This meeting was convened some three months after the May-June 2010 KRC. The purpose of the Greentree process meeting was to build on the momentum generated at the KRC. The ICTJ used its extensive network to bring to the retreat experts in development assistance and international criminal law to work together in promoting and implementing complementarity at domestic level. It could be argued that the first Greentree process, and the subsequent meetings, as will be discussed in the ensuing sections, was esttentially a 'needs assessment' exercise.

The willingness of United Nations Development Programme (UNDP) to participate in the Greentree process is crucial in that it is one of the primary multilateral development agencies currently actively engaged in the coordination and implementation of aid or donor programmes globally.[709] In retrospect, it was observed that the the Greentree process is essentially a 'needs assessment' exercise, and it

[707] Ibid.
[708] For a summary of the meeting see generally, The International Center for Transitional Justice Meeting summary of the retreat on "Complementarity after Kampala: The way forward" 12 November 2010 available at https://asp.icc-cpi/iccdocs/asp_docs/Events/2010/MeetingSummary-Complementarity-Retreat-13Nov-ENG.pdf (date of use: 9 March 2017).
[709] Ibid.

suffices to add that this seeks establish the link between development funding and national capacity-building programmes.

Based on the preceding argument, it could be claimed that the agenda of the meetings tended to move towards making the process more operational by focusing on particular situations in selected states. In its pursuit of a 'needs assessment' exercise, the meeting sought to follow up on the emphasis by the ASP at the KRC which underscored the need for a more practical approach to support. The feeling was that with the necessary tools, states that are willing but unable to investigate and prosecute international crimes, would be placed in a position effectively to assume their responsibilities.[710] Within this scope, the agenda of the Greentree process has also tended to emphasise pilot programmes aimed at promoting complementarity in those selected states.[711] As the agenda emphasised pilot programmes, in effect, the Greentree process underscored a dignostic approach that conducted an evaluative exercise with respect to the status and needs of the post-conflict states that require urgent intervention to boost national capacity. To place this line of argument in proper perspective, it is necessary to examine the deliberations at the retreat, and it is to this that we now turn.

[710] See generally International Center of Transitional Justice Meeting Summary of the Retreat on: "Complementarity after Kampala: The way forward" 12 November 2010 available at https://asp.icc-cpi/iccdocs/asp_docs/Events/2010/MeetingSummary-Complementarity-Retreat-13Nov-ENG.pdf (date of use: 9 March 2017).
[711] See generally Clark H "Human development and international justice" Keynote address to the 11th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court 19 November 2012 available at http://icc-cpi.int/NR/rdonlyres/E10A5253-DA2D-46CE-90B8-7497426E9C39/0/ICCASP11_COMPKeynote_Remarks_HCENG.pdf (date of use: 9 March 2017).

### 7.2.2 Deliberations at the retreat

At the Greentree retreat there were substantive deliberations on the implementation of the principle of complementarity, and positive complementarity in particular.[712] This demonstrates the central role these two concepts played in the renewed assessment of the role of states and the ICC in the development of national capacity. The following are the main highlights of the deliberations of the 2010 Greentree process meeting as presented in the ICTJ report.[713] The report summarised the deliberations in the following terms.

The 2010 Greentree process retreat recognised that the development of the rule of law can be enhanced by various stakeholders through the effective pursuit of international criminal justice for serious crimes.[714] The meeting noted that there was ample evidence that various sectors working in the field of the rule of law were already involved in initiatives examining accountability for serious crimes.[715] It could be argued, however, that this observation was more subjective than empirical, given that the relevant and up-to-date data is scanty. Many participants, however, agreed that

> there is a real need for better integration of planning and assessment of needs, as well as configuring specialized justice efforts in ways that more clearly align with broader rule of law and development priorities. The complementary relationship between these two

[712] See generally for a comparative view the three Reports of the International Center for Transitional Justice for 2010, 2011 and 2012 available respectively at http://www.ictj.org/sites/default/files/ICTJ-Global-Complementarity-Greentree-2010-English.pdf (date of use: 9 March 2017); http://www.ictj.org/sites/default/files/ICTJ-Global-Greentree-Two-Synthesis-Report-2011.pdf (date of use: 9 March 2017); and http://www.ictj.org/sites/default/files/ICTJ-Report-Greentree-III-Synthesis-ENG-2012.pdf (dat of use: 9 March 2017).

[713] See generally, International Center of Transitional Justice Meeting Summary of the Retreat "Complementarity after Kampala: The way forward" 12 November 2010 available at https://asp.icc-cpi/iccdocs/asp_docs/Events/2010/MeetingSummary-Complementarity-Retreat-13Nov-ENG.pdf (date of use: 9 March 2017).

[714] See general, The ICTJ "Report on the 2010 Greentree Meeting" available at http://www.ictj.org/sites/default/files/ICTJ-Global-Complementarity-Greentree-2010-English.pdf (date of use: 9 March 2017).

[715] Ibid.

> sectors can play a pivotal role in helping to ensure that states properly meet their obligations to genuinely investigate and prosecute those responsible for serious crimes.[716]

The preceding observation underscores the fact that a number of impediments still frustrate attempts at ensuring accurate assessment of the needs of most states insofar as national capacity building is concerned. These constraints are chief in undermining the overall effort of the national authorities in superintending the exercise of effective investigation and prosecution of the key international crimes.

Secondly, the participants observed that in bolstering complementarity, lessons could be drawn from existing practices, notably those between the national and international criminal jurisdictions.[717] The meeting was of the view that existing practice would guide them in determining what kind of assistance should be extended to states that are willing but otherwise unable to investigate and prosecute serious crimes.[718] Experiences and lessons in this regard were shared by participants representing hybrid tribunals, *ad hoc* tribunals, and other accountability mechanisms such as the International Commission against Impunity in Guatemala (CICIG). Note was had, in particular, of how their respective accountability systems contributed to developing the capacity of the domestic criminal courts.[719] The report further observes that although experiences varied, the forms of assistance provided to national criminal systems included

> training programs targeting national officials such as prosecutors, investigators, prison guards, and witness protection officials; the transfer of knowledge from one institution to the other; making archives accessible to national authorities; provision of technical and logistical support; and raising awareness about the

[716] Ibid at para 4.
[717] Ibid at para 5.
[718] Ibid.
[719] Ibid.

> importance of international humanitarian law through extensive outreach efforts.[720]

However, as already observed above, the virtual absence of up-to-date data on the activities within the criminal justice systems of some of the affected states, effectively undermines the process of a reliable needs-assessment for purposes of establishing the national needs and gaps in the respective capacity-building systems of those states.

The Greentree retreat also noted that based on the experiences shared, when considering the form of assistance to be extended in a given situation, the special circumstances of each request must be taken into account in preference to offering a uniform standard of assistance.[721] The participants agreed that a needs assessment should be conducted with a view to identifying the unique requirements that would best suit the circumstances of each state requesting assistance. This can be seen as an approach by which to achieve coordination of the activities of the various states and stakeholders in order to ensure effective implementation of positive complementarity. Capacity building remains central to the concept of positive complemetarity, therefore a dependable needs-assessment process is necessary to articulate the national capcity-building gaps and needs involved.

Apart from the issue of a needs assessment, the retreat also recognised the crucial need to examine the close nexus between 'unwillingness' and 'inability' on the part of the states in the context of states assuming their responsibility to investigate and prosecute serious international crimes.[722] In this regard it was suggested that technical assistance rendered to the officials in the national systems may soften the resistance

[720] Ibid.
[721] The assistance model of 'one size fits all' was considered not appropriate when giving assistance to states in different circumstances.
[722] See para 8 of the 2010 ICTJ Report on Greentree process meeting.

arising from the political circumstances in the state concerned. But this would require careful scrutiny during the needs-assessment process to ensure that the prescribed technical assistance would yield the desired outcome. It should be noted that 'unwillingness' and 'inability' are pivotal considerations in which the principle of complementarity is anchored. The retreat, therefore, did not depart from complementarity as a foundation from which the concept of positive complementarity evolved.

Three main factors were identified by the participants as challenges to engaging stakeholders in the development community to help bolster complementarity at the domestic level:[723]

> The first issue relates to timing and the long-term nature of most capacity-building endeavours in contrast to the need for victims to see justice being done, or to react to opportunities to pursue justice, in the short-term. Secondly, a sector wide approach to development requires strategic planning whereas the international justice requires flexibility as result of the often volatile and changing environment in which it operates. Thirdly, rule of law assistance depends largely on partnerships with governments, which may be negatively affected if states are unwilling to cooperate.[724]

The three challenges identified in the preceding paragraph, appear to revolve basically around the realisation of the need for a more dependable 'needs assessment' apparatus. Notwithstanding these challenges, many initiatives geared towards strengthening national judicial capacity have already been undertaken by development actors operating in several states. These initiatives include, infrastructural and logistic support; training programmes for national officials; developing capacity in witness protection; and knowledge transfer.[725]

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[723] See para 9 of the International Center of Transitional Justice Meeting Summary of the Retreat "Complementarity after Kampala: The way forward" 12 November 2010 available at https://asp.icc-cpi/iccdocs/asp_docs/Events/2010/MeetingSummary-Complementarity-Retreat-13Nov-ENG.pdf (date of use: 9 March 2017).
[724] Ibid at para 10.
[725] Ibid at para 11.

### 7.2.3 Recommendations of Greentree I

The Greentree process meeting put forward a number of recommendations on how the development community can help to advance complementarity. Among the suggestions are:

> (a) ensuring that donors place on their agenda the need for legal reform, such as domestication of the Rome Statute and implementing legislation;
>
> (b) adopting a whole of government approach to complementarity i.e. aligning development cooperation project with other forms of bilateral technical cooperation such as between police forces; and
>
> (c) creating a support community that will consist of international justice and humanitarian actors on the one hand, and development and peacebuilding efforts on the other.[726]

It is submitted that the preceding recommendations underscore the significance of national capacity building as the ultimate object of any needs-assessment exercise suggested by the Retreat.

It was also suggested that other means of advancing complementarity would include developing a roster of expertise comprising ex-Tribunal personnel to be administered by a mechanism to be established,[727] and that a comprehensive tool kit on complementarity be developed.[728] Here it can be seen that complementarity is the basis upon which the most significant considerations of the Retreat proceeded.

The participants, while exploring the possibility of engaging the ICC to bolster complementarity, noted that while there had been some efforts by its various organs to strengthen domestic judicial capacity, there were concerns regarding the ICC's

[726] Ibid at para 12.
[727] Ibid.
[728] Ibid.

overall ability to advance complementarity.[729] Significantly, it was observed that a focus by the ICC on efforts to bolster complementarity would detract from its core functions.[730] Furthermore, it was suggested that the financial implications of ICC involvement in these additional responsibilities would be considerable.[731] This, moreover, turns the focus of the analyis on the ICC, which has been seen as an institution that is characterised by far-ranging constraints from the institutional and legal perspectives. The financial constraints besetting the ICC have been a major inhibiting factor in the international criminal justice process, and therefore did not escape the attention of the members at the Retreat.

In similar vein, the participants, while considering that the ASP would be an appropriate forum effectively to bolster complementarity, noted that the ASP was handicapped by, among other factors, lack of adequate financial resources and human capacity thereby rendering its role in this context extremely limited.[732] As will be seen in Chapter 5, the central role of the ASP in the implementation of positive complementarity demands a greater focus in terms of its own institution restructuring. The limited role of the ASP, which was noted by the Greentree process, should be rexamined with a view to bolstering it to enhance the overall cordination of the process of implementing positive complementarity.

It was further proposed that subsequent meetings should be convened to coordinate donor funding, and to launch a crusade to convince the sceptics of the value of complementarity.[733]

[729] Ibid at para 14.
[730] Ibid.
[731] Ibid.
[732] Ibid.
[733] Ibid at para 16.

In conclusion, the 2010 Greentree process retreat was the first serious attempt by stakeholders and development service providers involved in assisting in the promotion of the rule of law, to consolidate proposals. The participants collectively aimed effectively to implement the principle of complementarity in the context of domestic and international criminal jurisdiction.

## 7.3 Greentree II, 2011

### 7.3.1 Introduction

Progress achieved at Greentree I was followed by a second Greentree retreat (Greentree II) held at the same venue between 7 and 9 December 2011.[734] The ICTJ and the UNDP brought together some 70 participants representing interested state and non-state parties to the Rome Statute; practitioners of the rule of law; relevant United Nations system actors; principals and representatives from the ICC; essential stakeholders from national jurisdictions; and NGOs working on these issues,[735] under the theme 'Supporting complementarity at the national level: An integrated approach to the rule of law'.[736]

This theme reflects a 'next step' in deliberations to build on the understanding reached at the policy level on the significance of developing the relationship between experts in the international justice and rule of law sectors.[737]

[734] See generally, International Center for Transitional Justice synthesis report "Supporting complementarity at the national level: An integrated approach to rule of law" available at http://www.ictj.org/sites/default/files/ICTJ-Global-Greentree-Two-Synthesis-Report-2011.pdf (date of use: 10 March 2017).
[735] Ibid.
[736] Ibid.
[737] Ibid at 1.

The focus of Greentree II was on deepening the deliberations and discussions on technical and operational aspects strengthening complementarity at the domestic level.[738] Within this broad framework, the specific objects of Greentree II were:

> (a) to ensure increased co-ownership of the process by development/rule of law actors;
>
> (b) to provide analysis on the progress specific countries have made on complementarity;
>
> (c) to explore experiences with national capacity development and identify key technical areas for attention in joint initiatives on complementarity at the national level; and
>
> (d) to ensure coherence and coordination of in-country assistance between international justice and development actors and national stakeholders on the other."[739]

It is submitted that the second Retreat recognised the greater need to recognise the significance of actors engaged in the development-aid sector as critical instruments in promoting positive complementarity. The specific goals of Greentree II point to a desire on the part of the organisers to advance the purpose for which Greentree I met, namely, to explore ways and means of implementing the concept of complementarity and strengthening domestic systems to empower them to investigate and prosecute Rome Statute crimes.[740] Crucial to note at this point, is that the cooperation of all stakeholders is indispensable to achieving an effective, well-coordinated international criminal justice system that promotes positive complementarity in a sustainable, national capacity-building environment.

In the next section the study examines the nature of the discussions held during Greentree II.

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[738] Ibid.
[739] See O'Brien P Dinner Remarks "Supporting complementarity at the national level: An integrated approach to the rule of law" Dinner remarks 7 December 2011 Greentree Estate available at http://www.legal.un.org/ola/media/info_from_ic/POB%20Greentree%20ii.pdf (date of use: 10 March 2017).
[740] See ICTJ Synthesis Report on Greentree I "Complementarity after Kampala: The way forward" 12 November 2010 available at http://www.ictj.org/sites/default/files/ICTJ-Global-Complementarity-Greentree-2010-English.pdf (date of use: 10 March 2017).

### 7.3.2 Discussions at Greentree II

The starting point for the participants was to explore the strategic approaches that various countries have taken in pursuing investigations and prosecutions for Rome Statute crimes.[741] More specifically, the following points were considered during this process:

(a) lessons learned from past experiences;

(b) best practices in selected countries;

(c) the role of prosecutions in strengthening the rule of law in specific countries; and

(d) the role played by development actors in assisting efforts to pursue accountability for serious crimes and their future role.[742]

It can be seen that the preceding points all emphasise the critical significance of the 'needs-assessment' exercise in achieving a sound implementation of positive complementarity. Greentree II observed that the needs-assessment exercise was carried out in Uganda initially, and was linked to a well-coordinated sector-wide approach and plan.[743] It was noted that, in contrast, in Timor-Leste where no formal needs assessment was conducted, victims and witness of the international crimes received scant attention.[744] This underscored the critical importance of the national

[741] International crimes as set out under article 5 of the Rome Statute.
[742] See generally, International Center for Transitional Justice synthesis report on "Supporting complementarity at the national level: An integrated approach to rule of law" available at http://www.ictj.org/sites/default/files/ICTJ-Global-Greentree-Two-Synthesis-Report-2011.pdf at 2 (date of use: 10 March 2017).
[743] Ibid.
[744] Ibid.

ownership of the assessment process and the incorporation of the assessment component into overall existing national-development strategies.

The situations in other countries – including Bahrain, Egypt and Libya – were also considered. As regards these states, the main thrust of the discussion was on their willingness and capacity, and consequently what form of assistance they required. In the case of Libya, Greentree II emphasised that any form of technical assistance must be embedded in the local legal context in that the Libyans must be able to see that such technical assistance is in accordance with the laws of Libya.[745] In light of this, it is argued that the recognition of the existing domestic legal structure is important when considering coordinated national capacity building.

With respect to the existing capacity-building initiatives, Greentree II evaluated their respective successes and emphasised the need for the sustainability of these initiatives and also the significance of the coordination of the efforts by donor communities.[746] For instance, in the Democratic Republic of Congo (DRC), despite over 3000 training sessions having been conducted with national actors on investigative and prosecutorial techniques, it was observed that many suspects still walked away scot-free having been neither investigated nor prosecuted. However, the retreat was made aware that a judicial monitoring process had been created to track the progress made in each case, and that training was conducted in accordance with the findings of the monitors.[747] This modest achievement by stakeholders in the DRC in their bid to develop national capacity is a clear indication of the Herculean responsibilities that lie ahead for development-aid providers and other stakeholders involved in positive complementarity.

[745] Ibid at para 6.
[746] Ibid at para 8.
[747] Ibid.

The other matter of concern was that although the donor community had granted extensive funding to the Democratic Republic of Congo, coordination and competition among donors remained a challenge. It was also observed that in Sierra Leone, although the Special Court of Sierra Leone (SCSL) undertook several training initiatives with national lawyers, police officers, and interpreters involved in upholding the rule of law, most of the trainees abandoned government service in favour of international employment.[748]

Greentree II was also concerned about the relationship between broader rule of law reforms and the mechanisms created for accountability for serious international crimes in the states where the mechanism was established.[749] For instance, in Sierra Leone judicial reforms preceded the establishment of the SCSL. The interaction between the SCSL and the broader reforms in the country gradually bore fruit in the creation of the first witness-protection programme in Sierra Leone.[750]

Significantly, Greentree II examined the role that the ICC and the ASP to the Rome Statute can play in the strengthening of national capacity to investigate and prosecute serious international crimes.[751] This was against the background of the understanding that limited capacity and resource constraints characterise the operations of the ICC and the Permanent Secretariat of the ASP. Notwithstanding this handicap, it was observed that the ICC and the Permanent Secretariat of the ASP could still provide assistance in other forms. Greentree II noted that the other form of intervention and contribution the ICC could make was to streamline the coordination and cooperation that existed with the law enforcement networks in specific states.

[748] Ibid.
[749] Ibid at para 9.
[750] Ibid.
[751] Ibid at para 10.

As regards the Secretariat of the ASP, the participants observed that there was a mechanism in place to facilitate the exchange of information between the ICC, states, civil society, the 'Legal Tools' web portal, and other stakeholders. It was suggested that the members of the ASP pool resources with a view to pursuing accountability for serious international crimes.[752] But more importantly, the Retreat did not expound on the detailed steps that should be invoked to ensure that the ASP is more effective in the process of implementing of positive complementarity.

From a much wider international perspective, the retreat observed that the initiatives by multilateral organisations – such as the United Nations and the European Union – and civil society have had a significant impact on the promotion and advancement of the principle of complementarity during the period since the Greentree I. In this regard it was noted that the European Union had developed a tool kit – the European Union Action Plan – which, apart from addressing and providing policy support for ongoing and future rule of law programmes, also specifically refers to the principle of complementarity. Within civil society it was noted that the Open Society Justice Initiative had developed a handbook and provided assistance on gender justice for the civilian and military trials of largely mass-rape cases before the mobile courts in the Democratic Republic of Congo.[753] This, on its own, however, only marked a modicum of the efforts at awareness-creation campaigns by the civil society.

### 7.3.3 Outcome and Recommendations of Greentree II

One of the most significant achievements of Greentree II was its decision to move the principle of complementarity from the broader policy discussions to a more concrete

[752] Ibid.
[753] Ibid at para 11.

plan of action to achieve implementation of initiatives on the ground from a practical point of view. The implementation of the principle of complementarity, however, should be coordinated and in the context of specific country needs.[754]

It was proposed to put the principle of complementarity more clearly on the agenda of the ASP and to add it to the agenda of the General Assembly High Level Rule of Law debate in the ensuing year.[755] Generally, these proposals were geared towards generating sufficient political impetus for the principle of complementarity at a global level. It is submitted that the mention by the participants of ASP was, indeed, a significant consideration in so far as noting the key gaps and needs in the promotion of positive complementarity.

Last, but not least, it was recommended that small complementarity groups be established to facilitate the process of the implementation of complementarity initiatives in specific states.[756] It was suggested that these groups include, among others, relevant stakeholders, actors in the development sector, legal assistance providers, representatives of recipient states, representatives of the ICC, expert organisations, regional and sub-regional organisations, the United Nations, and the donor agencies.[757]

More importantly, the needs-assessment process based on the context of individual state circumstances would form the basis for the operations of these groups and any assistance programme to specific states targeted for this exercise. It is therefore essential that before technical assistance is extended to a given state, there must be a

[754] Ibid.
[755] Ibid at para 13.
[756] Ibid at para 14.
[757] Ibid.

comprehensive needs-assessment evaluation to render such aid effective and relevant to the circumstances of the state in question.

In the next section the study examines the proceedings and recommendations of the third Greentree retreat.

## 7.4 Greentree III

### 7.4.1 Introduction

A high-level retreat with the theme 'Supporting complementarity at the national level: From theory to practice' which came to be known as Greentree III, was convened, again at Greentree Estate, between 25 and 26 October 2012.[758] Greentree III, like its two predecessors, was convened by the ICTJ with support from the governments of South Africa and Denmark and in cooperation with the UNDP. Greentree III was organised in close consultation with the ASP. It is submitted that the consultation with the ASP was instructive in so far as the needs assessment for institutional restructuring is concerned.

Like Greentree II, Greentree III was attended by some 70 participants with varied backgrounds whose representation ranged from states, developmental agencies, the United Nations, and the ICC, to the civil society. This diverse background, it is argued, was critical in ensuring a diverse but well-coordinated view of the needs-assessment process.

[758] See generally International Center for Transitional Justice synthesis report on "Supporting complementarity at the national level: From theory to practice" Greentree Estate, Manhasset New York 25-26 October 2012 available at http://www.ictj.org/sites/default/files/ICTJ-Report-Greentree-III-Synthesis-ENG-2012.pdf (date of use: 10 March 2017).

Greentree III built on the developments at Greentree I and II by focusing on the needs and challenges confronting selected states currently engaged in the investigation and prosecution of the most serious crimes under the Rome Statute – Colombia, the Democratic Republic of the Congo (DRC), Guatemala, and the Ivory Coast (Cote d'Ivoire).[759] These four countries were illustrative of states experiencing the processes of investigation and prosecution that required international intervention in the form of developmental assistance in the context of the international criminal justice. It is argued, however, that limiting the study to only four countries compromised the usefulness of the study and was an insufficient sample on which to base a truely coherent analysis and evaluation of the problem.

### 7.4.2 The discussion at Greentree III

Following the recommendations of Greentree II, on 24 September 2012[760] the United Nations General Assembly High-level Meeting on the Rule of Law deliberated on the issues raised at the retreat. The retreat noted that the UN General Assembly (UNGA) had committed to ensuring that impunity would not be tolerated and the perpetrators of such serious crimes would be brought to justice through domestic mechanisms or, where appropriate, regional or international mechanisms.[761]

Greentree III noted that the UNGA also gave serious attention to enhanced technical assistance and capacity building, best practices, strengthening international

[759] Ibid at para 5.
[760] See generally Declaration of the UNGA High-Level Meeting on Rule of Law 24 September 2012 UNGA/A/RES/67/1 available at https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf (date of use: 10 March 2017).
[761] See generally Press Release UNGA "First-ever High-level meeting on Rule of Law" 24 September 2012 available at https://www.un.org/press/en/2012/ga11288.doc.htm (date of use: 10 March 2017).

cooperation, and sharing knowledge.[762] The UNGA, therefore, underscored the significance of national capacity-building in achieving the implementation of positive complementarity.

It was highlighted that the four states singled out as illustrative of the complementarity process, faced challenges and difficulties in the promotion of accountability in their respective domestic criminal courts.[763] The challenges noted included a lack of adequate training among existing staff, lack of infrastructure and financial resources, and limited human resources.[764] In the four states examined it was noted that two important features were common to all: issues concerning political will, and difficulty in prioritising cases against persons considered most responsible for the most serious crimes.[765]

The participants recognised that in response to the issue of political will it was necessary to adopt a wide range of measures including reinforcing the independence of the judiciary and national prosecutors, encouraging stakeholders to provide development assistance to strengthen capacity and independence, and even, where necessary, offer political support.[766] Overall, the provision of development assistance was emphasised as a major measure for addressing the challenges faced by domestic criminal courts in ensuring effective investigation and prosecution of serious crimes under the Rome Statute. Coordination of the activities among the key players

[762] See generally International Center for Transitional Justice synthesis report "Supporting complementarity at the national level: From theory to practice" Greentree Estate, Manhasset New York 25-26 October 2012 para 6 available at http://www.ictj.org/sites/default/files/ICTJ-Report-Greentree-III-Synthesis-ENG-2012.pdf (date of use: 10 March 2017).
[763] Ibid at para 7.
[764] Ibid.
[765] Ibid.
[766] Ibid at para 8.

therefore becomes a crucial consideration in the overall process of the implementation of positive complementarity.

### 7.4.3 Way forward

The retreat noted that despite the positive achievements of certain selected states in the fight against impunity, there were still real challenges to be tackled. The group continued to emphasise the nexus between international criminal justice and the development community in ensuring adequate national capacity to advance the initiatives of complementarity. The UNDP stated that it would be consulting with development organisations on this matter during 2013. It was also suggested that donors should form an informal group to discuss the way forward on the issue of resources for assistance to support efforts towards complementarity. [767] It is clear from the procedings of the Retreat that the needs-assessment exercise palys a very significant role in the process of seeking to attain effective implementation of positive complementarity.

## 7.5 Conclusion

The Greentree process as seen through its three retreats, laid serious emphasis on the intervention of the international development community and other stakeholders in capacity building for the domestic criminal systems in order to enhance their respective capacity to investigate and prosecute international crimes under the Rome Statute within their territories and courts.

[767] Ibid at para 24.

It has been seen that 'needs assessment' was a major preoccupation throughout the Greentree process. In this regard, the Greentree process provided a valuable forum for the articulation of the nexus between international criminal justice and the developmental agenda to advance positive complementarity.

# CHAPTER 5

# LEGAL AND INSTITUTIONAL FRAMEWORK

## 1 Introduction

In this chapter, the policy options for developing a legal and institutional framework for the concept of positive complementarity are explored in light of the background analysis of the concept in the previous chapters. The exploration begins by examining the options available at the national level. The Rome Statute implementation legislation as an instrument for giving effect to the Rome Statute at the national level is of critical significance. It then proceeds to examine the policy alternatives at the regional level, including a discussion of the concept of supranationalism in the context of positive complementarity.[768] This is pursued with the aim of testing whether supranationalism offers a viable alternative legal and institutional framework.[769]

The pertinent provisions of the Rome Statute are evaluated to determine how to render them comprehensive and effective in support of positive complementarity.

The development of the domestic capacity of the institutions engaged in exercising national jurisdiction requires the adaptation of national standards to the requirements set for international cooperation.[770] This is a big challenge as over half of the states party to the Rome Statute have not yet adapted their national legislative frameworks to respond to the Rome Statute regime. It has been argued that positive

[768] See generally European Studies Hub "Sovereignty, intergovernmentalism and supranationalism" in available at http://hum.ac.uk/europeanstudieshub/wp-content/uploads/2013/05/module-4-extract-2-Sovereignty-intergovernmentalism-and supranationalism.pdf (date of use: 1 March 2017).
[769] See generally Kembayev *Legal Aspects of the Regional Integration* 15-18.
[770] Hunter E 'Strengthening national capacity to prosecute genocide, crimes against humanity and war crimes within the international criminal court system' Case Matrix Network.

complementarity is the most critical and useful conceptual insight to address the lack of a legislative framework.[771] It is submitted that positive complementarity indeed addresses this gap enabling a legal framework by engaging the various stakeholders in the international criminal justice system in national capacity building in territories of needy states party to the Rome Statute.

## 2 Legal and institutional measures to implement positive complementarity

### 2.1 Introduction

In this section the study examines the guidelines for the implementation of a viable framework for positive complementarity. Some of the standards prescribed in this part are benchmarked on the recommendations of the KRC.[772]

During the deliberations at the KRC, interventions to achieve positive complementarity were identified as falling within three broad categories: (i) technical assistance and capacity building; (ii) legislative assistance; and (iii) physical infrastructure. This categorisation was presented by representatives of South Africa and Denmark at the KRC.[773]

[771] Ibid.
[772] See discussion on the Kampala Review Conference in Ch 4 above.
[773] Ibid.

## 2.2 Implementing legislation

### 2.2.1 Introduction

In this section the study focuses on the legislative aspects of capacity development in the fight against impunity. An adequate legislative framework is a prerequisite for effective prosecutions in national courts.[774] The legislative assistance entails the drafting of appropriate legislative instruments and frameworks. It also involves rendering assistance in surmounting the challenges involved in the promulgation of legislation.[775]

To be optimally effective, the ICC relies on its state parties (those countries that have ratified or acceded to the Rome Statute) to have adopted national legislation enabling them to cooperate with the ICC. This legislative process is what is termed the 'implementation' of the provisions of the Rome Statute on cooperation in the national law of the state.[776] The purpose of Rome Statute implementing legislation is two-pronged. Firstly, it enables cooperation between the ICC and state parties; and secondly, the implementing legislation enables the state – as opposed to the ICC – to exercise its complementary national criminal jurisdiction.[777]

### 2.2.2 Rationale of implementing legislation

The question immediately arising is what obligations, if any, states party to the Rome Statute have to implement the ICC provisions on cooperation. In general, states are

[774] Human Rights Watch "The status of ICC implementing legislation" available at www.hrw.org/legacy/campaigns/icc/doc/icc-implementation.pdf (date of use: 1 August 2017).
[775] ICC-ASP-8-Res.9-Annex.IV-ENG.pdf.
[776] See ICC Coalition for the International Criminal Court "Implementing legislation" available at http://www.iccnow.org (date of use: 4 June 2017).
[777] Ibid.

expected to implement the provisions of the Rome Statute relating to cooperation with the court in their respective national laws.[778]

Implementing legislation must be considered as one of the aims of any effort at capacity building in the national jurisdictions.[779] Assistance to states takes the form of the drafting of the appropriate legislation which should take into account definitions of the crimes, the modes of liability, as well as the procedural aspects – most notably the rights of the accused to a fair trial.[780]

Concerns remain as to the significant gap which lingers in the national legal frameworks of state parties. These limitations are characterised by the low number of state parties which have incorporated the Rome Statute into their municipal legislative framework.[781] The assistance rendered is aimed, inter alia, at generating a greater number of adoptions of implementing legislation to incorporate the Rome Statute into domestic law.

The negative effect of the slow pace in the incorporation of international obligations by the relevant state parties, can be seen in the correspondingly slow rate of incorporation of the ICC's cooperation regime.[782] The inference is that in those states there would be inadequacy or limitation in the capacity to exercise national jurisdiction over serious international crimes. The possible consequences of this scenario may include lack of the guarantee of fair trial protecting the interests of the accused or the victims.[783]

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[778] Ibid.
[779] Parliamentarians for Globalization "Implementing legislation on the Rome Statute" available at http://www.pgaction.org/programmes/ilhr/icc-legislation.html (date of use: 1 March 2017).
[780] Ibid.
[781] Only some 49 state parties have incorporated the ICC's legal framework into their respective domestic law and only 46 states have incorporated international obligations to cooperate.
[782] Simmons & Allison (2010) 64/2 *International Organizations* 225-56.
[783] Ibid.

The Rome Statute contains provisions on how it is to be implemented in the national law of state parties. The inference is that states are under no legal obligation to implement or incorporate the Rome Statute in their national criminal law. The only provisions allied to the implementation are those relating to the administration of justice, and the obligation to cooperate fully with the ICC.[784]

Much as there is no obligation on the states to implement the Rome Statute, it would be useful if a decision were to be taken to promulgate such legislation, on condition that it provides adequately for effective witness protection and the right of victims.[785] The legislation should further include the right of the victim to participate in the proceedings – although this aspect may not feature in all states owing to specific national requirements.

The comprehensive domestication of the Rome Statute would provide an ideal opportunity to generate a revision of domestic legislation to conform to acceptable international law standards.

The drafting of a legislative framework implementing Rome Statute crimes and obligations, is an exercise which, among other things, requires specialised expertise in the discipline of legislative drafting. In this respect, assistance would take the form of providing trained drafting experts.

Training in legislative drafting is lengthy and highly specialised. This challenge could be addressed by establishing a national institutional framework that is more readily responsive to the need for competent drafters.

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[784] See arts 70(4)(a) and 86-92 of the Rome Statute which, respectively, deal with legislation on penalties arising from non-compliance with aspects of the administration of justice, and the obligation to fully cooperate with the court.

[785] See generally, Amnesty International "Implementing the Rome Statute" available at www.amnesty.org/en/international-justice/issues/international-criminal-court/implementing-rome-statute (date of use: 1 March 2017).

Identifying and instituting ways to overcome domestic hurdles in implementing this legislation are an important strategy in extending assistance to states to enable them to achieve the positive benefits of complementarity.[786]

The ratification of the Statute may, in itself, yield a number of benefits, including transformation of the extant legislative structures in a state. The legislative framework adopted must be in line with international law standards.[787]

From the above analysis it follows that states are under no obligation to incorporate the core international crimes in the Rome Statutes into their national criminal law.[788] However, it should be noted that implementing legislation seeks to safeguard the primary rights of the state to investigate and prosecute core international crimes in the Rome Statute within its own domestic jurisdiction.[789] This, in effect, goes a long way to demonstrate the ability of the national authority to investigate and prosecute in accordance with the requirements of the Rome Statute.[790]

### 2.2.3 Challenges of implementing legislation

A number of states have adopted and incorporated the Rome Statute within their domestic criminal law.[791] But, for varying reasons, a number of others have not.[792] A number of challenges may be identified that act as impediments to the process of

[786] "Making the International Criminal Court work: A Handbook for implementing the Rome Statute" September 2001 available www.hrw.org/campaigns/icc (date of use: 1 March 2017).
[787] Ibid.
[788] Ibid.
[789] See Delmas-Marty (2006) 4 *Journal of International Criminal Justice* 2-3.
[790] Article 17 of Rome Statute.
[791] One hundred and twenty-four states have ratified the Rome Statute; of these 34 are African states, 19 are Asia-Pacific states, 18 are from Eastern Europe, 28 are from Latin American and Caribbean states, and 25 are from Western Europe and other states. See posting available at ICC website http://asp.icc-cpi.int.
[792] Ibid.

adopting implementing legislation. Some of the challenges have been reinforced by procedural impediments erected in the process of adopting the implementing legislation.[793]

The absence of adequate technical skills among the nationals of a given state to draft appropriate legislation, has contributed to the slow rate of domestication of the Rome Statute.[794] However, in response to this predicament a number of international institutions have given legislative assistance – for example, the Commonwealth Secretariat in London, United Kingdom, has compiled an International Criminal Court Model Law for adoption by Commonwealth states.[795] The Commonwealth Secretariat also organises and supports the training of lawyers in legislative drafting skills.[796] The Secretariat further extends its training to equip prosecutors, judges, and other professionals engaged in the administration of international criminal justice to better perform their roles in the fight against impunity in their respective states.

### 2.3 Technical assistance and capacity building

Among the first considerations that influence donors are political factors, particularly those connected to the prosecution process; the prospects of the recipient state promoting the rule of law to assure accountability; and the technical issues around

[793] See Kaul Haans-Peter "International Criminal Court – Current challenges and perspectives" Keynote address by Judge Kaul Hans Kaul, Vice-President of the ICC at Salzburg Law School, 8 August 2011 available at https://www.icc-cpi.int. (date of use:30 October 2017)
[794] Human Rights Watch report "The status of ICC implementing legislation – States parties need to expedite enactment of implementing legislation" 1-3 available at https://patheon.hrw.org/legacy/campaigns/icc/docs/icc-implementation.pdf (date of use: 15 September 2017)
[795] See generally (2010) 2 *Equality of Arms Review* 15-16.
[796] A programme in legislative drafting has been run for commonwealth lawyers at the University of the West Indies, Cave Hill campus in Barbados, Caribbean Island for many years. See http://cavehill.uwi.edu.

donations.[797] Most western donor agencies now tend link their donations to the requirement of good governance and the existence of an effective national judiciary that dispenses sound justice, security, and adequately protects respect for rule of law.[798] These factors have become key criteria for donor agencies, which they tend to link to the release of their assistance and other aid programmes dealing with the promotion of the policy of positive complementarity in many developing states.[799]

Against this background, it should be noted that to empower domestic capacity, technical assistance in various forms needs to be extended to states requiring assistance.[800] The aim of such assistance is to build national capacity, and thus positively complement the efforts of the domestic courts in the overall global fight against impunity.[801]

In general, assistance in strengthening domestic capacity to exercise national criminal jurisdiction is a consideration for donor agencies when deciding on how to intervene in a national situation in order to support relevant projects related to positive complementarity.[802]

Certain international organisations and civil society have generated guidelines to be followed by donor agencies to ensure that development funding is properly linked to good administrative practices and political governance by the government in the

[797] See generally Grimm S et al "European Development Cooperation to 2020: Challenges by new actors in the international development" EDC2020 Working Paper 2009 available at http://www.edc2020.eu/fileadmin/Textdateien/EDC2020_2020_WP4_websversion.pdf (date of use: 1 March 2017).
[798] Ibid.
[799] Ibid. Donor funding has become increasingly linked to good governance.
[800] See generally, Bergsmo, Bekou & Jones (2010) 2 *Goettingen Journal of International law* 791-811.
[801] Ibid.
[802] See generally Nelson J "Building partnerships: Cooperation between the United Nations system and the business community" United Nations and International Business Leaders Forum 2002 available at www.un.org/milleniumgoals/2008highlevel/pdf/background/UN_Business%Framework.pdf (date of use: 1 March 2017).

recipient state.[803] In most cases, the donor agencies will look for indicators within the national set up. In releasing their funds, they satisfy themselves that the funding will generate greater accountability, assure integrity, and inculcate a sense of independence. Within the national judiciary, there is insistence that thorough vetting is conducted before judicial officers are hired, and that their performance is regularly monitored to check for possible abuse and corruption.[804]

It should be noted that certain states, much as they would be willing to prosecute international crimes, are unable to do so for lack of the necessary expertise and experience in dealing with the complexities of such crimes.[805] In this type of scenario, the issue of concern to complementarity is 'inability' and not 'unwillingness' to exercise national jurisdiction.[806] Phrased differently, the national authorities would ordinarily be willing to investigate and prosecute, but as they lack the necessary legal expertise or resources, they are unable to exercise national criminal jurisdiction to the satisfactory international standard, or at all.[807]

The training of the personnel in the technicalities of investigating and prosecuting Rome Statute crimes is a crucial step in the efforts to achieve an effective positive complementarity policy for any state.[808] Some of these core international crimes – eg, genocide – would require broad-based investigations which, in turn, demand specialised personnel to handle the investigations and trial effectively. The complexity of these crimes demands effective training of all personnel involved in the process of investigation and prosecution, where necessary.

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[803] Ibid.
[804] A key indicator in the donor funding of the judiciary would be to ensure there is no corruption and that the independence of the judicial officers is guaranteed.
[805] See Olasolo "Complementarity analysis of national sentencing" 36-40.
[806] See generally Heller 2006 *Criminal Law Forum* 17.
[807] See generally Solera (2002) 84 *International Review of the Red Cross* 145-69.
[808] Ibid.

The other area that calls for training is the national judiciary. Judges and other members of the national judiciary should be trained in trial skills in cases involving international crimes, including courtroom management techniques.[809] There is a need to build the capacity of national judges if they are to cope with the complexities associated with the Rome Statute crimes which require a specialised knowledge of and training in international criminal law.

In some states – Kenya and Uganda, for example – there have been attempts to establish separate chambers specialising in Rome Statute crimes. In Uganda, for example, a War Crimes Division was established to deal with specific Rome Statute crimes.[810] The War Crimes Division was devoted solely to the adjudication of international crime.

The time involved in the practical legal training of national judges could be an issue of concern. It could take relatively longer to train judges in, for instance, intricate legal aspects of international criminal law and procedure.[811] In comparison, however, other aspects of national capacity building, for instance, training in aspects of prison management and investigation, could take less time. Supplying foreign judges and prosecutors to assist national courts to support war crimes chambers or hybrid tribunals is an important strategy in supporting positive complementarity.[812]

The training of defence counsel to represent an accused charged with international crimes effectively is another critical aspect of national capacity building, and,

[809] Ibid.
[810] See generally International Centre for Transitional Justice "Is Uganda's judicial system ready to prosecute serious crimes?" January 2015 available at https://www.ictj.org/news/uganda-kwoyelo-case (date of use: 2 March 2017). See also the International Crimes Division (ICD) of the High Court of Uganda Information Manual available at www.jlos.go.ug/index.php/document-centre/court-information/381-international-war-crimes-division-of-the-high-court-brochure/file (date of use: 5 November 2017).
[811] See generally Allen "Ritual (ab)use?" 47-54.
[812] Ibid.

therefore, the promotion of the policy of positive complementarity. This would generally entail training in aspects of international criminal law and procedure, although elements of forensic investigation could also prove useful.[813] It will be noticed that, in most national criminal law curricula, international criminal law is only a programme of study at masters or doctoral level, yet most defence counsel or prosecutors and even judges engaged in those cases, would have covered only rudimentary general principles of international law in their undergraduate law degrees. These actors then need to undergo intensive training in advanced international criminal law if they are to be able to cope with the demands of trials involving international crimes.[814]

There are three aspects of international crime adjudication which present serious challenges to the development of national capacity:[815] complexity; quantity; and cost associated with building national capacity.[816] Two examples of practical and innovative efforts to address these challenges are the Legal Tools Database (LTD), and the Case Matrix Network (CMN).[817] These two aids are crucial in national capacity building geared towards putting an end to impunity through the policy of positive complementarity.

The LTD is recognised as the largest online library of legal materials on the knowledge and practice of international criminal law.[818] It was established by the OTP between 2003 and 2005.[819] This tool is a repository of vast materials on international

[813] El Zeidy (2005) 5 *International Criminal Law Review* 83-119.
[814] Ibid.
[815] Ibid.
[816] Ibid.
[817] See Case Matrix Network available at www.casematrixnetwork.org/icc-case-matrix/ (date of use: 2 March 2017).
[818] See Klamberg M "Commentary on the law of the International Criminal Court" available at https://legal-tools.org/docs/aa0e2b/pdf/ (date of use: 8 November 2017).
[819] Ibid.

criminal law including: different states' municipal legislation; national cases on key international law, international cases, and legislation; all preparatory works of the ICC, the Rome Statute, rules, regulations, judgments, decisions and orders; and volumes of pertinent international and regional judicial decisions involving human rights.[820] These documents are available electronically for easy access, and, more importantly, are available free of charge, provided one is able to access them on the internet.

The LTD has proved extremely helpful for defence lawyers, judges, and prosecutors engaged in the investigation, prosecution, and defence of cases involving serious international crimes in their respective states.

On a more practical note, the CMN provides, free of charge, the latest technology-aided services to assist in the investigation, prosecution, and adjudication of the most serious international crimes.[821] Essentially, the CMN supplements the operations of the LTD in that it provides all the relevant services and tools instrumental in the exercise of national jurisdiction over the most serious international crimes. These tools are helpful across the board to judges, defence counsel, investigators, prosecutors, and legal advisors, among many stakeholders who benefit from them. Victims and witnesses in international criminal cases also benefit from the facilities available on the CMN.[822] The 7 500 pages of materials, helpful in trials, are two analytical digests that deal with elements of international crimes and modes of liability.[823] The technology used in designing these facilities ensures easy access to

[820] A staggering over 60 000 documents are kept in the Legal Tools Database.
[821] Users of the application in the Case Matrix Network may also find it easy to link incidents to witnesses, victims, and suspects.
[822] See Core International Crimes Database in the Case Matrix Network website at https://www.casematricnetwork.org.
[823] See Hunter E "Strengthening national capacity to prosecute genocide, crimes against humanity and war crimes within the international criminal court system" 30.

information required by those engaged in the process of international criminal justice in whatever capacity and wherever they are.

The underlying factor in the use of these tools is the assurance of a cost-effective approach to mainstreaming accountability into legal assistance and capacity building of the judicial institutions of the state parties whose resources are underdeveloped or inadequate.

Another aspect that requires attention is national capacity building in the protection of victims and witnesses – a particular concern in cases involving Rome Statute crimes. Victims and witnesses have come to occupy a very important position in the international criminal justice process.[824] Advice on structuring reparation programmes for victims of Rome Statute crimes in situations of scarce resources, is an important aspect to include on the positive complementarity agenda.[825] An effective witness-protection programme is a crucial requirement to encourage fair and free participation in trials by witnesses and victims without fear of victimisation or repercussions.[826] The setting up of a suitably elaborate witness protection programme calls for legal expertise in the appropriate field.

The need for personnel trained in forensic expertise cannot be gainsaid. The training on court management systems to ensure a cadre of staff capable of organising, safeguarding, and making accessible, as appropriate, large quantities of sensitive

[824]The Office of the Prosecutor has given prominence to the issue of victims of the international crimes in most of its operational and legal considerations.
[825] See art 75 of the Rome Statute. See generally Shelton & Ingadottir "The International Criminal Court Reparations to victims of crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79)" Centre on International Cooperation New York 26 July-13 August 1999, Meeting of the Preparatory Commission for the International Criminal Court available at www.pict-pcti.org/publications/PICT_articles/REPARATIONS.PDF (date of use: 2 March 2017).
[826] See generally McCarthy (2009) 3/2 *International Journal of Transit Justice* 250-71.

information is very important in the overall scheme of positive complementarity.[827] This goes hand-in-hand with the need to train personnel in archival management in order to ensure the preservation of vital materials in the administration of the international criminal justice process.

The media form a critical component of education. Capacity building in this area entails the training of journalists in essential elements of reporting on Rome Statute crimes and efforts to address them through the domestic courts.[828]

Allied to this is the work of civil society. Assistance should be provided to non-governmental organisations (NGOs) engaged in public outreach programmes in conjunction with court officials. When it comes to outreach, it is also important to stress the significance of the advocacy role of civil society which also requires support.[829] Accordingly, assistance should be accorded to NGOs engaged in monitoring prosecutions and trials of Rome Statute crimes, and in advocating on behalf of victims and others affected.

To sum up: national capacity building is a very important strategy to ensure the realisation of the implementation of the policy of positive complementarity within the domestic law of state parties.

[827] An effective court management system would rule out instances of lost files and also would provide easy means of analysis of statistics.
[828] See, for example, ICC "Reporting on the ICC: A practical Guide for the Media" available at https://www.icc-cpi.int/iccdocs/PIDS/publications/ICC_Guide_for%20Journalists_EN.pdf (date of use: 2 March 2017).
[829] Gonzalez (2006) 3/5 *Sur Revista Internacional de Direitos Humanos* available at http://dx.doi.org/10.1590/S1806-64452006000200003 (date of use: 2 March 2017).

## 2.4 Physical infrastructural intervention

The establishment of a relevant and sound physical infrastructure is pivotal to the effective implementation of positive complementarity. The institutions that maintain the administrative structures and support the legal framework are a critical component in the overall scheme of positive complementarity.

It is important to point out that the key infrastructural developments would include the construction of courtrooms and prison facilities, as well as the consolidation of the national and local capacity necessary to "ensure that the functioning of such institutions comply with international standards."[830] An adequate system of court management is necessary to ensure the security of evidence in the possession of the courts which, in turn, ensures that there are no miscarriages of justice due to loss of vital evidence.

The system for the retrieval of data from archives should be facilitated. This should help the courts and other stakeholders to access vital information whenever necessary. Due to the sensitive nature of the information involved in the international criminal investigations and trials, there is need to reinforce the safeguards in systems for processing that information.[831] It therefore becomes imperative to ensure sufficient hardware for court management systems capable of safeguarding and making accessible, as appropriate, large quantities of sensitive information.

[830] See generally Heller 2006 *Criminal Law Forum* 17.
[831] See generally Kleffner (2004) 2 *Journal of International Criminal Justice* 944-8.

Allied to the preceding proposition, is the creation of archive storage areas and systems capable of keeping material accessible. This safeguards the materials against damage due, for instance, to the vagaries of the weather.[832]

The rights of the accused form a critical aspect of positive complementarity.[833] In this regard, efforts should be made to ensure a suitable security infrastructure for detention cells and facilities for the accused persons.

In conclusion, it emerges from the preceding analysis, that a concerted effort between the national jurisdiction and the international community is essential in ensuring effective implementation of a policy of positive complementarity.

## 2.5 Development agencies and conditional donor aid

The response of the international donor community has been decisive in denying support funding to non-compliant states.[834] Since international cooperation is an essential element of furthering the realisation of the concept of positive complementarity, the roles of all actors on the international plane are crucial.[835] Most international donor agencies have tended to link their donor funding grants to general accountability as regards the rule of law in the target states.[836] States are expected to have in place, an effective framework to provide for adequate protection of their

[832]Safety of the records helps guarantee ready availability of data for analysis and planning.
[833] See generally Gioia "Reverse cooperation" 75-102.
[834] See generally, Grimm et al "European Development Cooperation to 2020: Challenges by new actors in the international development" EDC2020 Working Paper 2009 available at http://www.edc2020.eu/fileadmin/Textdateien/EDC2020_2020_WP4_websversion.pdf (date of use: 1 March 2017).
[835]Good corporate governance has become the trend as a condition for donor grants. Good governance and rule of law and accountability are now invariably conditions in most donor agreements.
[836] See generally, 2006/C46/01 "The European Consensus On Development" available at http://ec.europa.eu/development/icenter/repository/european_consensus_2005_en.pdf (date of use: 1 March 2017).

citizens against atrocious crimes committed by those in positions of authority. For instance, the World Bank[837] maintains a policy linking development financing to sound practices and respect for rule of law in the recipient state. The European Union has a similar uniform policy of tying their aid or funding to sound practices that protect the interests of the recipient state. The United Nations also maintains a strict policy to ensure accountability and sound practices that promote the protection of victims and all parties involved in the international criminal justice process.[838]

The mainstreaming of the accountability measures into technical assistance and capacity building by most of the international development agencies goes a long way in helping entrench positive complementarity.[839] By threatening to withhold donor funding until certain minimum standards regarding the rule of law have been met, states could be persuaded to exercise their domestic jurisdiction effectively in the investigation and prosecution of international crimes.[840]

In a different scenario, where donor funding to a state is already in place, the donor could also unilaterally withhold that funding until general rule-of-law conditions improve sufficiently to guarantee the effective and genuine exercise of domestic jurisdiction over international crimes.[841] This control measure could also send signals to other states that could be similarly intransigent in administering fair and just processes of international criminal justice within their respective territories.

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[837]These donors ensure the funds they disburse are not used to further atrocities or other activities that create more victims.
[838] See generally, Nelson J "The United Nations and the Private Sector: A framework for business engagement with the United Nations" based on UNDP/IBLF 2003, Global Compact Office, United Nations September 2008.
[839] See generally, Carbone (2008) 30/3 *European Integration* 323-42.
[840] See generally, Nelson J "Building partnerships: Cooperation between the United Nations system and the business community" United Nations and International Business Leaders Forum 2002 available at www.un.org/milleniumgoals/2008highlevel/pdf/background/UN_Business%Framework.pdf (date of use: 1 March 2017).
[841] See generally Solera (2002) 84 *International Review of the Red Cross* 145-69.

In summary it emerges that the various interventions that seek to establish and sustain positive complementarity have one common thread – accountability on the part of the state party.

## 3 International Law Association initiative

### 3.1 Introduction

In this section, the importance of the work of the International Law Association (the ILA) is discussed with particular reference to the principle of complementarity and the development of the concept of positive complementarity. The ILA was formed: (a) to bring together all interested in international law worldwide, from legal and mediation practice, the judiciary, academia, business, and international, governmental, and non-governmental organisations; (b) to foster understanding of international law for the study, clarification, and development of international law both generally and particularly, through its scholarship fund for young persons across the world; and (c) to promote greater respect for and adherence to international law.[842]

Based on these aims, the ILA seeks to achieve its overall constitutional objective, which since 1873 has been "the study, clarification, and development of international law, both public and private, and the furtherance of international understanding of, and respect for international law."[843] The ILA undertakes its activities largely through its established committees. The particular committee whose work is relevant to this study, is the Committee on Complementarity in International Law (CoC).

[842] See www.ila-hq.org/index.php (date of use: 12 June 2017).
[843] Ibid.

The ILA Executive Council approved the establishment of the CoC at its meeting in London on 2 November 2013. Professor Mia Swart (South Africa), who moved the idea, was appointed chair. The main goal of the CoC is to "consider the question of how the concept of complementarity, particularly positive complementarity, should be interpreted and applied both in the context of admissibility proceedings of the International Criminal Court and in the domestic jurisdictions of State Parties (and beyond)."[844]

In the following section, the work of the CoC on complementarity, and more particularly, positive complementarity, is discussed.

### 3.2 Working session 2014

The CoC commenced its work in November 2013. The Committee is composed of 34 experts in areas of international criminal law.

In the earlier session of the CoC held on 7 April 2014, Swart noted that the Committee would focus on four aspects of complementarity: (a) complementarity as a practice of admissibility before the ICC under article 17 of the Rome Statute; (b) 'positive complementarity', which focuses on developing capacity at a national level to prosecute international crimes; (c) the relationship between complementarity and subsidiarity, and whether there is an emerging legal principle that prosecutions should

[844] International Law Association, Johannesburg Conference 2016 Discussion Report "Complementarity in international law" at 5.

first occur at the national level; and (d) the relationship between complementarity and the political will to prosecute.[845]

In her introductory remarks, Swart highlighted the lack of political will in the African context, and further acknowledged that the ICC is unlikely to provide impetus for such a will in the face of antagonism among African states towards the court.[846] This observation has been borne out in recent years by the move by a number of African states – including South Africa – to withdraw from the Rome Statute. Against this background, the CoC set out to clarify the meaning of the term 'complementarity' and to determine whether the ICC has a role to play in national capacity-building efforts.[847]

The CoC, therefore, embarked on an exercise to produce a report that would add value to the dialogue on complementarity, and not merely to restate what is already in the literature and jurisprudence of the ICC on article 17 of the Statute.[848]

Mennecke, a Danish member of the CoC, noted that much as complementarity was a critical topic at the 2010 KRC, it had since evolved in the ASP from an admissibility issue to a broader issue that encompasses positive complementarity.[849] Mennecke further noted that positive complementarity has not gained traction in the face of the concerns of some state parties that do not want the ICC to become, or be perceived to be, a developmental organisation. Despite this, he indicated that there was a broader understanding between state parties that they must work with each other and with external actors to broaden the ICC's impact and close the impunity gap.

[845] International Law Association Committee on Complementarity in International Law Working Session, Washington DC, Monday 7 April 2014 available at www.ila-hq.org/index.php/commitees (date of use: 12 June 2017).
[846] Ibid at 1.
[847] Ibid.
[848] Ibid. See the remarks by Professor Morten Bergsmo.
[849] Ibid.

The concern expressed by a number of stakeholders about the ICC being viewed as a developmental agency has equally been of concern to the CoC. In this regard, Mennecke drew the attention of the Committee to a speech by the UNDP Administrator, Helen Clark, on the nexus between development assistance and the ICC. In that speech, Clark warned of the potential obstacles to painting the ICC as a developmental organisation.[850] In this regard, Mennecke suggested that the CoC should examine how the various external actors have developed positive complementarity (even if they have not expressly referred to it as such). Swart, however, questioned the labelling of positive complementarity as development aid. According to Swart, the two concepts are not necessarily synonymous and providing resources to strengthen the judiciary and disseminating information about international crimes does not necessarily fit within the traditional definition of development aid.[851] In the same vein, she argued that there is no legal obligation on either the state parties or the ICC to build national capacity in the manner suggested above.

This discourse appears to underscore the fact that there has been lack of a common understanding of the meaning of the term positive complementarity, and therefore different stakeholders have tended to ascribe different meanings and connotations to the term. This has led to calls from some quarters, for example, the Attorney-General of Guatemala, that attention should be given to the broader notion of fighting impunity rather than to the technicalities of complementarity under the ICC regime.[852]

It was observed by Bekou (United Kingdom), that there was a shift in the understanding of positive complementarity at the KRC in 2010, where it was noted

[850] Ibid at 2
[851] Ibid.
[852] Ibid. See, in particular, the remarks on this by Professor Mennecke.

that the issue was wider than mere development aid.[853] In this regard, the CoC was asked to note the issue of duplication of national capacity-building efforts by various stakeholders in different sectors. In addressing the concern raised by Swart as to possible neo-colonial influence in capacity-building initiatives, Bekou suggested that such capacity building must be allowed to develop organically from direct requests by the states concerned, regardless of whether such requests were made to former colonial powers.[854]

Another important suggestion by Carter (United States) was that due to possible ethical issues with the judges of the ICC, the ASP should create an independent body to carry out the role of national capacity building.[855] This is an important suggestion, which is addressed in greater detail later in this chapter where it is suggested that the ASP be restructured.

The CoC also considered the possible study of, and discussion on, the issue of regional courts, notably the African Court on Human and People's Rights (ACHPR), and their potential impact on the prosecution of the core international crimes. The CoC was invited to consider the hierarchical relationship with the ICC. It was suggested that the Committee consider, as part of its work, an evaluation of the impact of regional courts on the obligations of state parties under article 17 of the Rome Statute.

However, the issue of the extension of the jurisdiction of regional courts – notably the ACHPR – raised concern among some members. Corell (Sweden), argued that, based on his experience with the European Court of Human Rights, extending the

[853] Ibid.
[854] Ibid.
[855] Ibid.

jurisdiction of a human rights court like the ACHPR to cover international crimes would be a disaster.[856] He suggested that focus should rather be directed at assisting developing states to adopt the necessary enabling legislation to create a system of complementarity at the national level, while the ICC should continue to focus on a higher level.[857] The clarification was then made that there would be no opposition to a regional criminal court in Africa, but rather the resistance was to the co-mingling of the jurisdiction of criminal courts and human rights courts.

An interesting concern was raised by Wedgewood (United States) that the ICC was already a burdened institution, and that to add the responsibility of capacity building to its role was not an advisable option.[858] She suggested that it would be better for the ICC to focus on its current role under the Rome Statute, and to leave the other roles to other institutions. This study concurs with this suggestion only to the extent that it relates to positive complementarity. This will be demonstrated later when it is suggested that the ASP, rather than the other juridical organs of the ICC, should focus on the coordination of activities relating to positive complementarity.

Ambos (Germany) suggested that there may be interest in dealing with positive complementarity, as it was an area that requires more thought and provokes discussion.[859] He noted that the jurisprudence of the ICC on positive complementarity was vague and unhelpful, and therefore, he further suggested that the CoC conduct a study of the different decisions of the ICC on admissibility under article 17 in the *Saif-Al-Islam* and *Abdullah Al-Senussi* cases.[860]

[856] Ibid at 3.
[857] Ibid.
[858] Ibid.
[859] Ibid at 4.
[860] Ibid.

Despite the query as to whether there was enough international law on positive complementarity, there seemed to be wide agreement among the members that the concept of positive complementarity should be examined further by the Committee. This understanding gained favour despite concern that non-state parties may not have been consulted on the matter.

The CoC was nonetheless invited to examine whether positive complementarity involves a legal question, a moral question, or a question of addressing poverty.[861] As to whether positive complementarity is 'legal enough', Mennecke, argued that issues such as 'same crime, same situation' are indeed legal matters.

In conclusion, no member expressed the view that the CoC should not address positive complementarity. Accordingly, the establishment of the CoC was a critical step in the exploration of the concept of positive complementarity. The Committee is engaged in an ongoing exercise in pursuit of its mandate to study the concept of positive complementarity. It remains to be seen what findings it will come up with. The work of the CoC is, therefore, an important contribution to this study. In the ensuing section, the study explores the 2006 sessions of the CoC.

### 5.3.3 Working session 2016

The CoC reconvened on 10 August 2016 in Johannesburg. A discussion report was presented by Jalloh (USA) explaining the mandate of the CoC and highlighting in broad strokes the concept of complementarity as enshrined in the Rome Statute.[862]

[861] Ibid. See the concern raised by Professor Mia Swart.
[862] Ibid at 1.

The report considers the issue of 'positive complementarity' in light of the practice of the so-called 'self-referrals' by concerned states given their limited capacity to investigate and prosecute international crimes.[863] The report further explains that at the ASP, the ICC has taken the view that positive complementarity is important. However, it has also stated that the role of the ICC in this regard should not be equated with that of a development agency, over and above its primary mandate which is to investigate and prosecute core international crimes.[864]

The report contains, as an addendum, the specific experiences of particular situations before the ICC, namely Kenya, Mali, and the Sudan. It should be noted that all these are situations in Africa.

In reaction to the report, Swart stated that in her view the CoC should aim to divorce complementarity from article 17 and rather examine national prosecutions by all states, regardless of whether they are state parties or non-state parties to the Rome Statute.[865] She stated that despite a decision having been taken to focus on positive complementarity, some definitional issues of complementarity still attracted the attention of the Committee, and therefore remained to be addressed.

On her part, Nouwen (Netherlands) argued that articles 17 and 20(3) of the Rome Statute at least provided a definition of complementarity. However, she noted that the term complementarity has been used by many to describe different aspects – for example, 'positive complementarity', 'investigative complementarity' or 'proactive complementarity'.[866] She concluded that all these terms mean different things to different people as they lack a legal basis in the Rome Statute or a clearly agreed upon

[863] Ibid 2. See, in particar, the remarks by Professor Jallo.
[864] Ibid.
[865] Ibid at 3.
[866] Ibid.

definition. In the premise, Nouwen suggested that if the CoC wished to focus on 'positive complementarity' it should take a decision on the type of positive complementarity on which it wishes to focus. She further argued for the adoption of a definition of positive complementarity from an official or semi-official ICC document, rather than an academic paper. This meant the adoption of the ICC documents, such as the OTP Prosecutorial Policy Papers, and the resolutions of the ASP on the definition of positive complementarity as adopted at the 2010 KRC.[867]

According to Nouwen, if the Committee decided to focus on 'positive complementarity' it should make it clear that while there are some links with the legal concept of complementarity as contained in the Rome Statute, there are also important differences that need attention. She added that complementarity as a legal concept in the Rome Statute and positive complementarity require different types of action and are ordinarily implemented by different actors.[868] She explained that legal complementarity is an admissibility rule in the Rome Statute. According to Nouwen, positive complementarity, by contrast, is not an arrangement of admissibility, but a policy aimed at enabling or encouraging states, through assistance from the ICC or states, to investigate and prosecute the crimes in the Rome Statute within their respective domestic courts.

Nouwen then concluded that positive complementarity is effectively a policy of co-operation, even if different from the type of cooperation primarily envisaged in the Rome Statute, namely cooperation between states and the ICC. Swart disagreed on this latter point arguing that positive complementarity does not necessarily mean

[867] Ibid.
[868] Ibid at 5.

cooperation.[869] Nouwen, however, in response, explained that the degree to which positive complementarity is about cooperation, depends on which type of positive complementarity one has in mind. For example, the OTP has set out the idea of positive complementarity in which it would engage the ICC in assisting states to prosecute core international crimes domestically.[870]

It was further argued that much as some form of ICC-to-state cooperation could be based on article 93(10) of the Rome Statute, many states have argued that it is not the responsibility of the ICC to engage in national capacity building, but that it should rather be left states and institutions such as the UNDP to make a contribution in this regard.

The issue of whether the Committee should consider the claim that states are under a duty to investigate and prosecute the international crimes under the Rome Statute was also raised. Nouwen responded that this was a "normative paradox of complementarity" because, on the one hand, complementarity may be based on the idea that ideally states should investigate and prosecute domestically; but on the other hand, the Rome Statute itself does not impose such an obligation on states, nor does the ICC have the jurisdiction to adjudicate state responsibility for failing in this obligation.[871]

On the point of absence of duty, Nouwen argued that while the Preamble to the Rome Statute recalls "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", neither this nor any other provision in the Rome Statute creates an obligation for the states to that effect. She argued that the Preamble

[869] Ibid at 4.
[870] Ibid.
[871] Ibid at 6.

simply refers to the existing obligations under bodies of international law other than the Rome Statute. In effect, the Rome Statute does impose an obligation on states to implement legislation to facilitate cooperation and to criminalise offences against the administration of justice, but not to investigate or prosecute crimes in the Rome Statute domestically, or to incorporate these into domestic criminal law.[872]

In Nouwen's view, some states have, nonetheless, incorporated the Rome Statute into their domestic law, in part to ensure that they benefit fully from the complementarity regime of the Statute.

On the point of charging the ICC with the responsibility for positive complementarity, Kress (Germany) stated that he understood the German position at the time to be that a juvenile, fragile, and struggling institution such as the ICC should perhaps be cautious before taking on all kinds of duties on top of those falling to it under the Rome Statute.

It should be noted that the work of the CoC is ongoing and is bound to highlight critical points about the concept of positive complementarity. The work of the CoC is, therefore, pertinent to the objectives of this study.

## 4 The International Law Commission (ILC) initiative

On 18 July 2014, the International Law Commission (ILC) admitted into its work plan the topic of crimes against humanity. The study by the ILC of the crimes against humanity is an initiative aimed at enhancing complementarity. It proposes the adoption of conventions to facilitate the exercise of jurisdiction by states and

[872] Ibid.

strengthen interstate cooperation.[873] Although, the ILC initiative is essentially an inter-governmental cooperation, it is closely aligned with the civil-society initiative for a convention on crimes against humanity.[874]

From the outset it is important to note that the ILC initiative recognises the crucial role that the ICC plays in the international criminal justice system.[875] Accordingly, the Rome Statute is central to most of the current work on the ILC initiative.

The ILC initiative, however, recognises that there is a legal gap in the system that needs to be addressed. The gap arises from the obligation, on the part of the states, to establish and exercise national jurisdiction, and on the other hand, the duty of states to cooperate with one another.[876]

The definition of crimes against humanity in the proposed ILC initiative will remain as it is in the Rome Statute. It is envisaged that the proposed convention on crimes against humanity will close the gap, by obliging states party to the Rome Statute to criminalise crimes against humanity in their national criminal law. Through the proposed convention, it is expected that the effect would be to harmonise the definition of the crimes against humanity across all national legal systems.[877]

[873] UN Report of the International Law Commission, Sixty-Ninth Session 1 May-2 June and 3 July- 4 August 2017, GAOR 72nd Session, Supplement No 10 (A/72/10). See also Tladi D "Complementarity and cooperation in international criminal justice: Assessing initiatives to fill the impunity gap" ISS Paper 277 November 2014 at 2.
[874] Ibid.
[875] Ibid at 2.
[876] Ibid.
[877] See Murphy SD Crimes against humanity – International Law Commission report on the work of its Sixty-Fifth Session 6 May-7 June 2013 and 8 July-9 August 2013 GAOR Sixty-Eighth Session Supplement No 10 A/68/10 Annex B para 8.

At its Sixty-ninth Session, the ILC adopted its Report setting out draft articles on, inter alia, crimes against humanity and the immunity of state officials from foreign criminal jurisdiction.[878]

One of the proposals regarding the convention is that it would require a state to exercise criminal jurisdiction over acts committed in its territory or by its nationals, as well as acts committed by non-nationals abroad who then become answerable when they enter the territory of a state party to the convention.[879] In effect, the convention would oblige state parties to exercise universal jurisdiction over a suspect in their territory, irrespective of his or her nationality and of where the crime was allegedly committed.

Another important feature of the proposed convention is that it seeks to provide for the inter-state cooperation in investigation, prosecution, extradition where necessary, as well as punishment of the offenders. Mutual legal assistance would be expected between the state parties to support a concerted effort to combat impunity. It should be noted that it is envisaged that the convention would impose a legal obligation upon member states to prosecute suspected offenders within their respective states.

A clear limitation of the ILC project is that it narrows its focus to one particular area, namely, crimes against humanity, while leaving the rest of core international crimes unaddressed by the convention.[880] Nonetheless, the ILC initiative is a serious step towards addressing the legal gap in combating impunity arising from the non-obligatory provisions of the Rome Statute.

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[878] UN Report of the International Law Commission, Sixty-Ninth Session 1 May-2 June and 3 July- 4 August 2017 GAOR Seventy-Second Session Supplement No 10 A/72/10.
[879] Ibid.
[880] See Tladi D "Complementarity and cooperation in international criminal justice" *ISS* Paper 277 November 2014 at 8.

In the following section, the study examines another initiative which, although similar to that of the ILC, has a different origin and focus.

## 5 The Belgium, Slovenia and the Netherlands (BSN) initiative

The Belgium, Slovenia and the Netherlands (BSN) initiative is designed to lead to a draft convention on mutual legal assistance in matters concerning the crimes under the Rome Statute.[881] The BSN initiative is the product of a declaration by over 40 states. It is far broader in scope than the ILC initiative in that it provides not only for crimes against humanity, but also war crimes and genocide.[882] Important to note, is that the BSN initiative seeks to maintain the definition of these crimes as currently contained in the Rome Statute.[883] It therefore maintains the status quo in so far as the definition of the core crimes is to be found in the Rome Statute.

The BSN initiative underscores the importance of practical cooperation between states as regards judicial assistance and extradition.[884] In this way, it enhances the efforts of states to plug the gap in the enforcement that arises from the current Rome Statute regime.

The overriding objective of the BSN initiative is to foster close inter-state cooperation in the global fight against core international crimes by introducing legally binding obligations for state parties. The BSN project also envisages universal jurisdiction in respect of the three core international crimes that it covers, namely, crimes against humanity, genocide, and war crimes. Viewed from a different angle, the BSN

[881] Ibid.
[882] Ibid.
[883] Ibid. See generally Tladi (2014) 29 *Southern African Public Law* 369-71.
[884] Ibid. Tladi (2014).

initiative seeks to reinforce the provisions of the Rome Statute regime as regards the principle of complementarity.

In conclusion, it should be noted that notwithstanding the inherent limitations of securing the maximum cooperation envisaged in the proposed BSN project, the initiative would go a long way in closing the legal hiatus which persists under the Rome Statute regime. The gap in the Rome Statute regime is characterised by the absence of a provision imposing a legal obligation on states to investigate and prosecute core international crimes under their domestic criminal law.

## 6 Civil society and positive complementarity

### 6.1 Introduction

The role of civil society actors in the advocacy and implementation of positive complementarity on the national, regional, and international levels cannot be gainsaid.[885] This is more so in an ever globalising world, where atrocities are committed with impunity.

Civil society invariably relies on programmes to educate the communities to articulate their rights and needs. It applies strategies by which to approach and fight issues of injustice in society. These strategies generally involve agitating for human rights protection by sensitising the communities, victims, and strategic partners to the fight against international crimes.[886]

[885] See generally Benedetti & Washburn (1999) *Global Governance* 22.
[886] The role of the civil society in the development of international criminal law has been visible through all stages including more actively during the negotiations and drafting of the Rome Statute.

Civil society was a key component in the advocacy for the creation of an international criminal court to fight impunity and in 1995 established the Coalition for an International Criminal Court.[887] The Coalition was made up of 31 civil society organisations (CSOs), including major international non-governmental organisations, like Amnesty International and Human Rights Watch. Membership later rose to over 800 NGOs, 236 of which were accredited to participate in the Rome Statute proceedings.[888]

The Coalition for the International Criminal Court played a crucial role throughout the drafting and adoption of the Rome Statute. It has been suggested that without the proactive involvement and agitation of the Coalition it is unlikely that the ICC would have been established, or, if it had been, its independence and powers would have been significantly compromised.[889]

Civil society organisations involved in the drafting of Rome Statute were extremely vocal and visible throughout, notably in cooperating with certain states to forestall efforts by a few powerful states to derail the Rome Statute process.[890]

The current active involvement of civil society is focused on advocacy for effective implementation of the Rome Statute by the domestic jurisdictions. Under the principle of positive complementarity, civil society is working actively with the international community and national authorities to bolster efforts at effective domestic prosecution.[891] The crusade by civil society for the universal ratification of the Rome

[887] A coalition of independent NGOs worldwide.
[888] *See* SALC *Positive Reinforcement: Advocating for International Criminal Justice in Africa* at 38.
[889] See generally Sriram (2012) 2/2 *International Criminal Law Review* 219-244.
[890] See generally Coalition for the International Criminal Court "Africa and the International Criminal Court" available at www.iccnow.org/documents/Africa_and_the_ICC.pdf (accessed 1 March 2017).
[891] See generally Bikundo (2012) 23/1 *Law and Critique* 21-41.

Statute by African states is pivotal in the fight for international criminal justice.[892] The adoption of the Rome Statute by all states would be instrumental in ensuring success in the fight against impunity. In this regard, implementing legislation is a very important tool in in a state's municipal dispensation to combat international crimes within its territory.[893]

In effect, civil society contributes to positive complementarity on a number of fronts: advocacy; litigation; capacity building; research; victim protection; community outreach; domestication; and documentation or information dissemination.[894]

Communities traumatised by atrocities need to come to terms with their experiences and be empowered to enjoy human rights and, more particularly, the right to recourse in a court of law that dispenses justice irrespective of the offender's social status.[895] An effective international criminal justice system which protects the rights of all classes of people acts as a deterrent to the future perpetration of crimes. This has the effect of restoring peace and order in the affected communities.

In Africa civil society has, within the realm of international criminal justice, formed itself into a movement called the 'African Network on International Criminal Justice' (ANICJ).[896] This is an informal network comprising a number of civil society organisations based in Africa and internationally, dealing with human rights, the rule of law, and international criminal justice.[897]

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[892] Ibid.
[893] See generally Concannon (2000) 32 *Columbia Human Rights Law Review* 201-05.
[894] Through the listed approaches the civil society seeks to enhance societal participation in the international criminal justice system. See generally Marlies *The International Criminal Court* 21 ff.
[895] See generally Ellis (2003) 15 *Florida Journal of International Law* 215, 223.
[896] The ANICJ is a coordinating body that brings crusaders for the cause of international criminal justice in Africa together under one umbrella.
[897] The ANICJ was formed in 2009 upon the instigation of the Institute for Security Studies (ISS) based in Pretoria, South Africa.

### 6.2 Civil society in action

Civil society organisations have played a very significant role in building national capacity to empower the national authorities to play their part in positive complementarity.[898]

The focus of civil society in combating impunity is directed towards a number of key programmes which include human capacity building and technical assistance, including infrastructural facilities.[899]

The adoption and ratification of the Rome Statute is a critical factor in the path to implementing positive complementarity.[900] Technical support is usually needed to effect this implementation.

The need for implementing legislation depends on whether a state follows the monist or the dualist approach to international law within its municipal dispensation.[901] If the state pursues a monist policy, treaties – including the Rome Statute – automatically form part of the national law on signature and ratification. On the other hand, if the state is dualist, an elaborate process must be put in place to incorporate (*in casu* the Rome Statute) into the state's the domestic law.[902] This ordinarily entails enacting specific implementing legislation to bring the treaty formally into the municipal law of the state.

[898] Civil society has been involved in the training of the judiciary in many states. They have been busy in activism creating awareness generally in matters of social justice.
[899] See generally Bjork & Goebertus (2014) 14 *Yale Human Rights and Development Journal* 205-229.
[900] See generally Burke-White (2008) 19/2 *Criminal Law Forum* 59-85.
[901] See Pace & Thieroff "Participation of Non-Governmental Organizations" 392.
[902] See generally Broomhall (1999) 143 *Association Internationale de droit penale* 45-111.

With effective implementing legislation in place in a state, the contentious issue of cooperation with the ICC is resolved in that the state would be under an obligation to comply with the international regime to combat impunity.[903]

Once the relevant legislation has been adopted, the state needs to establish the requisite infrastructure to facilitate the investigation and prosecution of serious crimes of concern to the international community.[904] Then the actual prosecution of those accused of having perpetrated international crimes should take place. This process should then be characterised by effective cooperation between the ICC and the state.[905] And for civil society to be able to participate meaningfully in this process, it is necessary for them to mobilise adequate financial and technical resources.[906]

### 6.3 Challenges and limitations to the role of the civil society

Civil society experiences certain limitations and challenges that tend to frustrate efforts at participating in the development of a society that respects the rule of law. These challenges and constraints impact negatively on the role of civil society in seeking to operationalise positive complementarity within the national systems.[907]

The inadequacy of knowledge and expertise in international criminal law is a major drawback in the fight waged by most civil societies.[908] This is a limitation that cuts across the board, including the legal fraternity. Most lawyers are inadequately, or not at all trained in international criminal law.

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[903] Ibid.
[904] See generally Bekou "In the hands of the state" 830-52.
[905] See art 88 of the Rome Statute which addresses cooperation between the court and the national courts.
[906] See generally Abdulhak (2009) 9 *International Criminal Law Review* 333-58.
[907] See generally Sriram CL "Civil Society and transitional justice in Kenya" *Working Paper: Security in Transition: An interdisciplinary investigation into the security gap*. SiT/WP/02/15.
[908] International criminal law is an evolving area of law study.

Another impediment has been lack of the political will on the part of various stakeholders due to the unqualified acceptance of the mistaken view that the international criminal court is overtly biased against African states and their leaders in its prosecution agenda.[909] There are no facts to support these allegations but perceptions have had a notable effect on the masses and on leaders. This consequently frustrates the work of civil society organisations operating in Africa. They must first dispel this perception of bias before they can embark on a programme to influence the establishment of positive complementarity activities.

The issue of lack of general awareness among the masses of the value of international criminal justice for society as a whole is a major hindrance in the work of civil society.[910] For the role of civil society to be understood and appreciated it is critical that the communities be well informed on international criminal justice.[911] Without that understanding, it would be difficult for the various stakeholders to appreciate and support the participation of civil society in advancing positive complementarity in domestic jurisdictions.[912]

Finally, it is instructive to point out that constraints on the financial and technical capacity of most civil society organisations impose effective limitations on players' ability to participate meaningfully in the implementation agenda of positive complementarity at the domestic level.[913]

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[909]There has been widely misconceived school of thought which advocates the argument that the ICC unfairly disadvantages African states.
[910]The need to create general awareness among the populace about what international criminal law is all about, cannot be gainsaid.
[911] See generally Vargas ES "Current challenges underpinning the Rome Statute implementation process in Bolivia" 10 September 2012 *The Peace and Justice Initiative: Towards universal implementation of the ICC Statute.*
[912] Ibid.
[913] See generally Burke-White (2008) 49 *Harvard International Law Journal* 53-108.

Most nationally-based civil society organisations are badly cash strapped and logistically unable to deliver on their programme mandate. This is on occasion exaccerbated by the attitude of the governments of the territories, for example, a block on receiving external donor funding intended for human rights activities.[914]

Cumulatively, all these factors tend to impact negatively on the participation of civil society in the implementation of positive complementarity programmes in domestic jurisdictions.

## 6.4 Conclusion

The preceding analysis underscores that the role of civil society is critical in advancing the agenda of positive complementarity in particular, and international criminal justice in general. Due to the political pressure exerted by many African governments, the agenda to operationalise positive complementarity is often challenging.

More needs to be done to support the role and programmes of civil society organisations engaged in national capacity building to advance the positive complementarity agenda. Greater awareness needs to be created among the political elite to sensitise them on the importance of having a stable legal framework and regime in place for the enforcement of international criminal justice within the domestic jurisdiction.[915]

[914] See generally Bergsmo, Bekou & Jones (2010) 2 *Goettingen Journal of International law* 791-811.
[915] See generally Bergsmo, Bekou & Jones "Complementarity and the construction of national ability" 1052-70. There is a need to create awareness among the political elite and the administrative authorities in African states to engender general appreciation of the need for international criminal law institutions.

# 7 Current institutional framework for positive complementarity

The current institutional framework for positive complementarity may be traced to the structure and functions of the Secretariat of the ASP, at least at an international organisational level. In the ensuing discussion the study examines the establishment of the Secretariat and the functions it performs. It also analyses the operations and evaluates the Secretariat's performance.

The challenges and limitations characterising the operations of the ASP Secretariat with regard to the implementation of positive complementarity are discussed with a view to proposing appropriate policy alternatives. The ASP Secretariat is currently responsible for the performance of functions and the administration of matters involving positive complementarity.

The purpose of the proposed discussion on the ASP Secretariat is to set out the basis upon which to consider and recommend the necessary structural adjustments that would render the Secretariat a more appropriate institution for the implementation of the concept of positive complementarity.

## 7.1 Secretariat of the Assembly of States Parties and positive complementarity

### 7.1.1 Establishment of Permanent Secretariat of the Assembly of States Parties

The ASP Permanent Secretariat was established as a result of a resolution adopted at the second session of the ASP on 12 September 2003,[916] under article 112 of the Rome Statute.[917]

[916] Assembly of States Parties Resolution on Establishment of the Permanent Secretariat of the Assembly of States Parties ICC-ASP/2/Res. 3 12 September 2003 available at https://asp.icc-cpi.int (date of use: 17 August 2016).

It is critical to note that until 31 December 2003, the United Nations Secretariat served as the Secretariat of the ASP. The new permanent Secretariat was introduced to start operating on 1 January 2004.[918]

The resolution establishing the ASP Secretariat recalls rule 37 of the Rules of Procedure of the ASP[919] in which specific functions are assigned to, or contemplated for, the Secretariat. Rule 37 of the Rules of Procedure provides that:

> [T]he Secretariat shall receive, translate, reproduce and distribute documents, reports and decisions of the Assembly, Bureau and any subsidiary bodies that may be established by the Assembly; interpret speeches made at the meetings; … and generally, perform all other work which the Assembly or the Bureau may require.[920]

It follows from the last provision in rule 37 that the Secretariat may be called upon by the ASP to perform all other functions as and when the Assembly or the Bureau of the ASP may require. This, arguably, could include overseeing positive complementarity assignments or projects. The study identifies rule 37 as a justification for invoking this particular provision to propose the extension of the functions of the ASP Permanent Secretariat to include the proposed functions on positive complementarity.

What immediately emerges from rule 37 is that the Secretariat has been entrusted with multifarious responsibilities. This becomes problematic in terms of the limited finance and human resources available to the Secretariat which would generally find itself

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[917] Article 112(4) of the Statute provides that: "The Assembly may .establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy."
[918] Resolution of ASP on Establishment of the Permanent Secretariat available at https://asp.icc-cpi.int (date of use: 17 October 2017). The Director of the Secretariat is Renan Villacis from Ecuador.
[919] These rules are contained in ICC document ICC-ASP/1/3 available at http://legal.un.org/icc/asp/1stsession/report/first_report_contents.htm (date of use: 30 October 2017).
[920] Assemby of State Parties rule 37 Rules of Procedure.

inadequately resourced to be able to focus intensely on positive complementarity responsibilities.

The Annex to the Resolution of the ASP establishing the Secretariat contains detailed provisions setting out the functions of the Secretariat.[921] In terms of the Annex to the Resolution, the functions of the Secretariat are to provide the ASP and its Bureau, including any other subsidiary body that may be established by the ASP, with independent substantive services as well as administrative and technical assistance in the discharge of their responsibilities under the Rome Statute, where possible by means of pooling resources with the ICC.[922]

It is immediately clear that the enormous responsibilities entrusted to the Secretariat are misaligned with the availability of the financial and human resources. Moreover, this could lead to a compromise in the degree of independence where the Secretariat pools resources with the ICC.

A further problematic provision which reinforces the severity of resource constraints is rule 9 of the Annex to the Resolution, which provides that

> ...the Secretariat shall be funded from the budget of the International Criminal Court. It shall have no income of its own and may not receive voluntary contributions directly from Governments or international organizations unless the Assembly decides otherwise.[923]

[921] The annex provides that the Secretariat shall be based at the Hague.
[922] Assembly of State Parties Resolution Establishing the Permanent Secretariat Annex para 4.
[923] Ibid.

The ICC, which is the only source of funding for the Secretariat, is currently itself faced with very severe financial constraints to the extent it cannot manage all possible investigations and prosecutions simultaneously.[924]

Those same financial limitations apply to Secretariat which is entrusted with important responsibilities in overseeing the implementation of positive complementarity.[925] To make matters worse, in terms of rule 9 of the Annex to the Resolution, the Secretariat is, in general, not authorised to receive external funding.[926] Taken together, all these factors effectively limit the effective implementation efforts to spearhead positive complementarity. It is submitted that a body entrusted with spearheading complementarity initiatives and projects should have a greater degree of financial freedom and adequate resources to enable it to fulfil its mandate. It is necessary to examine the relevant mandate of the Secretariat with specific reference to facilitating the implementation of positive complementarity. This is dealt with in the following sections.

### 7.1.2 Role of the ASP Secretariat in implementing positive complementarity

The state parties to the Rome Statute meeting at the KRC requested the ASP Secretariat to,

> with existing resources facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions.[927]

[924] See Rao "Financing of the Court" 399.
[925] See generally Gegout (2013) 34/5 *Third World Quarterly* 800-18.
[926] See ASP Resolution Establishing Permanent Secretariat.
[927] Assembly of States Parties Report of Bureau on Complementarity ICC-ASP/9/26 Ninth Session New York 6-10 December 2010 para 5.

Arguably, the state parties recognised the possibility of constraints on the resources available to the Secretariat in pursuing its undertaking when they requested it to proceed 'with existing resources.'[928] Nonetheless, this request was subject to time restraints as the state parties also requested "the Secretariat of the Assembly to report to the tenth session of the Assembly on progress in this regard."[929] In other words, the ASP set in motion a process of systematic operationalisation of the policy of positive complementarity which entailed regular monitoring and reporting on its progress.[930]

The Secretariat needed more guidance to ensure the proactive accumulation of information and raising awareness, as well as a process of instilling best practices in building capacity in the area of the investigation and prosecution of the serious crimes under the Rome Statute. Greater initiative and effort is also needed to identify and explore synergies with organisations already involved in capacity building in investigating and prosecuting serious crimes under the Rome Statute.[931]

It will be recalled that the resolution on complementarity at the KRC recognised the need for additional measures to be taken at the domestic level to combat impunity and the desirability of states assisting each other in this regard.[932]

As principal drivers of complementarity, South Africa and Denmark held consultations with the Secretariat of the ASP and requested a paper from the Secretariat to serve as basis for discussion during the inter-session period. There is no

[928] Ibid. See Clark "The limits and pitfalls of the International Criminal Court in Africa" *E-International Relations* 28 April 2011 available at www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-in-africa/ (date of use: 1 March 2017).
[929] Ibid. Assembly of States Parties Report of Bureau on Complementarity ICC-ASP/9/26 Ninth Session New York 6-10 December 2010 para 10.
[930] See generally, O'Donohue "The ICC and the ASP" 105-23.
[931] Assembly of States Parties Report of Bureau on Complementarity ICC-ASP/9/26 Ninth Session New York 6-10 December 2010 para 11.
[932] Ibid.

doubt that the cooperation between the states, the ICC and the ASP is necessary in developing the role of the Secretariat in a beneficial way.[933]

Pursuant to resolutions of the ASP, the working group continued to liaise with the ASP Secretariat to support initiatives to implement positive complementarity. Under the facilitation of South Africa and Denmark – Dwarika for South Africa and Nissen for Denmark[934] – the Group held informal consultations on complementarity in 2011.[935] The discussions centred on the role of state parties in the implementation of positive complementarity. In a similar vein, the state parties concentrated on ways in which the ASP Secretariat could undertake its mandate to implement positive complementarity.[936] Following these developments, the ASP Secretariat and the ASP Bureau prepared reports on complementarity for the 10th Session of the ASP.

The facilitators identified ways in which the support of the international community would strengthen national criminal courts' jurisdiction, in other words, how best to achieve the benefits of positive complementarity.[937] The five areas the Hague Work Group undertook to address are as follows: (i) to provide guidance to the ASP Secretariat in setting up its information-sharing function; (ii) to stimulate and reinforce dialogue on complementarity and strengthen domestic law; (iii) to provide political support; (iv) to provide suggestions on activities to be undertaken in relation to positive complementarity; and (v) to provide a forum for the exchange of views and information on complementarity, for example, best practices and lessons learnt.[938]

[933]Ibid.
[934]Report of International Criminal Court on the Tenth Session of the Assembly of States Parties to the Rome Statute,12-21 December 2011 New York.
[935]Ibid at 18.
[936]Ibid.
[937]Ibid.
[938]Ibid.

The ASP Secretariat was mandated to work on two levels: a 'general level'; and a 'case-specific level.'[939]

On the general level, the Secretariat would undertake several activities, the first step in which entailed setting up a website for 'Complementarity Extranet' (the Extranet). The Extranet is designed to: provide an information base on events relating to complementarity; indentify main complementarity actors and their roles; facilitate contacts between donor states, organisations, civil society, and recipient states; give designated actors the ability to post relevant information on the Extranet in order to share information; and to provide a 'message board' for users with passwords.[940]

On a case specific level, the ASP Secretariat, would, on a gradual basis, adopt a more proactive role of sharing and exchanging information between relevant complementarity stakeholders within international criminal law and the donor community.[941] This particular role would effectively place the Secretariat at the centre of the coordination of the activities of various stakeholders geared at the implementation of the concept of positive complementarity.

### 7.1.3 Limitations of the ASP Secretariat in its positive complementarity mandate

There are a number of factors that, cumulatively, have had a negative impact on the effectiveness of the ASP Secretariat to coordinate and facilitate the activities associated with the implementation of positive complementarity.[942]

[939] Ibid.
[940] Ibid.
[941] Ibid.
[942] See generally, Donat-Cattin "Decision-making in the International Criminal Court" 69-74.

It is submitted that these limiting factors, individually and cumulatively, have rendered the mandate of the Secretariat relatively ineffective in so far as the implementation of the policy of positive complementarity is concerned. The limiting factors range from the legal and political, to the inherently structural. Each of the factors is analysed in the following section.

**(a) Resource constraint**

There is clear limitation in terms of financial resources available to the Secretariat due to the limited budgetary allocation from the ASP.[943] The sharing of facilities with the ICC is a clear signal of constraint in terms of the Secretariat's resources.[944] The resource constraints are reflected in both office accommodation and physical infrastructural facilities allowing for official functioning.

The fifth preambular statement of the Resolution establishing the Permanent Secretariat of the ASP provides that:

> *Considering* that permanent secretariat services are necessary for the exercise of the functions of the Assembly and its subsidiary bodies and the fulfilment of the purposes of the Court, …
>
> 4. *Also resolves,* without prejudice to paragraph 3 of the present resolution, that the Secretariat shall be an integral part of the International Criminal Court and that, for administrative purposes, the Secretariat and its staff shall be attached to the Registry of the Court.[945] [Para 3 referred to here provides that: '…*[R]esolves* that the Secretariat shall operate under the full authority of the Assembly and report directly to the Assembly;… .[946]

[943]The sources of funding for the ASP are restrictive as they emanate from the member states.
[944]The Secretariat is housed in the precincts of the ICC.
[945] See Resolution on the Establishment of the Permanent Secretariat of the Assembly of States Parties to the International Criminal Court Resolution ICC-ASP/2/Res. 3.
[946]Ibid.

The nature of the constraint as embodied in the preceding provision, in its very essence exerts a negative impact upon the operations of the ASP Secretariat. Notwithstanding that the Secretariat operates under the full authority of the ASP and reports directly to it, the resolution provides that the Secretariat shall be an integral part of the staff of the Registry of the ICC.[947]

This provision is reinforced by paragraph 1 of the Annex to the Resolution on the Establishment of the Secretariat of the ASP. The Annex to the Resolution further provides that the seat of the Secretariat shall be in The Hague.[948]

The interpretation of the language of paragraph 1 indicates that the establishment of the Secretariat was to be effected at some future time, but as at the time of this study the Secretariat has already been established in The Hague in the offices housing the ICC Registry.[949] What this provision does not make clear is whether the staff of the ICC Registry could also be engaged in matters and functions of the ASP Secretariat without additional bureaucratic formalities.

Allied to the point of likely perceived bias, is the fear of attracting political criticism by virtue of the Secretariat's close links to the structures and facilities of the ICC.[950] The very reasons why some states withhold their support for ICC could be applied to deny the Secretariat the support it needs to carry out its mandate effectively.

[947] Ibid.
[948] Ibid.
[949] Ibid para 2.
[950] See generally Mackenzie *Selecting International Judges* 29-68, 103-04.

**(b) Structural inadequacies**

The structuring of the Secretariat is wanting in many respects. Its positioning suggests that it is part of the ICC structure, while ideally it should be an independent body. The perception that the Secretariat operates under the court may lead the opponents of the court to withhold their support for the Secretariat thereby limiting support for the programmes.

As indicated in the preceding paragraph, the Secretariat is entrusted with multifarious functions to be performed by a limited number of staff within the Registry of the ICC whose functions are not directly related to those of the Secretariat.[951] For instance, one of its functions is the planning, coordination, and servicing of meetings of the ASP, which in general, are not what the Registry of the ICC does, yet the Secretariat is deemed to be an integral part of the Registry staff.

Furthermore, paragraph 7 of the Annex to the Resolution on the Establishment of the Secretariat of the ASP provides that:

> [O]ther personnel resources shall include staff necessary to provide the substantive, administrative and technical assistance specified in paragraph 4 and 5… .[952]

Paragraphs 4 and 5 outline the administrative and technical functions, but are silent on what structure will be adopted by the offices exercising these functions. Looking at the provisions of paragraphs 4 and 5, the functions of the Secretariat are multifarious which demand a large staff component to operate effectively.

[951]See provisions of para 3 of the preamble to the Resolution International Criminal Court-ASP/2/Res.3 which states that the Secretariat shall be an integral part of the staff of the Registry of the International Criminal Court.
[952]Ibid para 7.

### (c) Mixed mandate of the Secretariat

The Secretariat does not only work on positive complementarity, but also engages with other totally unrelated aspects of the ASP's mandate.[953] This has the effect of shifting the focus away from positive complementarity. It is a disadvantage in that the Secretariat is inundated with work unrelated to the core focus of concern to positive complementarity.

This is not to advance the argument that the only responsibility of the Secretariat is to run programmes on positive complementarity. Rather, in light of all the other functions that the Secretariat is required to perform, there will be competing calls on time and resources available to be devoted to the coordination of activities related to positive complementarity.

From the authorising resolution, it can be seen that the ASP Secretariat has a number of functions. First, it outlines what it describes as the conference-servicing functions.[954] It also provides for core legal, substantive, and financial functions. Added to this are administrative functions, and finally, the category which the Resolution describes as: "Any other functions that the services bodies entrust to the Secretariat."[955] This latter function may be viewed as open-ended in terms of what the services' bodies may assign to the Secretariat. This observation must, however, be examined in the light of the provisions of paragraph 8 of the Resolution on the Establishment of the Secretariat[956] which states that "the functions of the Secretariat shall be exercised in a manner consistent with the Statute and with the principles of

[953]Ibid.
[954]Resolution for the Establishment of the Secretariat of the Assembly of States Parties to the International Criminal Court, International Criminal Court-ASP/2/Res.3 para 5.1.
[955] Ibid.
[956]Ibid para 8.

effective financial administration and economy…".[957] In effect, therefore, the functions as set out in paragraph 7 may not be as open-ended as could easily be assumed.

Another critical factor worth mentioning is that the Secretariat does not have sufficient staff dedicated to the project of positive complementarity. Financial constraints have rendered the maintenance of a large and stable staff impracticable. An independent body with a large number of staff devoted to the specialised function of coordinating positive complementarity activities, would be a preferable alternative.

**(d) Lack of financial independence**

The Secretariat lacks the financial independence required to fulfil its mandate. It must rely on the budget allocation of the ICC as approved by the ASP.[958] Approval entails a bureaucratic process which could delay the implementation of certain programmes run by the Secretariat.

The Resolution on the Establishment of the Secretariat provides that the Secretariat shall be funded from the budget of the ICC.[959] It follows that the Secretariat does not have an independent budget for its activities.

The bureaucracy that characterises the operations of the Secretariat in terms of securing its own resources and also having to secure approval from the ASP for most of its activities, naturally slows down the pace at which the positive complementarity programmes are implemented. Similarly, some of the delays that would be occasioned

[957]Ibid.
[958]This allocation of funding is normally approved only when the ASP convenes and authorises the expenditure.
[959]Resolution for the Establishment of the Secretariat of the Assembly of States Parties to the International Criminal Court, International Criminal Court-ASP/2/Res.3 para 9.

by the bureaucracy, would have the negative effect of slowing down the response to the need for implementation of positive complementarity.[960]

Related to the preceding is the fact that the Secretariat is, in fact, prohibited from receiving direct external donor funding. This provision states that the Secretariat "… shall have no income of its own and may not receive voluntary contributions directly from Governments or international organizations unless the Assembly decides otherwise."[961] There does not appear to be a clear reason for this prohibition given that financial resources are urgently needed for the Secretariat to realise its mandate. This probably made some sense before the Secretariat was entrusted with the responsibility of coordinating the positive complementarity programmes. Now, however, this cannot be justified in light of the urgency attendant on positive complementarity projects and the demand for substantial funding to implement them.

However, arguably, on careful reading of paragraph 9 it will be noted that exceptions exist to the general prohibition on the Secretariat receiving an income of its own and not receiving voluntary contributions. The paragraph provides that "unless the Assembly decides otherwise,"[962] which essentially means that there are instances when the ASP may authorise the Secretariat to have income of its own, and also instances when the Assembly would allow the Secretariat to receive voluntary contributions directly from governments or international organisations.

It is debatable whether this prohibition applies to voluntarily contributions from sources which are neither governmental nor international organisations, for instance, from sponsors in the private sector.[963] What is clear, however, is that such income or

[960]See Rules of Procedure of the ASP available at http://legal.un.org.
[961]Ibid.
[962]Ibid.
[963]See the prohibition contained in para 9 of the Annex to the Resolution para 9.

contributions from governments or the international organisations, can only accrue to the Secretariat once the Assembly has considered them and authorised the transactions. At the time of this study there is no recorded session of the ASP that has authorised the receipt of such payments.

### (e) Not established under the Rome Statute

Finally, and importantly, the Secretariat is not directly a creature of the Rome Statute but rather was established by a resolution of the ASP.[964] The advantage of having the Statute provide for the existence of such a body is that it would clearly spell out its functions and features in an unequivocal manner that it would leave less room for debate as to its role and relationship with other organs established under the same Statute, such as the ICC or the OTP.

## 7.2 Why a new legal and institutional regime?

As a result of the identified weaknesses and challenges in the current institutional framework, the study proposes policy alternatives. The first option would be to retain but restructure the current system in which activities are coordinated by the Secretariat.[965] However, the shortcomings of the current set up at the Secretariat may not completely reverse certain inadequacies.

[964]Resolution for the Establishment of the Secretariat of the Assembly of States Parties to the International Criminal Court, International Criminal Court-ASP/2/Res.3.
[965]See the structure of the Secretariat as outlined in the Resolution for the Establishment of the Secretariat of the Assembly of States Parties to the International Criminal Court, International Criminal Court-ASP/2/Res.3 para 5.1.

The other option would be to set up a completely new body with a degree of independence which deals specifically with positive complementarity. This presents a real challenge in light of the extant legal framework within the Rome Statute.

**(a) Financial independence**

Financial independence is crucial to the free operation of a body granted the important mandate to coordinate the implementation of activities involving positive complementarity. There is need for a body with sufficient independence to fund its own programmes and maintain flexibility in the implementation process – unlike the current Secretariat which relies entirely on the ICC's annual budgetary allocation.[966] The mere fact that its budget is lumped together with that of the ICC introduces the spectre of a lack of financial freedom.[967]

Apart from the consolidated budgetary allocation, combining funds for the ICC and the ASP Secretariat automatically introduces the fear of bias on the part of those opposed to the court and could influences those states to withhold or even withdraw their support for the work of the Secretariat.[968]

The proposal of a possible new and independent body focused solely on positive complementarity, could attract opposition, first of all, on the basis of an elaborate legal process that would entail the ASP debating and negotiating an amendment to the Rome Statute. As shown by the history of the negotiation and the drafting of the Rome Statute, securing a compromise stance on many articles of the final draft

[966] Ibid para 5.3.
[967] Ibid para 5.3(b).
[968] Ibid.

Statute was a real hurdle. To revive such a process would be unacceptable to many states who settled for compromise on various provisions in the Rome Statute.[969]

It is submitted that the debate and the entire process of amending the Rome Statute to introduce provisions for the establishment of a new body to deal with positive complementarity, would take years.

Secondly, assuming the ASP authorised the establishment of a new body devoted to positive complementarity, the cost would be prohibitive. The advantages in using the existing structures and infrastructure would be lost in securing the independence of the new body.[970]

The proponents of a new independent body, would argue that the new body would exist independently of the ICC, its Registry, and the OTP thereby allaying the fear of bias. Indeed, the fact that the Secretariat's budget would be directly allocated by the ASP which is a combined group of states, should engender confidence and elicit support for its activities.[971] However, the source of the budget would remain the ASP so that, in the final analysis, nothing much would have changed and the same financial constraints would still apply.[972]

[969]See the discussion in Chapter 2 above on the history of the negotiations and drafting of the Rome Statute.
[970] See generally Press Release "Assembly of States Parties concludes its fifteenth session" Press release 25 November 2016 ICC-ASP-20161125-PR1260 available at https://www.icc-cpi.int/legalAidConsultations?name=pr1260.
[971] Ibid.
[972] Worldwide Movement for Human Rights Report: International Criminal Court "ASP 15: Five recommendations to strengthen the International Criminal Court" 16 November 2016 available at https://www.fidh.org.

**(b) Increased specialisation**

It could be argued that any proposed independent new body specialising in positive complementarity would have the advantage of concentrating solely on projects relating to positive complementarity – contrary to the position of the current Secretariat.[973]

Greater specialisation would also introduce efficiency in and effective control of programming, including the timing and deployment of expert personnel in most of the aspects of the implementation of positive complementarity.

The counter-argument would be that indeed the Secretariat itself could be restructured to cater for positive complementarity in a way that does not necessarily call for a separate independent body. Further, the argument would be advanced, for instance, that the Secretariat was created by way of a resolution,[974] which is indeed a much faster and easier process, and a resolution could again be used to restructure the current Secretariat.

**(c) Wider acceptance**

As any proposed independent body on positive complementarity would have its own budget which, coupled with greater acceptance amongst the members of the ASP, would afford such a new body the necessary support to reach a wider audience and area of operation in many states.[975]

It can be seen that the preceding line of argument is more political than legal. It cannot be denied, however, that the Rome Statute was a product of political influence

[973]The structure of the Secretariat is outlined in the Resolution for the Establishment of the Secretariat of the Assembly of States Parties to the International Criminal Court, International Criminal Court-ASP/2/Res.3 paras 3, 4 and 5.
[974]Ibid.
[975]The current Secretariat has its budget tied to that of the ICC.

on the legal rules. The fact that positive complementarity draws largely from the goodwill of the member states in cooperating with the ICC, underscores the importance of political will in the entire interaction.[976]

However, the opponents of this proposition could argue that what is important is not necessarily the degree of acceptance, but the ability to deliver and coordinate the activities involved in the process of realising the goals of positive complementarity. The new Secretariat could be restructured in such a way that positive complementarity is afforded prominence and that adequate resources are allocated to achieve its objectives.

**(d) Entrenched in the Rome Statute**

Finally, it could be argued that the new body on positive complementarity would be entrenched in the Statute thereby granting it a greater degree of autonomy in its operations to realise its mandate. It would enjoy a degree of autonomy and confidence that would allow it to undertake the programmes it identifies as necessary for the realisation of positive complementarity.[977]

The counter-argument is that it would be a long, drawn out process, stretching over several years, to agree on a compromise as regards the amendment of the Rome Statute to bring in a new body on positive complementarity.[978]

In conclusion, weighing the merits of each side of the arguments, it is submitted that a better option would be to restructure the current Secretariat effectively to provide for

[976]Positive complementarity being that the court takes such measures within acceptable limits to support the national courts in effectively exercising jurisdiction over international crimes.
[977] See generally Maunganidze OA "ICC states parties must walk the talk more" ISS 28 November 2016 available at https://issafrica.org/iss-today/icc-states-parties-must-walk-the-talk-more.
[978] Ibid.

a more focused role in the coordination of activities promoting positive complementarity.

# CHAPTER 6

# CONCLUSIONS AND RECOMMENDATIONS

## 1 Conclusions

It is envisaged that this study is the ultimate justification for a heightened perception of the concept of positive complementarity within international criminal law. It provides a template for designing a legal framework to inspire further discourse and thus stimulate the intellectual desire and impetus for further scholarly legal research in this area.

The present thesis set out, firstly, to interrogate the definition, scope, and nature of positive complementarity, and secondly, to identify an appropriate legal and institutional framework for the implementation of positive complementarity effectively to combat impunity. The study aimed at exploring the meaning, nature, and rationale for the concept of positive complementarity from a legal perspective.

Something worth mentioning is that there is no clear definition of the term complementarity *per se* in the Rome Statute.[979] There is not even a mention of that term anywhere in the Statute. It is nonetheless a term that was coined in the course of the drafting of the Statute and has become a catchphrase applicable the legal regime articulated under article 17 of the Rome Statute, in terms of which the ICC intervenes to exercise international criminal jurisdiction where a state is unable or genuinely unwilling to investigate or prosecute an international crime. From the discussion in the thesis it is concluded that complementarity may be regarded as a tool for the apportionment of jurisdiction between the ICC and national courts.

[979]As indicated, in Chapter 1, there is only mention of the word 'complementary' in the Preamble and art 1 of the Statute.

The study has addressed the lack of a fixed definition of the concept of positive complementarity or its scope. The principal tenets – most notably the definition, the constitutive elements, and the scope – of the concept of positive complementarity, remain largely unclear.[980] It was emphasised that the parameters set for the application of and the formal justification for positive complementarity, have remained unclear thereby rendering the concept susceptible to varied interpretations.[981] It was also noted that the absence of a universally acceptable definition introduces a degree of uncertainty as to the exact nature of positive complementarity. This, in turn, renders it less effective, turning it into an instrument of rhetoric rather than a tool for the realisation of its principal aim, namely, filling the impunity gap.

It further emerged from a general survey of existing literature that there is a glaring gap in the understanding of the concept of positive complementarity. This underscores the fact that the literature of the law has been slow to develop and present the various themes characterising the positive complementarity. The study sought to augment existing legal literature by considering the institutional and legal aspects of the concept of positive complementarity.[982] It also explored the opportunities presented, the benefits generated, and the challenges posed by the emerging concept of positive complementarity.[983] In so doing, the study underscored the significance of the concept of positive complementarity in addressing the effects of the impunity gap.

[980] Chapter 4 deals with the nature of the concept of positive complementarity.
[981] Ibid.
[982] See Bernard (2011) 1/19 *International Journal of Humanities and Social Science* 203-16.
[983] See Blaak (2010) 2 *Equality of Arms Review* 10-13. See also Salvatore (2010) 8/1 *Journal of International Criminal Justice* 137.

The study has traced the developments in the history of international criminal justice from the time of the International Military Tribunals for Nuremberg (IMT Nuremberg) and the International Military Tribunal for the Far East (IMTFE), through to the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The Nuremberg and Tokyo international military tribunals are discussed only to illustrate the distribution of jurisdictional competence. The distribution of jurisdictional competence emerges as an important factor here, in that the IMT Nuremberg focussed on serious international crimes. The Tokyo Tribunal, like the IMT Nuremberg, provided a basis for the distribution of jurisdictional competence in terms of which the focus of international tribunals was on serious crimes, while less serious crimes were left to the national courts of the relevant states.

The IMT Nuremberg and Tokyo Tribunal did not use the principle of complementarity in their trials. The trials proceeded before the military tribunals, irrespective of the consent or concurrence of national states, as there had been a complete breakdown in the systems of the national courts of the states[984] covered by the jurisdiction of the military tribunals. The international military tribunals essentially exercised sole jurisdiction. They enjoyed jurisdictional primacy, and had no need to seek prior approval or compliance before they could exercise criminal jurisdiction over any suspect arraigned before them.

An historical survey of the ICTY and ICTR is undertaken as regards jurisdictional competence.[985] Shocking atrocities perpetrated in Rwanda and the Former Yugoslavia

[984] See The International Military Tribunal, Trials of the Major War Criminals before the International Military Tribunal Nuremberg 14 November 1945-1 October 1946 Official Text at 24-6 available at https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.
[985] See generally Brown (1998) 23 *Yale Journal of International Law* 383-95.

again attracted the attention of the world.[986] The mass killings in these two regions consequently resulted in the establishment of the *ad hoc* tribunals to deal urgently with cases arising from the atrocities. Having considered both the ICTY and the ICTR, some comparisons can be made and conclusions drawn. It is noted that the two *ad hoc* international criminal tribunals enjoyed jurisdictional primacy in the sense that they had priority jurisdiction in respect of international crimes committed in the states concerned, irrespective of whether or not the national authorities failed to investigate or prosecute the suspected offenders. This underscores the tribunals' jurisdictional primacy over national criminal courts. Finally, it is equally important to observe that apart from their primacy of jurisdiction, the tribunals' jurisdiction was also designed to be concurrent with that of the national courts.

In conclusion, unlike the ICTY and the ICTR which enjoyed primary jurisdiction over the national authorities,[987] as already indicated, the ICC is not based on the principle of the jurisdictional primacy but rather on the principle of complementarity as was explored in Chapter 3. The primacy regime was designed to generate "a jurisdictional hierarchy in which domestic jurisdictions retain the ability to prosecute perpetrators, but which preserves an 'inherent supremacy' for the international tribunal."[988] In this way the national authorities still retain the right to prosecute offenders or exercise national jurisdiction, notwithstanding the primacy of the tribunals.

In summary, the Rome Statute elected to distribute jurisdictional competence by way of complementarity and not by primacy of the international tribunal. Apart from the twin international criminal tribunals – the ICTR and ICTY – there were other international criminal tribunals that would generally be described as hybrid.

[986] See generally Tolbert & Kontic "The International Criminal Tribunal" 135.
[987] Article 9(1) Statute of the ICTY and art 8(2) Statute of the ICTR.
[988] Newton (2001) 167 *Military Law Review* 20, 42.

Like earlier international tribunals, hybrid tribunals had to provide for the distribution of jurisdictional competence. Apart from the ICTR and ICTY, other special courts were established to promote overall efforts in the fight against international crime.[989]

From the above analysis of the international tribunals, one may conclude that primacy has had no regard for the consent of the state before instituting prosecution – ie, it was immaterial whether or not the state was willing or able to exercise national jurisdiction.

States increasingly feared that their sovereignty was being eroded. To circumvent this it was necessary to devise a new jurisdictional relationship with states to secure their state sovereignty while at the same time not compromising efforts to fight impunity on an international level.[990] The core issue which emerged is how to deal with juridical competence where both domestic and international criminal jurisdiction are invoked concurrently to adjudicate international crimes.

This culminated in the establishment of the ICC. It emerges from the survey of that period that the early tribunals did not use the principles of complementarity in their trials, as trials proceeded irrespective of the consent or concurrence of the states involved. What characterised these early tribunals was the primacy of international jurisdiction over national jurisdiction.

Together with other hybrid international tribunals, such as the Special Court for Sierra Leone and the United Nations Transitional Administration in East Timor (UNTAET), these judicial institutions played a crucial role in underscoring the need for the

[989] See generally *Prosecutor v Augustin Ngirabatware* ICTR-99-54-T
[990] Primacy of jurisdiction would then not be the best option in this regard.

development of a new principle that would generate a more effective legal regime for the enforcement of the international criminal justice. The trend that emerged from the work of these tribunals up until the establishment of the ICC, may be described, in international criminal law terms, as the shift or transition from primacy to complementarity. It is this legal and judicial transition from primacy to complementarity that the thesis has investigated.

It was concluded that in an era without international tribunals, national courts not only enjoyed primacy of jurisdiction, but also had sole jurisdiction over criminal acts. Therefore, it was states, whether exercising jurisdiction based on territoriality, nationality, or passive or protective personality, that were responsible for the prosecution of crime. Without international criminal tribunals, the issue of the distribution of jurisdiction between international tribunals and domestic courts did not arise. The only issue involving the distribution of jurisdictional competence that *may* have arisen, concerned its horisontal distribution between states *inter se*.

In this way it was seen that the principle of complementarity evolved as a legal mechanism through which the national jurisdiction maintained the principle of state sovereignty while at the same time conceding to the ICC the power to intervene in circumstances as set out in the Rome Statute.[991] The exercise of primary jurisdiction is one feature which distinguishes the international military tribunals from the ICC. In similar vein, the exercise of jurisdiction by the international military tribunals differed from the basis of jurisdiction exercised later by the *ad hoc* international criminal tribunals

[991] See the admissibility procedure as set out in arts 17 and 19 of the Rome Statute.

In summary, therefore, the paradigm shift from primacy to complementarity may have been heavily influenced by the need to respect and protect the principle of the sovereignty of the state.

The negotiation and drafting history of the Rome Statute demonstrated that a delicate balance had to be struck to secure compromise on many key provisions of the Rome Statute. The ILC played a pivotal role in the formulation of the draft Statute that was eventually adopted by the states as the Rome Statute of the International Criminal Court. The definition of complementary jurisdiction emanated from this observation by the ILC. The concept of complementarity was finally accepted on the basis of the presentation by the Preparatory Committee. A clear limitation of the ILC project is that it narrows its focus to one particular area, namely, crimes against humanity, while leaving the other core international crimes unaddressed by the convention.[992] Nonetheless, the ILC initiative is a serious step towards addressing the legal gap in combating impunity arising from the non-obligatory provisions of the Rome Statute.

In April 1998, a final report and new Draft Statute were presented to the Rome Conference.[993] The principle of complementarity – expressed as draft article 15 on admissibility – was eventually expressly incorporated in various provisions of the ICC Statute, inter alia, paragraph 10 of the Preamble and articles 1, 17, 19 and 53. All texts dealing with the principle of complementarity as contained, most notably, in the Preamble, article 1, article 17 and all other provisions in the Draft, were adopted by

[992] See Tladi D "Complementarity and cooperation in international criminal justice" *ISS* Paper 277 November 2014 at 8.
[993] See generally Washburn (1999) 11 *Pace International Law Review* 361 available at http://digitalcommons.pace.edu/pilr/vol11/iss2/4 (date of use: 12 December 2017).

the Rome Conference as a package deal. The negotiation process at the Rome Conference tended to build on the work of the *ad hoc* Committee and the PrepCom.[994]

The practice of the ICC soon revealed many challenges with the implementation of the principle of complementarity as enshrined in the Rome Statute. It was seen in the study that the OTP then began to shift towards advocating a positive approach to complementarity. This led to the evolution of the concept of positive complementarity. It is also important to note that the OTP's policy of pursuing those most responsible for crimes has tended to generate the 'impunity gap'. The need to address the question of the impunity gap, coupled with the gravity threshold requirements, has, in turn, influenced the evolution of the policy of positive complementarity. The policy concept of positive complementarity, therefore, is partly associated with national activities seeking to bridge that gap and deal with the lesser-ranking offenders in the realm of international criminal justice.[995]

The complementarity model appears not to be delivering effectively owing to misalignment between the resources available to the court and the lofty goals and expectations of the international community.[996] In this light, the OTP embarked on a policy transformation process whereby it developed strategies encapsulated in three-year Prosecutorial Strategy policy documents.[997]

The policy concept of positive complementarity is a *sui generis* concept, with much uncertainty still characterising its nature, definition, and scope. Its evolution can be

[994] Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court UN GAOR Forty-Ninth Session Supp No UN Doc A/49/10 1994 Preamble para 3.
[995] Assembly of State Parties Report of the Bureau on Stocktaking: Complementarity. "Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap" ICC-ASP/8/51 Resumed Eighth Session 18 March 2010.
[996] See generally Burke-White (2008) 19/2 *Criminal Law Forum* 59-85.
[997] See the various OTP strategic policy papers fully discussed in Chapter 4.

traced to the consultative work of a Group of Experts who issued a report contained in the document entitled the 'Informal Expert Paper'[998] as discussed in this study. The study finds that this Expert Paper played a crucial role in shaping the content and direction of the OTP's subsequent Prosecution Strategy Policy papers.

The current institutional structures do not effectively support the implementation of positive complementarity. The legal framework, too, is wanting in many respects when it comes to support for the actualisation of the policy concept of positive complementarity. The framework does not effectively support the involvement of the court into fully-fledged positive complementarity activities.

The OTP's involvement in positive-complementarity exercises may also be seen as a conflict of interests on the part of the ICC Prosecutor and may compromise its ability to engage independently in matters which ultimately end up before the court for determination.

The concept of positive complementarity, as emerges from the study, has eluded precise definition and legal description. This lack of exactitude, in essence, constituted a critical component of the research problem in this study.

Seven years after the Statute entered into force, the first Review Conference of the Rome Statute was finally convened from 30 May 2010 to 11 June 2010 in Kampala.[999] The KRC was engaged in a stocktaking exercise designed to assess and evaluate the successes and failures of the ICC during its first years of operation in light of the Rome Statute.[1000] This provided an opportunity to evaluate and reflect on the progress

[998]The Informal Expert Paper of 2003 discussed in Chapter 4 above.
[999]Over 4 600 international experts attended the Review Conference. Other dignitaries included two UN Secretaries-General, diplomats, and even heads of state. The victims of atrocities too were in attendance, as were members of civil society.
[1000] Clark (2010) 2 *Goettingen Journal of International Law* 689-711.

of the court, as well as an assessment of the international criminal justice system under the Rome Statute.

In summary, the Report recommends steps that could be taken to advance the principle of complementarity through positive complementarity at the domestic level. One of the important recommendations of the KRC is that all stakeholders should strengthen the principle of complementarity by encouraging national proceedings, where relevant, as a means of bridging the impunity gap. In the final analysis, the resolution on complementarity was adopted by consensus at the Review Conference. The definition of positive complementarity was adopted without any new legal obligation being introduced or imposed. As a consequence, no legal or institutional framework was formulated in the resolution to back the definition up, nor was there any indication of doing so in the future. This created a normative gap which will have to be addressed in that it signals a normative challenge with regard to the enforceability of the concept. The KRC emerged with a working, but not comprehensive, definition of positive complementarity.

Ultimately, one must ask whether the KRC in fact presented any conclusive normative justification for the concept of positive complementarity. It is argued that no such concrete conclusion was arrived at. The definition is characterised by loose ends that defy normative exactitude. The normative analysis of positive complementarity reveals that a legal framework is yet to be fully developed to allow for the establishment of an enforceable regime of positive complementarity.

Alongside the review conference were the Greentree process retreats, which dealt with the practical aspects of the implementation of the principle of complementarity, but neither attempted a definition of the concept of positive complementarity, or

addressed the conceptual aspects of the concept. The Greentree process as seen through its three retreats, laid serious emphasis on the intervention of the international development community and other stakeholders in capacity building for the domestic criminal systems in order to enhance their respective capacity to investigate and prosecute international crimes under the Rome Statute within their territories and courts. In this regard, the Greentree process provided a valuable forum for the articulation of the nexus between international criminal justice and the developmental agenda to advance positive complementarity.

The Greentree process, however, recognised and emphasised the central role that the Secretariat of the ASP of the Rome Statute can play in the transformation of complementarity from a conceptual basis to practical implementation ensuring effective investigation and prosecution of serious crimes under the Rome Statute. It was seen in the study that the effectiveness of the Secretariat of ASP was impeded by limitations in financial and human resources. No profound impact has been made by the activities of the permanent ASP Secretariat on complementarity, and even the relevant sections of the ICC dealing with complementarity have not been effective in ensuring its effective implementation.

The study therefore proposes a radical and comprehensive restructuring of the ASP Secretariat[1001] effectively to oversee the implementation of positive complementarity. This constitutes the originality of this thesis and offers a concrete contribution to knowledge and research.

The findings of this study with respect to the restructuring of the current Secretariat constitute concrete recommendations to the respective governments of state parties to

[1001] See Assembly of States Parties Establishment of the Permanent Secretariat of the Assembly of States Parties to the International Criminal Court ICC-ASP/2/Res 3.

the Rome Statute, the ASP,[1002] the OTP, the ICC, as well as the UNSC,[1003] and are thus intended to inspire and prompt their urgent international initiatives.

In the ensuing section the study findings are discussed and thereafter recommendations are presented based on those findings.

The principle of complementarity is a cardinal pillar of the Rome Statute which supports the battle against impunity in the context of the international criminal justice. The development of the principle of complementarity[1004] demonstrates the result of the delicate compromises made by various interest groups, between the desire to protect interests of state sovereignty on the one hand, and the drive to achieve international criminal justice goals for the greater global interests, on the other.

It is interesting to observe that the very delicate balance that engendered the acceptance of the principle of complementarity, has influenced the genesis of the policy of positive complementarity. The trend in international criminal justice seems to concede more and more in favour of state sovereignty interests in the concerted effort against most serious crimes of concern to the international community.

In conclusion, the principle of complementarity is clearly a key tool in the global fight against impunity which helps to ensure an effective exercise of both the national and the international criminal justice systems. From the analysis in the thesis, it may be concluded that the complementarity principle as provided for in the Rome Statute,

[1002] The ASP is an assembly of 122 states which have ratified the Rome Statute. Of the 122 states, 34 are African states, 18 are Asia-Pacific states, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other states. All other states that have signed the treaty are granted observer status at ASP meetings. The ASP is a body of states established under art 112 (1) of the Rome Statute with specific functions, which include providing management oversight to the presidency, the Prosecutor and the registrar regarding the administration of the court. For detailed provisions for the ASP see art 112 of the Rome Statute.

[1003] The UNSC has power to act under Chapter VII of the Charter of the United Nations to invoke its 'trigger' mechanism by referring a situation to the prosecutor so the court may exercise jurisdiction. See art 13 of the Rome Statute.

[1004] Article 17 of the Rome Statute articulates the legal framework of the principle of complementarity.

plays a crucial role as a legal instrument that strikes a critical balance between the desire to ensure an effective international criminal justice system to prevent impunity, on the one hand, and the protection of state sovereignty, on the other. It is concluded that the principle of complementarity plays a crucial role as a legal instrument with which to strike the critical balance between the need for the preservation of state sovereignty, and the desire to ensure an effective international criminal justice system designed to halt impunity.[1005] It was necessary to provide the above analysis of the principle of complementarity so as to establish a basis upon which to construct the ensuing analysis of the concept of positive complementarity.

From the practical and functional points of view, the constraints and teething troubles which characterised the operations of the new ICC soon emerged when, in 2003, the first prosecutor of the ICC, Luis Moreno Ocampo, took the oath of office.[1006] At its inception, the ICC was entrusted with a number of responsibilities, both prosecutorial and judicial. The 2003 Prosecutorial Policy Paper set the foundation upon which the thinking for positive complementarity begins to emerge. Most of the thinking in the paper is geared towards establishing a legal regime that is cooperative and not antagonistic towards national courts.[1007] In conclusion, it may be argued that the activities of the OTP during the period 2006-2009 laid the foundation for the formulation of the ensuing Prosecutorial Strategy Policy Paper for the period 2009-2012. From all the preceding matters before the ICC it can be deduced that the OTP did not view complementarity merely as a question of admissibility, but ascribed to it

[1005] See generally Gioia (2006) 19 *Leiden Journal of International Law* 1095-1123. See further arguments in Burke-White (2008) 19/2 *Criminal Law Forum* (2008) 71.
[1006] Ceremony for the Solemn Undertaking of the Chief Prosecutor, Statement by Luis Moreno Ocampo, 16 June 2003, available at http://www.icc-cpi.int/NR/rdonlyreas/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf (date of use: 23 February 2017).
[1007] See generally, Marshall "Prevention and complementarity in the International Criminal Court: A positive approach" available at http://www.wcl.american.edu/hrbrief/17/2marshall.pdf (date of use: 24 February 2017).

a much broader context in which its discretion would be implemented with the overall object of fighting impunity in the international plane.[1008]

In conclusion, the ability and success of the OTP to implement the positive approach as contained in its prosecutorial strategy policy papers may prove something of a challenge.

The legal basis for the OTP to engage in efforts for domestic prosecution may be challenged on the ground that the ICC has a legal mandate to assess admissibility compliance and not to involve itself in encouraging states to comply with the Statute requirements.[1009] The latter exercise, it is submitted, may prove problematic when the admissibility of a case is challenged in a matter before the court. There is nothing in the Rome Statute that would prohibit the prosecutor from exercising this function.[1010]

Any attempt at a definition of the concept of positive complementarity will of necessity raise normative questions. The concept of positive complementarity still attracts differing perspectives and interpretations. There is no settled definition from the exiting literature analysed. There appears to be a multi-facetted approach to explaining what the concept of positive complementary means. In all these arguments, however, it emerges that positive complementarity is a radical departure from the basic elements of classic complementarity. In conclusion, the various works consulted fail to come up with a uniform interpretation of the concept of positive complementarity.

In the final analysis, it is argued that both proactive complementarity and positive complementarity refer essentially to one and the same notion. Any perceived

[1008] See Kaplan (2009) 7 *Journal of International Criminal Justice* 257-79. See also Gaja "Issues of admissibility" 49-52.
[1009] See generally, El Zeidy (2006) 19 *Leiden Journal of International Law* 741-51.
[1010] See generally, the arguments presented in Burke-White (2008) 19 *Criminal Law Forum* 59.

distinction should, therefore, be subsumed into a single overriding concept – positive complementarity.

The current institutional framework for positive complementarity may be traced to the structure and functions of the Secretariat of the ASP, at least at an international organisational level. In conclusion, weighing the merits of each side of the arguments, it is submitted that a better option would be to restructure the current Secretariat effectively to provide for a more focused role in the coordination of activities promoting positive complementarity.

In light of the preceding conclusions the study makes recommendations, which are examined, in the next section of this chapter.

## 2 Recommendations

In light of the preceding findings and conclusions, this study recommends that the current Permanent Secretariat of the ASP should be restructured to incorporate certain key features that would enable a specialised focus on promoting and coordinating activities relating to positive complementarity. This is important because it will empower the ASP not only legally, but also institutionally.

The proposed restructuring of the Secretariat should be implemented by way of a resolution to be adopted by the ASP since the Secretariat itself came into existence by way of such a resolution.[1011] The resolution of the ASP to effect the restructuring is a much easier and less costly process than the proposal for an amendments of the Rome Statute. Moreover, the legally viable means of bringing about these changes in the

[1011] Resolution on Establishment of the Permanent Secretariat of the Assembly of States Parties, Assembly of States Parties ICC-ASP/2/Res 3 12 September 2003 available at https://asp.icc-cpi.int (date of use: 17 August 2016).

context of the Rome Statute and the founding Resolution, is by way of a further resolution. A proposal to amend the Rome Statute would otherwise have to be informed and supported by the provisions of articles 121 and 122 of the Statute.[1012]The recommendations herein would have to be channelled through the Secretary-General of the United Nations, and then to be considered by the ASP. Such proposals for amendments would have to be proposed by a state party.[1013]

In effect, article 123 of the Rome Statute would also come into play, in that it empowers the Secretary-General of the UN to initiate the process of change in the structure of the ASP Secretariat. If this route were followed, the proposed amendments to the Statute would be double-pronged. Double-pronged because the first set of amendments would amend certain of the existing articles in the Statute. The second set would introduce entirely new provisions and set up an altogether new structure for the Secretariat.

This study does not recommend the amendment of the Rome Statute *per se* for the reasons stated above. Moreover, the process of amendment of the Rome Statute would of necessity entail prohibitive costs. Instead, the study proposes the restructuring of the Secretariat through a resolution by the ASP.

Firstly, it is suggested that a Draft Resolution be introduced that seeks to restructure the Secretariat of the ASP clearly and expressly to define the term 'positive complementarity'[1014] and to translate it from a mere policy concept to a practical normative principle. The resolution gives effect to the process achieving a

[1012]Articles 121 and 122 of the Rome Statute.
[1013]Article 123 Rome Statute.
[1014] See generally Burke-White (2008) 49 *Harvard International Law Journal* 53-108.

restructured legal and institutional framework for the ASP. Such a resolution should first expressly set out the following theoretical basis in its Preamble:

(i) definition of the term 'positive complementarity';

(ii) identifying the elements of positive complementarity;

(iii) distinguishing positive complementarity from complementarity as already set out under article 17;

(iv) establishing the scope and application of positive complementarity;

(v) outlining the actors involved in the implementation of positive complementarity and their respective roles;

(vi) determining the international community to act in concert to fight impunity.

The rationale for setting out the definition of the term 'positive complementarity' is to ensure that there is general and common understanding of the concept in the context of the role of the ASP Secretariat. The codification of the concept of positive complementarity would help in the process of clearly delineating the roles involved in the implementation of the concept. It also helps to settle the discordant fashion in which positive complementarity has been defined and argued by most academics and scholars.

The next proposal is to set out the elements of the concept of positive complementarity clearly effectively to bring out what the tenets of the concept are. This way it would be easy to assign roles and functions to various actors under the proposed new legal structure of the ASP Secretariat.

The rest of the theoretic basis as set out in the proposed Preamble would help to reinforce the understanding of the scope of the concept of positive complementarity,

so that its implementation would be rendered less controversial as regards certainty of roles.

Secondly, it is proposed that a special office of Coordinator for Positive Complementarity be established within the Secretariat to coordinate the activities of positive complementarity between the ICC Chambers, the OTP, state parties, and other stakeholders including civil society.

It is further proposed that the resolution will seek to ensure that the Office of the Coordinator for Positive Complementarity is not housed within the precincts of the ICC. This will ensure the degree of independence necessary for it to operate freely and autonomously while coordinating the activities of positive complementarity and assuring all parties that the ICC does not exercise undue influence on any party in the fight against impunity.

An outline of the proposals for the draft Resolution of the ASP to the Rome Statute on positive complementarity would be as follows:

1. Establishment of Office of Coordinator for Positive Complementarity (OCPC)
    (a) There shall be established an Office of the Coordinator for Positive Complementarity, within the Secretariat of the Assembly of States Parties, and the office shall:
        (i) be an independent office within the Secretariat that shall be solely responsible for coordinating the activities of positive complementarity between all stakeholders;
        (ii) be capable of raising its own funds for its operation and also for purposes of funding positive complementarity activities;

(iii) not act as one of the organs of the Court, and shall in no way answer to the Office of the Prosecutor or the Court in carrying out its own responsibilities and mandate;

(iv) in carrying out its mandate shall cooperate with, but shall remain independent of other Rome Statute entities, namely, the Office of the Prosecutor and other organs of the Court, save for the Office of the Director of the Secretariat and the Assembly of States Parties.

(b) The Office of the Coordinator for Positive Complementarity shall be assisted by four Deputy Coordinators respectively in charge of:

(i) capacity building: including legislative assistance, technical assistance, and infrastructural development;

(ii) coordination with the stakeholders: namely civil society, international and regional bodies, including the International Criminal Court organs, other organs of the Assembly of States Parties, and the United Nations;

(iii) finance;

(iv) investigations and prosecutions: this function is not intended to replace the Office of the Prosecutor's role, but rather to support the Office of the Prosecutor and national prosecutors in all their activities to ensure an effective exercise of international criminal jurisdiction by both the Office of the Prosecutor and domestic courts.

(c) The Office of the Coordinator for Positive Complementarity shall have a staff of qualified and experienced Positive Complementarity Officers (PCOs) who shall be available for deployment to any state party's national courts that are ready and able to implement positive complementarity principles. Their qualifications will range from international criminal law, civil society, development, criminology, and social sciences relevant to the interests of victims of atrocities.

(d) The Coordinator for Positive Complementarity (CPC) shall be appointed by the Bureau of the Assembly of States Parties upon the advice of the Director of the Secretariat of the Assembly of States Parties, and shall be a person:

(i) who has relevant qualifications, expertise, and experience in international criminal law in the context of the Rome Statute;

(ii) of a high degree of integrity and independence in the execution of his or her official mandate;

(iii) who is capable of exhibiting a high level of impartiality.

2. The functions of the Office of the Coordinator for Positive Complementarity shall be:

(a) to provide expertise in international criminal law to assist in facilitating and implementing the principle of positive complementarity under the Rome Statute;

(b) to cooperate with the other offices within the Secretariat of the Assembly of States Parties, the International Criminal Court and its organs, notably the Office of the Prosecutor, in implementing positive complementarity;

(c) to cooperate with state parties to assist and empower them by way of capacity building;

(d) to liaise with donor agencies and civil society to raise funding for projects associated with positive complementarity in any state party;

(e) to provide State party national courts with experts in the judiciary, or prosecution and investigation, to reinforce domestic efforts to ensure the effective implementation of positive complementarity.

(f) to engage in any activity that would reinforce the administration of international criminal justice with respect to positive complementarity and which may from time to time be determined under the Rome Statute.

It is proposed that in the exercise of his or her duties and performance of the functions of his or her office, the Coordinator for Positive Complementarity, shall maintain extreme impartiality by not unduly favouring either the state party or the International Criminal Court, but shall ensure the attainment of the overall objective of effective action to combat impunity. The importance of a coordinator in every aspect of the operations of the renewed ASP cannot be gainsaid, in that the ASP would be the coordinating point for the implementation of positive complementarity at different fora, both nationally and internationally.

The structure proposed in the draft resolution is inspired by the need to attract specialised and qualified persons to manage the offices.

The preceding structure of offices should be able to provide a formidable administrative mechanism that would set the legal and institutional structure of the ASP. In summary, therefore, it is submitted that if the preceding legal and institutional framework is incorporated within the revised structure of the Secretariat of the ASP of the Rome Statute, the relevant legal and institutional framework for positive complementarity would be effectively established. In this way, the fight against impunity will be bolstered.

The success of the new structure would depend on a number of factors, most notably the relationship and cooperation the Secretariat will continue to have with other institutions and stakeholders, such as the other organs of the ICC. The importance of the OTP in this proposed new structure is crucial. The governments of the state and non-state parties to the Rome Statute, the international, regional and national development service providers, and civil society, all will play a crucial role in the success of the new structure, and therefore there must be cooperation and synergies between all these stakeholders.

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