A catalyst for justice? The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo

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CHAPTER TWO
Tracing an Idea, Building a Norm: Complementarity as a Catalyst

Since the signing of the Rome Statute in 1998, complementarity has increasingly expanded from a legal concept to an instrument of policy. This policy sees the ICC not only as a forum for prosecution where states fail to undertake criminal investigations and prosecutions themselves, but also as a means to enable or encourage proceedings at the national level. As stated by former Prosecutor Luis Moreno-Ocampo in a speech to the ICC's Assembly of States Parties, one of his Office's "core policies" would be to pursue a "positive approach to cooperation and to the principle of complementarity." This meant, in his words, "encouraging genuine national proceedings where possible, relying on national and international networks, and participating in a system of international cooperation."[63]

Such a description of complementarity might now seem commonplace; however, the expansion of its definition, and of its popular understanding, was neither obvious nor ordained. Furthermore, while the vision of "positive" complementarity outlined by Moreno-Ocampo may have been "an inherent concept of the [Rome] Statute," it was also a policy invention. As Carsten Stahn notes, "In Court policy, complementarity was slowly discovered as a virtue, … as an instrument to foster legitimacy and enhance the efficiency of justice."[64] This discovery was chiefly driven by non-state actors—international human rights NGOs, influential donors, and academics—many of whom had initially sought a stronger role for the Court vis-à-vis national courts (primacy, rather than complementarity); had themselves served in previous leadership positions with other criminal tribunals; and, in certain cases, came to occupy important leadership positions in the early years of the ICC itself. These "norm entrepreneurs" have persuasively advanced the conception of complementarity as a catalyst, awhile framing it as a series of obligations upon states to legislate, investigate, and prosecute international crimes at the national level.[65]

This chapter traces the expansion in complementarity's meaning and purpose as a catalyst and queries how it has come to dominate so much of the ICC's discursive space. It is divided into three parts. First, it offers an overview of the Rome Statute's drafting history, emphasizing how the predominant understanding of complementarity among states at the time was as a principle of constraint. Unlike the ad hoc tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY), the drafters of the Statute chose not to grant the ICC primacy over national jurisdictions. This issue was deeply contested in the negotiations over the Court and reflected a delicate process that sought to balance supranational jurisdiction with an enduring concern for state sovereignty. Furthermore, in line with this process, a deliberate choice was made to permit states substantial leeway in their prosecution of international crimes, including, for instance, their ability to prosecute Rome Statute crimes as "ordinary" crimes.

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[63] Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Address by Prosecutor Luis Moreno-Ocampo (The Hague, 6 September 2004), 2, at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/LMO_20040906_En.pdf.

[64] Carsten Stahn, "Taking complementarity seriously: On the sense and sensibility of 'classical', 'positive' and 'negative' complementarity," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 235.

[65] The concept of "norm entrepreneur" has a long history explored further below. Cass Sunstein is first believed to have introduced the phrase in a 1996 article, wherein he defines entrepreneurs simply as "people interested in changing social norms." See Cass R. Sunstein, "Social Norms and Social Roles," *Columbia Law Review* 96(4) (May 1996), 903-968.

Despite these careful negotiations, the second section of the chapter examines the evolution of complementarity from a technical rule of admissibility crafted by states towards a more catalytic vision driven by private actors. In so doing, it traces complementarity's growth as a policy concept, which was embraced early on by the OTP as a way of encouraging national accountability for grave crimes. The intellectual history of complementarity is also considered, including the experiences of the ICTR and ICTY, whose completion strategies vis-à-vis the states of the former Yugoslavia and Rwanda played an important role in academic writing on the concept of positive complementarity and, in turn, influenced early ICC practice. Finally, the role of non-state actors in advancing the normative content of this concept is examined. Through this discourse analysis, the chapter demonstrates how the carefully negotiated compromises that informed the Rome Statute's drafting have been progressively reshaped through the principle of complementarity.

The final section attempts to better understand the means by which complementarity's polysemy (its meaning as both a rule of admissibility and a catalyst that compels domestic reform) evolved with such apparent speed. Indeed, rather than complementarity's "slow discovery" as a virtue, the pace of this discovery—given the degree to which it altered the perceived obligations of states, and the extent to which states have ratified that perception[66]—is perhaps more notable for its swiftness. One reason for this swiftness, I suggest, is that the framing of complementarity as a catalyst benefited from the unprecedented and influential role that non-state actors played in the establishment of the ICC itself. I also suggest that a growing literature on transnational "communities of practice," a concept advanced by the political scientist Emanuel Adler, offers a helpful lens through which to understand how this new norm has proliferated. In highlighting this dynamic interplay between practice and discourse the chapter concludes that, rather than a static legal concept, complementarity is better understood as an evolving, adaptive principle.

1. Complementarity as Constraint

While negotiations around the ICC's establishment inaugurated a wave of interest in complementarity, the principle itself is not new. As Mohammed El Zeidy notes, "the conditions or the parameters of [complementarity's] operation developed over a lengthy period of time until the adoption of the 1998 Rome Statute."[67] For example, the principle was the subject of much debate around the creation and operation of a UN War Crimes Commission during World War II, where the role of the Commission vis-a-vis Allied states played an "antecedent role" to the Rome Statute.[68] Still, most academic

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[66] For instance, the successful negotiation of duty-based language in the resolutions that emerged out of the Rome Statute Review Conference was seen as significant victories by civil society. See, e.g., Kampala Declaration, RC/Decl.1, para.5 (adopted 1 June 2010)("Resolve to continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally-recognized fair trial standards, pursuant to the principle of complementarity."); Resolution RC/Res.1 – Complementarity (adopted 8 June 2010), para. 2 ("Emphasizes the principle of complementarity as laid down in the Rome Statute and stresses the obligations of States Parties flowing from the Rome Statute").

[67] Mohamed El Zeidy, "The genesis of complementarity," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 77.

[68] Mark S. Ellis, *Sovereignty and Justice: Balancing the Principle of Complementarity between International and Domestic War Crimes Tribunals* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2014), 19.

commentary on the subject did not emerge until the early 1990s, spurred on by the end of the Cold War and, relatedly, the International Law Commission's (ILC) efforts to study the question of international criminal jurisdiction.

1.1 The International Law Commission: 1990-1994

Trinidad and Tobago first requested that the UN General Assembly consider the question of establishing an international criminal court in 1989.[69] In its initial report responding to that request, the Commission presaged much of the debate that would follow by emphasizing that the main questions to resolve in establishing such a court was whether it was intended to "replace, compete with or complement national jurisdictions."[70] The General Assembly subsequently requested that the Commission prepare a formal draft statute for an international court "as a matter of priority." It did so, culminating in the ILC's 1994 Draft ICC Statute, which proposed jurisdiction over genocide, aggression, war crimes, and crimes against humanity.

Of note in that 1994 draft was article 42, which drew upon the principle of *ne bis in idem* (the principle that a person should not be prosecuted more than once for the same criminal conduct) as embodied in the ICTY and ICTR statutes.[71] As proposed, a person could be retried under the proposed court's if the offense for which he or she had been tried by another court was "characterized as an ordinary crime," or if the proceedings "were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted."[72]

Support for this provision was far from unanimous, with substantially differing views as to the ICC's relationship with national jurisdictions. As Kleffner notes:

> Some members of the ILC envisaged the court as supplementing rather than superseding national jurisdiction, while others envisaged it as an option for prosecution in case the State concerned was unwilling to unable to do so. A third group of members suggested providing the court with limited inherent jurisdiction for a core of the most serious crimes, thus presumably envisaging exclusive jurisdiction of the international criminal court for these crimes.[73]

Although no final decision was taken on a specific model at the time, the draft statute presented by the ILC endorsed the third option: the court should be "complementary to national criminal justice systems in cases where such trial procedures may not be

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[69] Notably, this initial request focused on a court with far narrower subject matter jurisdiction: drug trafficking. After the Prime Minister drafted a motion (with the assistance of former Nuremberg prosecutor Benjamin Ferencz and law scholar M. Cherif Bassiouni) proposing that the International Law Commission study the idea, the General Assembly adopted it in 1989. Crucially, the language of that motion was to consider a court with jurisdiction to try crimes including, but not limited to, illicit drug trafficking. See, e.g., Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008), 37-38.

[70] El Zeidy, "The genesis of complementarity," 111.

[71] Draft Statute for an International Criminal Court (1994), at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf.

[72] Draft Statute, Article 42(2)(a); see also James Crawford, "Current Developments: The ILC's Draft Statute for an International Criminal Tribunal," *American Journal of International Law* 80 (1994).

[73] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 73.

available or may be ineffective."[74] The ILC further proposed, in article 35, a regime according to which jurisdiction would be allocated based on a determination of the admissibility of a case.[75]

In the commentary to this paragraph, the Commission explained to the General Assembly that the international court was "intended to operate in cases when there is no prospect of [the suspect] being duly tried in national courts."[76] Thus, "the emphasis is … 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 [.]"[77] With respect to a situation where a person had already been tried by another (domestic) court, the 1994 draft retained the provision that subsequent trial by the ICC would not be barred where the initial trial had been for an ordinary crime, or in the case of sham, i.e., non-genuine, proceedings.[78] The ILC report thus reflected the "classical" conception of complementarity as a limiting jurisdictional principle. In Stahn's words, it was a "concept to regulate potential conflicts as between the (primary) jurisdiction of national courts and the residual jurisdiction of the ICC."[79]

1.2 The Ad Hoc and Preparatory Committees: 1995-1998

Whereas complementarity appeared only in passing in the ILC's earlier draft, it featured prominently in the discussions of the Ad Hoc Committee that was set up by the General Assembly to discuss the ILC's report, in advance of the Assembly's 1995 session.[80] The topic appeared under three general headings in the Committee's 1995 report: the "significance" of the principle, its jurisdictional implications, and the role of national jurisdictions.[81] As the report noted, many state delegations "stressed that the principle of complementarity should create a strong presumption in favor of national jurisdictions."[82] In so doing, a number of advantages were highlighted, including that "evidence and witnesses would be readily available," "language problems would be minimized," and the "applicable law would be more certain and developed."[83] Furthermore, states had a "vital interest in remaining responsible and accountable for prosecuting violations of their laws—which also served the interest of the international community."[84] An additional point of debate was whether the principle should be reflected in the Preamble of the Statute or its operative part.[85]

Other delegations expressed support for national courts retaining current jurisdiction with the proposed ICC but insisted that "the latter should also have primacy

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[74] ILC Draft Statute, Preamble.
[75] Ibid., Article 35 ("Issues of Admissibility"). The Rome Statute retains this provision: admissibility assessments are case-specific.
[76] *Yearbook of the International Law Commission 1994, Vol. II*, A/CN.4/SER.A/1994/Add.1, Part Two, 27 (commentary 1).
[77] Ibid.
[78] See ILC Draft Statute, Article 42(2)
[79] Carsten Stahn, "Complementarity: A Tale of Two Notions," *Criminal Law Forum* 19 (2008), 90.
[80] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 76.
[81] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, A/50/22 (1995), at http://www.legal-tools.org/uploads/tx_ltpdb/doc21168.pdf. See generally paras. 29-37.
[82] Ibid., para. 31.
[83] Ibid., paras. 31, 129.
[84] Ibid., para. 31.
[85] Ibid., paras. 35-37.

of jurisdiction."[86] A particular point of contention remained the principle of *ne bis in idem*, as it was seen by some delegations as "incompatible with what they considered to be the intention of the ILC not to establish a hierarchy between the ICC and national courts or to allow the ICC to pass judgment on the operation of national courts."[87] To that end, it was suggested that the distinction between ordinary crimes and international crimes that had survived previous drafts be deleted. In particular, "It was stressed that the standards set by the Commission were not intended to establish a hierarchy between the international criminal court and national courts, or to allow the international criminal court to pass judgement on the operation of national courts in general."[88]

A Preparatory Committee ("PREPCOM"), whose task it was to further develop the draft Statute replaced the Ad Hoc Committee in 1996, with the idea that a plenipotentiary conference would follow. Over the course of the next three years, "the original 43-page 1994 ILC draft Statute expanded into a draft Statute of 173 pages replete with bracketed options, alternative phrasing, and footnotes for consideration at the Rome Conference."[89] John Holmes, the head of the Canadian delegation that was asked to coordinate informal consultations on what then became article 35, produced a draft that, for the first time, introduced the terms "unwilling," "unable," and "genuine" into the text of the proposed Statute, along with a set of conditions for determining where those conditions would render a case admissible.[90]

According to Holmes, inability was not controversial in principle: relevant agreed upon factors were the "total or partial collapse" of a state's national judicial system," the state being unable to secure the accused, or being "otherwise unable to carry out its proceeding."[91] Unwillingness, however, proved more contentious, "as some delegations had concerns with regard to State sovereignty and constitutional guarantees in domestic systems against double jeopardy."[92] To assuage concerns about the subjectivity inherent in such a test the word "genuinely" was inserted, as it was thought to carry a more objective connotation.[93] Debates around the *ne bis in idem* principle also persisted, leading to the deletion of the ordinary crimes exception that had survived previous drafts.[94] The Statute instead refers to the "same conduct" of an accused, "to make clear that a national prosecution of a crime—international or ordinary—did not prohibit ICC retrial for charges based on different conduct."[95]

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[86] Ibid., paras. 32, 218.
[87] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 77.
[88] Ad Hoc Committee Report, para. 43.
[89] Schiff, 70. See also Immi Tallgren, "Completing the 'International Criminal Order': The Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court," *Nordic Journal of International Law* 67 (1998), 107-137. . Tallgren offers a compelling account of the PREPCOM negotiations through the analogy of "Master" and "Butler," the latter "see[ing] complementarity as a means of restricting the role of the ICC and its scope of jurisdiction" (i.e., constraint) and the former "represent[ing] the process of internationalization," 124.
[90] See J.T. Holmes, "The Principle of Complementarity," in R. Lee (ed.), *The International Criminal Court – The making of the Rome Statute* (The Hague: Kluwer Law International, 1999).
[91] Ibid., 45-49.
[92] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 85.
[93] In addition to concern that sham proceedings might be used to shield an accused, two other forms of unwillingness were agreed upon: undue delay inconsistent with an intent to bring the person to justice, and lack of independence or impartiality.
[94] Holmes, 57-58. Stigen also confirms that, the "ordinary crime" criterion, initially endorsed by the [ILC], "was proposed but rejected [in the negotiations] as it met too much resistance." Stigen, *The Relationship between the International Criminal Court and National Jurisdictions,* 335.
[95] Kevin Jon Heller, "A Sentence-Based Theory of Complementarity," *Harvard International Law Journal* 53(1) (2012), 224. For a similar conclusion, see Nouwen, *Complementarity in the Line of Fire*, 50. Article

1.3 The Rome Statute: Article 17 and the Substance of the Principle

In the end, the term "complementarity" itself hardly appears in the Rome Statute. The Statute only notes, in its tenth preambular recital and in Article 1, that the ICC "shall be complementary to national criminal jurisdictions."[96] Article 17 sets out the substantive criteria for determining the admissibility of a case, though it does not use the term "complementarity" as such. The article states that "a case is inadmissible where . . . [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 the investigation or prosecution."[97] A case will also be inadmissible when "the State has decided not to prosecute, unless the decision resulted from the *unwillingness or inability* of the State to genuinely prosecute," or when the person "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."[98]

The Statute thus sets forth a two-step test, "the first explicit question of which is whether a State is investigating or prosecuting the case or has done so."[99] Where there are no such proceedings evident at the national level – which under ICC case law requires, as the following chapter discusses, similar charges of conduct – the case is admissible. The more difficult assessment to be made is the second step: whether a state, even where proceedings are underway, is "unwilling or unable genuinely to carry out the investigation or prosecution." This prong of the test has generated significantly more controversy, as it invites the ICC to scrutinize the quality and standard of national proceedings.[100] As noted, it involves a more subjective assessment of the standards by which such proceedings should be judged.

The text of Article 17 makes clear that complementarity is a case-based assessment; the question is not whether a "situation" in general is or has been the subject of domestic investigations or prosecutions.[101] To that end, commentators and Court

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93(10) further supports this interpretation, as it refers to the Court providing 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 crimes under the national law of the requesting State." Article 93(10) is discussed further in chapter three.

96 Rome Statute Preamble, tenth recital. Article 1 of the Statute also states that the ICC "shall be complementary to national criminal jurisdictions."

97 Rome Statute, Article 17 ("Issues of Admissibility").

98 To determine whether a State is "unwilling" to prosecute after an investigation, the Court will look to see whether the proceedings shielded the person concerned, whether the proceedings were unjustifiably delayed "inconsistent with an intent to bring the person concerned to justice," or whether the proceedings were not conducted impartially or independently and "in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice." Ibid., Arts. 17(2)(a-c).

99 Darryl Robinson, "The Mysterious Mysteriousness of Complementarity," *Criminal Law Forum* 21(1) (2010), 68. As chapter three examines further, the Court has only rarely entered into questions of ability or willingness, finding instead an absence of domestic proceedings in almost all of its admissibility decisions to date.

100 Robinson has drawn attention to the fact that, despite the two-step test clearly set out in the text of Article 17, a "slogan version" of complementarity has nevertheless come to exercise a "powerful grip on popular imagination." In this "slogan" version, complementarity is effectively reduced to a "one-step test" that focuses entirely on the unwillingness or inability prong of the complementarity test. Ibid., 67-102.

101 As defined by Pre-Trial Chamber I, cases "comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one more identified suspects, [and] entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear." Situations, by contrast, are "generally defined in terms of temporal, territorial and in some cases personal parameters." *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the

documents alike have noted that, "complementarity does not require an assessment of [a] state's overall justice system … merely that is it capable of conducting genuine proceedings in the particular case."[102] While the condition of that system can undoubtedly influence the ability to investigate or prosecute a particular case, it is not a determinative basis for admissibility. As explored further in the dissertation, however, arguments have emerged to the effect that a national system should be considered "available" only when it "incorporates the entire spectrum of substantive and procedural safeguards enshrined in the Statute and by which the ICC is to abide."[103]

Complementarity also combines optional and mandatory features. Article 17 provides that the "Court *shall* determine that a case is inadmissible" in response to a challenge lodged by a state or individual.[104] States, however, may also "refer" cases to the ICC, as both Uganda and the DRC have done.[105] El Zeidy has termed this "optional complementarity" and notes that it is the "reversed scheme of 'mandatory complementarity,'" in that it is not due to the Court's determination that a state was inactive, unwilling or unable, but rather the "state itself voluntarily decided to renounce the exercise of its jurisdiction in favor of the [ICC]."[106] This practice has generated a significant literature amongst commentators who contend that such referrals are unsupported by the Statute and the intention of the drafters.[107] Robinson, however, persuasively contests this view, noting that Article 14 expressly provides for state party referrals, and that they were a "recurring and explicit topic of deliberation throughout the negotiations."[108]

Articles 18 and 19 set out the procedural framework for complementarity. The former sets out a notification requirement of one month for the OTP when a situation has been referred, or where the Office initiates an investigation. Notably, states may also pre-empt an OTP investigation by invoking Article 18. Doing so obligates the requesting state to initiate an investigation, but compels the Prosecutor to "defer" to the domestic jurisdiction.[109] (To date, however, this procedure has "largely remained a dead letter."[110])

Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101, PTC I, 17 January 2006, para. 65. For further on the distinction, see Rod Rastan, "Situation and Case: Defining the Parameters," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011).

[102] Nouwen, *Complementarity in the Line of Fire*, 74, 106. As Nouwen notes, however, the Court's pre-trial chambers have "indicated that the word 'case' must be interpreted differently depending on the stage of the proceedings in which admissibility is assessed," 72-73.

[103] See Federica Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court," *Leiden Journal of International Law* 19 (2006), 1113.

[104] Three states have raised such challenges to date: Kenya, Libya, and the Ivory Coast.

[105] See Rome Statute, Article 14 "(Referral of a situation by a State Party").

[106] El Zeidy, "The Genesis of Complementarity," 137.

[107] See, e.g., William Schabas, "Prosecutorial Discretion v. Judicial Activism," *Journal of International Criminal Justice* 6 (2008).

[108] Darryl Robinson, "The Controversy over Territorial State Referrals and Reflections on ICL Discourse," *Journal of International Criminal Justice*, 9 (2011), 364. As a juridical short hand, then, the ubiquitous description of the ICC as a court of "last resort" is inaccurate. See, e.g., Max du Plessis and Jolyon Ford (eds.), *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries* (Pretoria: Institute for Security Studies, 2008). Du Plessis and Ford argue, "[T]he ICC is, by design, a 'court of last resort' – with the main responsibility for dealing with alleged offenders resting with domestic justice systems," 8.

[109] It should be noted that while this procedure applies to situations that are referred to the OTP or where the Prosecutor has opened an investigation *proprio motu*, it does not apply in situations referred by the Security Council.

Where the OTP has decided to prosecute, Article 19 grants the right to challenge admissibility to an accused, as well as to "a State which has jurisdiction over a case." Such challenges may be brought only once—and, for states, "at the earliest opportunity"—and "prior to or at the commencement of the trial."[111]

Taken together, the Rome Statute's complementarity criteria establish a "horizontal relationship between national and international courts: they constitute jurisdictional alternatives to one another with right of way normally given to national courts."[112] This "horizontal paradigm" in turn, appeared to "cement a systematic preference in the Rome Statute for domestic prosecution … and affirm[ed] that States may represent the most effective way of repressing international crimes.[113] Added to this were the decisions on the part of the drafters to explicitly depart from the primacy that characterized the ad hoc tribunals for Rwanda the former Yugoslavia, to not include the absence of domestic due process rights as a condition for admissibility, and, relatedly, to reject the distinction between international and ordinary crimes as a basis for the *ne bis in idem* provision.

Unsurprisingly, these compromises were met by dismay on the part of many who sought a stronger role for the Court. Federica Gioia notes, for instance, that "despite the ambitious objectives set forth in the Preamble of the Statute, the ICC still pays too great a tribute to state sovereignty,"[114] while Frédéric Mégret observes that human rights NGOs, in particular, found the Statute's "compromises" to "have been fundamentally unrepresentative of the state of international law, or least at variance with the better objectives of international criminal justice."[115] Ultimately, then, the Statute was a "bargained document," one in which the complementarity principle "emerged early … as a key protection of state sovereignty."[116]

2. From Constraint to Catalyst: The Evolution of Complementarity

The drafting history recounted above affirms that the Rome Statute was the result of extensive negotiation and significant compromise. The decision to vest the ICC with jurisdiction secondary to that of domestic courts was critical: many states insisted

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[110] Carsten Stahn, "Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), 240. Articles 89 and 94 also provide for consultation between a state and the Court in cases where an ICC request conflicts with domestic investigation of prosecution (or conviction). Similarly however, this regime has been little used to date. Article 17 is thus the dominant juridical avenue through which the Court's complementarity case law has been developed to date.

[111] Rome Statute, Article 19(4)-(5)

[112] Yuval Shany, *Regulating Jurisdictional Relations Between National and International Courts* (Oxford: Oxford University Press, 2007), 35.

[113] Padraig McAuliffe, "From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism," *Chinese Journal of International Law* 13 (2014), 271.

[114] Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court," 1096; see also Mohamed El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law," *Michigan Journal of International Law* 23 (2001-02), 869.

[115] Frédéric Mégret, "Implementation and the Uses of Complementarity," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 374.

[116] Schiff, 79, 85. For a similar characterization of the negotiations, see Gerry Simpson, "'Throwing a Little Remembering on the Past': The International Criminal Court and the Politics of Sovereignty," *University of California Davis Journal of International Law and Policy* 5(2) (1999).

upon it, even as many human rights advocates had, at least initially, hoped that the new institution would possess the same jurisdictional primacy enjoyed by the ICTY and ICTR. As Markus Benzing argues, "The most apparent underlying interest that the complementarity regime of the Court [was] designed to protect and serve is the *sovereignty* both of State parties and third states."[117] So understood, complementarity was thought to primarily be an instrument of limitation, a "technical term of art for a priority rule set out in Article 17 of the Rome Statute."[118]

2.1 Early ICC Policy: The Office of the Prosecutor

A "thicker" notion of the complementarity principle grew swiftly in the wake of the ratifications that brought the ICC formally into existence in the summer of 2002. While the Court did not start functioning until late the following year—after Prosecutor Luis Moreno-Ocampo had been elected and other key staff appointed—a "start-up team" within the Office of the Prosecutor suggested that an expert consultation process on complementarity be convened early on, to consider the "potential legal, policy and management challenges which are likely to confront the OTP as a consequence of the complementarity regime of the Statute."[119] Comprised of independent experts, the "Informal Expert Paper" that emerged from this process reflects the early seeds of a broader approach to complementarity. In its words, "The principle of complementarity can magnify the effectiveness of the ICC beyond what it could achieve through its own prosecutions, as it prompts a network of over 90 States Parties and other States to carry out consistent and rigorous national proceedings."[120]

The Paper took as its premise —both as a matter of "respect for the primary jurisdiction of States" and of the limits on the number of prosecutions the ICC could "feasibly conduct"—that the complementarity regime thus "serves as a mechanism *to encourage and facilitate* the compliance of States with their primary responsibility to investigate and prosecute core crimes."[121] The report argued that two principles should guide this approach: 1) partnership, which may include "possibly provid[ing] advice and certain forms of assistance to facilitate national efforts," as well as situations where the OTP and a state "agree that a consensual division of labour is in the best interest of justice"; and 2) vigilance, which "marks the converse principle … that where there is an indicia that a national process is not genuine, the Prosecutor must be poised to take follow-up steps, leading if necessary to an exercise of jurisdiction."[122]

The distinction between partnership and vigilance signaled an emergent distinction between complementarity as a contentious, competition-oriented principle and as the framework for a more consensual relationship between the Court and national jurisdictions. For the latter, the Paper envisioned a range of direct assistance and advice functions, including "exchang[ing] information and evidence to facilitate a national investigation or prosecution," providing technical advice (the OTP would, it was

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[117] Markus Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity," *Max Planck Yearbook of United Nations Law, Volume 7* (2003), 591-632, 595 (emphasis in original).
[118] Nouwen, *Complementarity in the Line of Fire*, 14.
[119] "Informal expert paper: The principle of complementarity in practice," ICC-OTP (2003), 2, at http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF.
[120] Ibid., 4
[121] Ibid., 3.
[122] Ibid., 4.

presumed, "build up a unique and unparalleled in-house expertise"), and training.[123] As to its "vigilance function," the Paper noted that "certain background contextual information … may be gathered in order to inform an admissibility assessment under either the 'unwillingness' or 'inability' branches" of the Statute. Such contextual information might include a state's legislative framework "(offences, jurisdiction, procedures, defenses);" "specific jurisdictional regimes (military tribunals);" and the "legal regime of due process standards, rights of accused, procedures."[124] Factors affecting the inability test could include a "lack of judicial infrastructure," as well as a "lack of substantive or procedural penal legislation rendering [the criminal justice] system 'unavailable.'"[125]

In this indexing, the Expert Paper articulates a number of possible indicia that have assumed a more determinative character over time in the course of their uptake in scholarship and a range of advocacy materials. Furthermore, it paints an early picture of both the coercive and cooperative dimensions of complementarity, and of the OTP's wide-ranging and discretionary role in its application. To that end, the Office's first policy paper, also published in 2003, emphasized that a "major part of [its] external relations and outreach strategy … [would] be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes."[126] The paper further developed the idea of a division-of-labor relationship between the Court and national jurisdictions, noting that 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."[127] Such an approach suggested a two-tiered arrangement between the ICC and states, with those "most responsible" being prosecuted in The Hague. Architecturally, the OTP reflected the prioritization of this policy as well. The establishment of a separate division responsible for jurisdiction and complementarity issues (the Jurisdiction, Complementarity and Cooperation Division) underscored the importance attached to this aspect of the Office's work.[128]

2.2 Emergent Theories: Cooperation and Coercion

From the outset, then, complementarity's potential was understood as more than a tool for regulating jurisdiction but also, as Stahn notes, "a forum for managerial interaction between the Court and States."[129] This "systemic dimension" of complementarity, Stahn argues, "institutes a legal system under which the Court and domestic jurisdictions are meant to complement and reinforce each other in their mutual efforts to institutionalize accountability for mass crimes."[130] Scholars have offered different descriptions to explain this relationship. The ICC as "backstopping" national courts has been one, more passive iteration, while the Court as a "reinforcement"

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123 Ibid., 5-6.
124 Ibid., 13-14; 28-31.
125 Ibid., 15. At the same time, the Paper noted that the "standard for showing inability should be a "stringent one. As the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards." Ibid.
126 "Paper on some policy issues before the Office of the Prosecutor," 5.
127 Ibid., 3.
128 The JCCD's function is discussed further in chapter four. Notably, the establishment of the Division was not without controversy, as critics saw it as unduly politicizing the OTP's role. See,e.g., Schiff, 113-115.
129 Stahn, "A Tale of Two Notions," 88.
130 Ibid., 91.

mechanism has been another.[131]

By contrast, a catalytic relationship is more active in its design. Burke-White, for instance, has argued that, "international and domestic institutions are engaged in complex interactions whereby the international level, and particularly the ICC's complementarity regime, may catalyze changes at the national level."[132] Likewise, referencing complementarity's dynamic component, Stahn has written that, "complementarity serves as a catalyst for compliance by virtue of the construction of articles 17 and 19 of the Rome Statute."[133] And, as noted earlier, Kleffner argues that complementarity should be a "catalyst for compliance," insofar as it is "understood as aiming to induce and facilitate the compliance of States with their obligation 'to exercise [their] criminal jurisdiction over those responsible for international crimes,' which underlies the Rome Statute."[134]

2.2.1 Cooperation

Kleffner's reference to inducement and facilitation again suggests two different models for the Court's role as a catalyst: one coercive, the other cooperative.[135] In the latter, the ICC's relationship with domestic jurisdiction is fundamentally beneficent: the Court and national jurisdictions complement each other not only in a "negative" dynamic, wherein the ICC's competences are engaged by the absence (or non-genuineness) of state action, but "also in a positive fashion, i.e. through mutual assistance and interaction."[136] This policy of "positive" complementarity received early endorsement from the OTP. As Stahn argues, however, "positive" complementarity is not only a policy invention; it is also an "inherent concept of the Statute," reflected, for instance, in its cooperation regime.[137] Thus, "positive" complementarity is "focused on problem-solving, i.e. the ability of the Court to strengthen domestic jurisdictions and to organize a division of labor based on 'comparative advantages.'"[138]

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131 Anne-Marie Slaughter and William Burke-White, "The Future of International Law is Domestic (or, The European Way of Law)," *Harvard International law Journal* 47(2) (Summer 2006), 122.
132 William W. Burke-White, "Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo," *Leiden Journal of International Law* 18 (2005), 568. See also William W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice," *Harvard International Law Journal* 49(1) (Winter 2008). Burke-White argues, "As a strategy for encouraging national governments to undertake their own prosecutions of international crimes, proactive complementarity would allow the Court to catalyze national judiciaries to fulfill their own obligations to prosecute international crimes," 57.
133 Stahn, "A Tale of Two Notions," 92.
134 Kleffner, "Complementarity as a Catalyst for Compliance," 80.
135 Stigen echoes this two-sided approach, noting that, "The complementarity principle seeks to enhance national jurisdictions partly by stimulating and partly by applying pressure," 17. See also Rod Rastan, "Complementarity: Contest or Collaboration," in Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010). Rastan contends that, "limiting complementarity to a contest paradigm will prevent the realization of the statutory goal to put an end to impunity and thereby contribute to the prevention of crimes," 84.
136 Stahn, "Taking Complementarity Seriously," 260.
137 Ibid., 236. Nouwen similarly contends that the Statute's cooperation regime is what effectuates a policy of assisting domestic jurisdictions; in her view, "such a policy of assisting domestic jurisdictions is not inherent in complementarity." *Complementarity in the Line of Fire*, 97-98
138 Ibid., 260-261.

Even if it was "hardly … contemplated by all the [Rome Statute] negotiators," numerous commentators and jurists have endorsed this approach to complementarity.[139] Former ICC Judge Mauro Politi, for instance, notes that there is "no doubt" that one important goal of complementarity "is to establish a division of labor between national jurisdictions and the ICC, under which the Court should essentially concentrate on those who have major responsibility for the crimes involved."[140] Cherif Bassiouni likewise identifies that an "important ancillary function of the ICC is to prod national jurisdictions to assume their international legal obligations," which may extend to the Court providing technical assistance and capacity-building support to national criminal justice systems.[141] Cooperation also animates complementarity's affinity with a "managerial model of compliance," or a "global compliance system for the enforcement of international criminal law,"[142] wherein the ICC and states participate in a "cooperative venture to ensure accountability of perpetrators."[143] Gioia likewise writes that, "A 'friendly' version of complementarity relies on the assumption that the ICC is not meant to act as a censor of national jurisdictions but rather to allow for the most efficient sharing of competencies between the national and international level."[144]

Burke-White's scholarship has perhaps been the most well-known and influential articulation of the ICC's relationship to national jurisdictions, casting it explicitly in catalytic terms. An early article, from 2005, on the influence of the ICC in the DRC posited that the Court was not merely an institution acting against domestic states but rather part of a "multi-level global governance model," one that also "participates in the domestic process, altering political as well as legal outcomes."[145] As part of such a multi-level system, his elaboration of a "Rome System of Justice" is rooted in a "virtuous circle in which the Court stimulates the exercise of domestic jurisdiction through the threat of international intervention."[146] Burke-White's invocation of the ICC as the apex of an organic judicial chain (the "virtuous circle"), while also recognizing its coercive properties (the "threat of international intervention"), comes together in his idea of "proactive complementarity," in which the ICC "can and should encourage, and perhaps even assist, national governments to prosecute international crimes."[147]

Burke-White's writing—part of a growth of scholarly interest on the impact of the ICTY's proceedings on domestic jurisdictions more generally—also drew heavily on the introduction of a completion strategy for the Tribunal to support the notion of shared responsibility between national and international courts.[148] Characterizing the completion strategy as a catalytic force for domestic accountability in states like Bosnia

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139 Stigen, 476.
140 Mauro Politi, "Reflections on complementarity at the Rome Conference and beyond," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 145.
141 M. Cherif Bassiouni, "The ICC – *Quo Vadis*?," *Journal of International Criminal Justice* 4 (2006), 422.
142 Rod Rastan, "Complementarity: Contest or Collaboration?," 131.
143 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 311.
144 Federica Gioia, "Complementarity and 'Reverse Cooperation,'" in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 817.
145 Burke-White, "Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo," 559.
146 Burke-White, "Proactive Complementarity," 57.
147 Ibid., 56
148 See, e.g., Burke-White, "The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina."

and Serbia, he argued that such an approach could be instructive for the ICC's complementarity regime. In his words, "The structural changes in the ICTY's jurisdiction and mandate undertaken as part of the Completion Strategy essentially shifted the governance structure from one of absolute international primacy toward a new relationship with incentives similar to those of complementarity."[149] These changes occurred in the same period as the ICC's operations began to take shape, contributing to the developing concept of "positive" complementarity.

Under the completion strategy the ICTY's Rules of Procedure and Evidence were amended, such that the Tribunal could effectively incentivize domestic institutions by "send[ing] cases back to national jurisdictions, monitor[ing] domestic proceedings, and remov[ing] cases back to the international forum only if key targets were not met."[150] UN Security Council Resolution 1503, issued in August 2003, endorsed the Tribunal's strategy and called upon the international community to "assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY."[151] Coordinating mechanisms initially set out in the 1996 Rome Agreement, which governed the relationship between the ICTY and local courts, were likewise strengthened under the so-called "Rules of the Road," with the Tribunal, after years of delay, fulfilling its obligation to review locally-initiated cases before an arrest warrant could be issued by domestic authorities.[152]

This approach found early endorsement in OTP policy (not coincidentally, Burke-White served as an early advisor to Prosecutor Moreno-Ocampo). "Positive" complementarity was described as a deliberate way to promote national proceedings through the provision of information to states, advice, and the development of legal tools to empower domestic criminal jurisdictions.[153] The metaphor of catalyst was also embraced by those affiliated with the Office. In the words of Juan Mendez, the OTP's then Special Advisor on Crime Prevention, "Under its policy of positive complementarity, the Office of the Prosecutor can act as a catalyst for national action."[154]

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[149] Ibid., 320.

[150] Ibid. There is an abundant literature on the so-called Rule 11*bis* "referrals" and their impact on domestic jurisdictions in former Yugoslavia. For further discussion, see Fausto Pocar, "Completion or Continuation Stratey? Appraising Problems and Possible Developments in Building the Legacy of the ICTY," *Journal of Internatinal Criminal Justice* 6 (2008), 655-665; see also David Tolbert and Aleksandar Kontic, "The International Criminal Tribunal for the former Yugoslavia and the transfer of cases and materials to national judicial authorities: lessons in complementarity" and Fidelma Donlon, "Positive complementarity in practice: ICTY Rule11*bis* and the use of the tribunal's evidence in the Srebrenica Trials before the Bosnian War Crimes Chamber," both in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 888-954. For a more sober assessment of the ICTY's engagement with domestic institutions, see Yaël Ronen, "The Impact of the ICTY on Atrocity-Related Prosecutions in the Courts of Bosnia and Herzegovina," *Penn State Journal of Law & International Affairs* 3(1) (2014), 113-160.

[151] United Nations Security Council Resolution 1503, S/RES/1503 (28 August 2003), at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3f535ca64.

[152] For a thorough discussion of these developments and the ICTY's role on domestic war crimes prosecutions, see Lara J. Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge: Cambridge University Press, 2010). For an early assessment of the "Rules of the Road," see also Mark S. Ellis, "Bringing Justice to an Embattled Region—Creating and Implementing the 'Rules of the Road' for Bosnia-Herzegovina," *Berkeley Journal of International Law* 17(1) (1999), 1-25.

[153] Office of the Prosecutor, "Report on the activities performed during the first three years (June 2003-June 2006)," ICC-OTP (12 September 2006), 22-23.

[154] Juan Méndez, "Justice and Prevention," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 33.

The division-of-labor approach to cooperation as a means towards this end was also closely linked to the OTP's policy of "invited" referrals under Article 14. The 2006 report of the Office stated for instance, that, over the course of the first three years (2003-2006), it had adopted a formal policy "of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court."[155] As subsequent chapters detail, such a division of labor was the explicit basis for seeking the DRC government's referral, where it was made clear that the OTP's role was to prosecute senior leaders and those "most responsible," while domestic authorities would handle other responsible actors. More recently, Prosecutor Bensouda's statement suggests a similar approach to the situation in Libya. After not contesting Libya's admissibility challenges, she told the UN Security Council that, "Joint complementary efforts of both the Government of Libya and the ICC, strongly and actively supported by the international community, are … crucial for ending impunity in the country."[156] She further added that her Office would "prioritise its investigations and prosecution of those who are outside the territory of Libya and who are thus largely inaccessible to the Libyan authorities," while the government would focus on those suspects within Libyan territory.

2.2.2 Coercion

Coercion, in which the threat of ICC intervention is meant to function as a leveraging device on national jurisdictions, has arguably been the more predominant iteration of complementarity, rooted as it is in a compliance-oriented model of state interaction with the Court. Stigen, for instance, has posited that the Court's catalytic effect is fundamentally one of ICC-avoidance. In his words, "An ICC finding that the territorial state or the suspect's home state is unwilling or unable to proceed genuinely may well be perceived as a considerable stigma that states will seek to avoid."[157] In order to avoid such stigma, states would be compelled to act. Similarly, in his early work, Bruce Broomhall suggested that the ICC would "spur" on national prosecutions in order to avoid "adverse attention, the diplomatic entanglements, the duty to cooperate and other consequences of ICC activity."[158]

Kleffner's work on complementarity also explores the principle's coercive potential, "as a mechanism through which States Parties are induced to and facilitated in complying with [the] obligation [to investigate and prosecute ICC crimes]."[159] In his view,

> the novelty of complementarity lies in the fact that, for the first time in the history of international criminal law, States Parties have agreed *ex ante* that this

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[155] OTP Report 2003-2006, 7.

[156] To that end, the OTP and the Libyan government "recently concluded a burden-sharing Memorandum of Understanding, the purpose of which is to facilitate our collaborative efforts to ensure that individuals allegedly responsible for committing crimes in Libya as of 15 February 2011 are brought to justice either at the ICC or in Libya itself." See "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011)," remarks delivered in New York, 14 November 2013.

[157] At the same time, Stigen correctly notes that the auto-referrals of Uganda and the DRC to the ICC suggest that, at least in some case, "being labeled as unable is something that some states can live well with," 475.

[158] Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003), 84, 87.

[159] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 309.

> failure [to investigate and prosecute] will entail a concrete legal consequence: States forfeiting the claim to exercise jurisdiction, including over their own nationals and officials.[160]

Kleffner's conception of the Court's role is similarly compliance-oriented. In his words, the ICC "can generate a pull-effect towards complying with the obligation to investigate and prosecute."[161] One reason for this anticipated effect is, he contends, the Court's "high degree of legitimacy" and its potential as a vehicle to "bestow legitimacy on national proceedings," which further "generates a pull towards compliance."[162] Additionally, in his view, the "procedural setting of complementarity contains elements of an interaction between the Court and national criminal jurisdictions, which may serve to induce states to carry out investigations and prosecutions."[163] A final reason is the threat of sanction, which "finds support in the largely *antagonist premise* on which the regime of complementarity is based."[164]

As with "positive" complementarity, the experience of the ad hoc tribunals in Rwanda and the former Yugoslavia also played an influential role in elaborating the catalytic potential of jurisdictional "forfeiture." The ICTR, like the ICTY, amended its Rules of Procedure and Evidence in 2004 under pressure from the UN Security Council, in order to allow the referral of cases from the Tribunal to "competent national jurisdictions, as appropriate, including Rwanda."[165] Notably, the requirement of a fair trial was explicitly included amongst the conditions that had to be satisfied for referral, leading in turn to the 2007 passage of a national law in Rwanda that sought to implement the ICTR's due process standards (including abolition of the death penalty).[166] Notwithstanding this accommodation, the Tribunal denied the first five requests for transfer to Rwanda, using the antagonist premise on which the primacy regime was based to strengthen, ostensibly, fair trial guarantees at the domestic level.[167]

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[160] Ibid., 319-320.
[161] Ibid., 311.
[162] Ibid., 313. Kleffner sees the ICC as carrying both procedural and substantive legitimacy, insofar as it "is based on the *specific consent of States* to the Rome Statute," while also safeguarding the sovereignty of states, "in as much as it reaffirms rather than encroaches upon their primary role in the investigation and prosecution of core crimes," 311, 314. Further, complementarity "benefits from a large degree of determinacy" and "leaves no doubt" that "the soel role of the ICC is to supply the deficiencies of national criminal jurisdictions," 315.
[163] Kleffner, "Complementarity as a Catalyst for Compliance," 82.
[164] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 320.
[165] UNSC Resolution 1503, preambular para. 8; Rule11*bis* of the ICTR's rules was so amended in April 2004. As with the ICTY, there is a similarly abundant literature on the ICTR's referral process and its impact at the national and local level in Rwanda. For a fuller treatment see L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Leiden: Martinus Nijhoff Publishers, 2005); Jesse Melman, "The Possibility of Transfer(?): A Comprehensive Approach to the International Criminal Tribunal for Rwanda's Rule 11bis To Permit Transfer to Rwandan Domestic Courts," *Fordham Law Review* 79(3) (2011), 1271-1332.
[166] See Organic Law No. 11/2007 of 16 March 2007 concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda, Official Gazette of the Republic of Rwanda, 19 March 2007; the law has subsequently been amended. For a fuller exploration of the 2007 law and domestic accountability in Rwanda, see Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge: Cambridge University Press, 2010). For an incisive reading of the death penalty's abolition as more than the result of top-down pressure from the ICTR, see Audrey Boctor, "The Abolition of the Death Penalty in Rwanda," *Human Rights Review* 10 (2009), 99-118.
[167] See "Complementarity in Action: Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial," International Criminal Tribunal for Rwanda (February 2015), para. 43, at http://www.unictr.org/sites/unictr.org/files/legal-

Under this threat-based approach, complementarity's catalytic potential rests on several presumptions. One presumption is that states necessarily want to avoid the ICC, or that the political costs of pursuing domestic prosecutions will necessarily prevail over the desire to keep the Court at bay. Put another way, the ICC may not be a court of "last resort" (as it is so often described), but rather a *forum conveniens* for states. Thus, the cooperative dimensions of complementarity might well stifle its coercive potential, insofar as a state could seek the ICC's assistance (as in the case of Uganda and the DRC), or may seek to "offload" complex cases to another judicial forum. Robinson makes a similar point when he acknowledges that "an over-strong regime might resist ICC intervention as a *threat to* government, [while] an under-strong government might welcome impartial and effective intervention as a *reinforcement of governance*."[168] Another presumption—one increasingly tested by the current posture of African states towards the ICC—is that the Court commands a high degree of "legitimacy," as Kleffner claims.

Notwithstanding these concerns, the Court's coercive capacities have been taken up as part of the OTP's approach to complementarity. In his first address to the ASP, the ICC Prosecutor noted that, "due to the dissuasive effect that the mere existence of the court generates, the possibility of presenting a case at the International Criminal Court could convince some states with serious conflicts to take the appropriate action."[169] Furthermore, one sees in the Office's approach to certain situation countries a more adversarial approach towards domestic jurisdictions. In Uganda, for instance, later attempts by the government to negotiate with the Lord's Resistance Army clashed with the ICC's outstanding arrest warrants. Similarly, in Kenya, the Prosecutor adopted a threat-based approach to complementarity in an attempt to force the government to establish a domestic tribunal to prosecute its post-election violence. This history is examined more fully in chapter four.

2.3 A Catalyst for Compliance: The Duties of Complementarity?

Complementarity's power to advance domestic accountability relies upon a duty-based reading of the Rome Statute. These duties have commonly been understood to encompass not only the prosecution of serious crimes through national criminal fora, but also the domestic implementation of the Rome Statute's substantive and procedural provisions. Most commentators root these duties in a purposive reading of the Statute, particularly its preambular language, which recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[170] As Padraig McAuliffe has noted, "the open-ended and aspirational language of the Preamble," in particular, supports a "teleological impulse to apply expansive modes of interpretation to admissibility provisions in the interest of maximizing the impact of its

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library/150210_complementarity_in_action.pdf. For a critical analysis of the ICTR's referral jurisprudence, see Nicola Palmer, "Transfer or Transformation: A Review of the Rule 11*bis* Decisions of the International Criminal Tribunal for Rwanda," *African Journal of International and Comparative Law* 20(1) (2012).

[168] Darryl Robinson, "The Controversy over Territorial State Referrals and Reflections on ICL Discourse," *Journal of International Criminal Justice* 9 (2011), 383.

[169] Press Release, "ICC – Election of the Prosecutor, Statement by Mr. Moreno Ocampo," ICC-OTP-20030502-10 (22 April 2003).

[170] Para. 6, Rome Statute. See, e.g., Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law," 1113. Gioia states that only investigations and prosecutions that "abide by the highest standards of fair trial" can be regarded as "proper implementation of the obligations at stake [in the Rome Statute]," and that "failure to comply with such standards should be construed as tantamount to failing to perform the obligation and result in the Court legitimately stepping in."

main institution, the ICC."[171] Much of the literature cited above exemplifies this teleological impulse.

In fact, as its careful drafting illustrates, there is no provision on states parties' prosecutorial duties in the operative part of the Statute.[172] While states may be obliged to investigate or prosecute crimes based on *other* rules of international law, the Statute itself obliges states only to cooperate with the Court (as Part IX of the treaty enumerates), to ensure that its domestic law facilitates cooperation with the ICC, and that offenses against the "administration of justice" be criminalized domestically.[173] Furthermore, as a matter of treaty interpretation, the preambular recital was deliberately not made part of the Statute's operative text; rather, it merely "recalls" a suggested pre-existing duty, not one arising from the treaty itself.[174]As Nouwen notes, the recital itself "merely reflects an aspiration, just like many of the other preambular considerations."[175] Similarly, it is not the case, as Kleffner and the ICC Appeals Chamber have both suggested, that states "forfeit" or "relinquish" their claims to jurisdiction merely by virtue of the ICC intervening.[176] Rather, until such time as an accused is convicted or acquitted for the same crimes, "states can, in theory, conduct national proceedings simultaneously with those of the Court."[177]

With respect to implementation, there is also no positive obligation on member states to implement the Rome Statute's substantive (or procedural) provisions.[178] As Alain Pellet (himself a member of the ILC that authored the 1994 draft Statute) states, "neither the signatory States nor even the States Parties have any clear obligations to bring their domestic legislation into harmony with the basic provisions of the Rome

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[171] McAuliffe, "From Watchdog to Workhorse," 285, 294. See also Darryl Robinson, "The Identity Crisis of International Law," *Leiden Journal of International Law* 21 (2008), 944-946 (noting that, through "victim-focused teleological reasoning aggravated by utopian aspirations," ICL seeks to "end" crime rather than merely manage it).

[172] See, e.g., Payam Akhavan, "Whither National Courts? The Rome Statute's Missing Half," *Journal of International Criminal Justice* 8(5) (2010); Anja Seibert-Fohr, "The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions," in A. von Bogdandy and R. Wolfrim (eds.), *Max Planck Yearbook of United Nations Law* 7 (Koninklijke Brill, 2003), 559

[173] Such rules may arise under relevant human rights treaties that impose a duty to criminalize and investigate, see, e.g., UN Convention Against Torture (Articles 4, 5, and 7) and the International Convention for the Protection of all Persons from Enforced Disappearance (Arts. 4, 6, 9 and 11). Regional human rights treaties may also impose such obligations: the Inter-American Court on Human Rights has, for instance, held that "[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." *Velásquez Rodriguez v. Honduras*, para. 174; Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Review* 100 (1991): 2539-615. Arguably, customary international law may also impose a duty to investigate and prosecute. See, e.g., International Law Commission, *Second Report on the Obligation to Extradite or Prosecute*, para. 26, UN Doc. A/CN.4/585 (June 11, 2007).

[174] Robinson, "The Mysterious Mysteriousness of Complementarity," 94-95.

[175] Nouwen, *Complementarity in the Line of Fire*, 39.

[176] See, e.g., *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, Appeals Chamber, 25 September 2009 ("Katanga Appeals Judgment"), para 85.

[177] Nouwen, *Complementarity in the Line of Fire*, 78-79.

[178] Article 88, Rome Statute.

Statute."[179] Indeed, as noted during the drafting of Article 20(3) on *ne bis in idem*, states explicitly rejected a proposal that would have made a case admissible before the ICC where the national proceeding failed to consider the international character or grave nature of a crime. For this reason, the Statute instead refers to the "same conduct" of an accused, "to make clear that a national prosecution of a crime—international or ordinary—did not prohibit ICC retrial for charges based on different conduct."[180]

In a related vein, the difference between "ordinary" and international crimes has also been advanced as a basis for domestic implementation. In the context of the ICC, Kleffner has again been one of the strongest proponents of this position. He argues that:

> Implementation can only be considered satisfactory if it comprehensively and effectively covers the entire range of conduct criminalized by the Rome Statute, without adversely affecting pre-existing obligations under international law that go beyond the Rome Statute, and while taking into account the need to fill gaps in the legislation that may lead to impunity, such as those resulting from the absence of universal jurisdiction."[181]

Notably, key ICC actors have also endorsed this view. Sylvana Arbia, the Court's former Registrar, writes:

> Without [implementing legislation], states could be left in the position of prosecuting only for some of the constitutive acts of the crimes, such as murder and rape. This could undermine the basis of national prosecutions, and may invite the ICC's Judges to take jurisdiction where this might not be needed.[182]

Arbia's qualification that the ICC "may" take jurisdiction grants that outcome it is not mandatory but the language of both she and Kleffner is equally impact driven and threat-based: failure to conform with the Rome Statute risks jurisdictional forfeiture.

Influential non-state actors have advanced similarly expansive interpretations. Of particular relevance are individuals whose organizations often act as a bridge between academic or policy communities and advocacy-oriented organizations engaged in accountability work. For instance, Mark Ellis, who serves as Executive Director of the International Bar Association (described as "the world's leading organisation of international legal practitioners, bar associations and law societies"[183]), is unequivocal that state failure to "effectively incorporate the Rome Statute into its domestic body of

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[179] Alain Pellet, "Entry Into Force and Amendment of the Statute," in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. 1* (Oxford University Press, 2002), 153.

[180] Kevin Jon Heller, "A Sentence-Based Theory of Complementarity," 224. That said, as Robinson notes, it may be "prudent to ensure that [a state's] criminal laws are at least as broad as the subject matter jurisdiction of the ICC." It is not, however, required. See Darryl Robinson, "Three Theories of Complementarity: Charge, Sentence, or Process?," *Harvard International Law* Journal, 53 (April 2012), 169, fn. 25.

[181] Jann Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*. 112.

[182] Silvana Arbia and Giovanni Bassy, "Proactive Complementarity: A Registrar's Perspective and Plans," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 65.

[183] International Bar Association, "About the IBA," http://www.ibanet.org.

criminal and procedural law" would trigger a finding of "inability" under the Rome Statute.[184] In his view,

> [A] State Party must incorporate the Rome Statute's substantive criminal law provisions into its domestic body of law. This is the complementarity part of the test. It requires States Parties to take steps such as criminalizing all offences contained in the Statute, ensuring that the principle of command responsibility is incorporated into domestic legislation, removing any statute of limitations for Rome Statute offences, and perhaps most importantly, denying immunity to heads of state.[185]

Similarly, David Donat Cattin, Secretary-General of the influential Parliamentarians for Global Action's (a "non-profit, non-partisan international network" of legislators whose "vision is to contribute to the creation of a Rules-Based International Order for a more equitable, safe and democratic world"[186]), argues that the principle of complementarity "implies that States shall fully implement the Rome Statute in their domestic legal orders in order to comply with their primary responsibility to realize the object and purpose of the treaty (and [Rome Statute] system)," which is to put an end to impunity and deter future crime.[187] The PGA, in turn, describes complementarity as follows:

> Complementarity means that states have the primary obligation to investigate and prosecute those responsible for international crimes, but also that the Court will only intervene when states do not have the genuine will or the capacities to do so. ... To this effect, the first and minimal condition enabling States to abide to this obligation of accountability for genocide, crimes against humanity, war crimes and crime of aggression is the existence of legislation that incorporates in their National law the crimes and general principles of law contained in the Rome Statute.[188]

Notably, as chapter six illustrates, the PGA played a crucial role in the implementation of the Statute in Uganda and Kenya, as well as the DRC.

Other views of complementarity encompass even more ambitious policy goals, including that domestic criminal justice systems satisfy "international standards."[189]

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[184] Ellis, *Sovereignty and Justice*, 123.

[185] Ibid., 125. Curiously, later in his text, Ellis nevertheless appears to endorse the Libyan government's challenge to ICC admissibility on the grounds that it is "irrelevant" if the acts are charged as "ordinary crimes" pursuant to the Libyan Criminal Code. In so doing, he avers that his "position is supported by a number of jurists who have argued that the prosecution of international crimes using ordinary domestic law would satisfy a state's obligations under the Rome Statute," 211.

[186] Parliamentarians for Global Action, "About Us – Overview," http://www.pgaction.org/about/overview.html.

[187] David Donat Cattin, "Approximation or Harmonisation as a Result of Implementation of the Rome Statute," in Larissa van den Herik and Carsten Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2012), 361-62. For a similar analysis, see Roberto Bellelli, "Obligation to Cooperate and Duty to Implement," in Roberto Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (UK: Ashgate Publishing, 2010), 221.

[188] "Implementing Legislation on the Rome Statute," http://www.pgaction.org/programmes/ilhr/icc-legislation.html.

[189] As with investigations and prosecutions, it is clear that the absence of due process and/or the failure to meet such standards is not grounds for admissibility under Article 17. For a convincing articulation of this view, see Kevin Jon Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process," *Criminal Law Forum* 17 (2006), 255-280.

Linking these goals to the juridical foundation of complementarity, Ellis contends that "inability" as set forth in Article 17(3) should encompass states that "lack the type of judicial systems that is required under the international standard of legal fairness, or have failed to incorporate implementing legislation necessary to cooperate with the Court, or have failed to ensure fair trial proceedings."[190] To that end, he has proposed the establishment of an International Advisory Group that could, at the request of the ICC or a state party, provide an "objective, impartial and non-political evaluation regarding a state's ability to carry out judicial proceedings with international standards."[191] In his view, questions this Group should ask in making its assessments would include the following:

> Does the domestic court have extensive backlogs resulting in long pre-trial detention? Does the state have a sufficient number of trained defense lawyers and an effective legal aid program for indigent defendants? Are there sufficient guarantees against outside pressure on the judiciary? Does the state impose the death penalty? Can the court provide witnesses and victims with medical, psychological and material support during and after trial through a witness and victim support office? Can the court provide these same witnesses and victim security protection prior to, during and after the trial? Is there ongoing political strife and repression in the country? Does the state have detention facilities that meet international standards?[192]

While Ellis' ambitious criteria could be asked of any country's criminal justice system, here it is the language of complementarity that animates them.

"Positive" complementarity is also summoned by many human rights and rule-of-law actors in their efforts to engage criminal justice sector reform more broadly. For instance, at a 2011 workshop on witness protection held in Uganda, a paper prepared by the OHCHR drew explicitly on the ICC, noting that the Court has "emphasized the importance of witness protection in recent decisions, demonstrating that [it] is a key concern." To that end, and "in line with the doctrine of positive complementarity, the application of witness protection standards by the Court will serve a great role in demonstrating adequate capacity, competence and credibility" of Ugandan courts.[193] Similarly, in his work on witness protection, Chris Mahony has argued that Uganda "must now consider *the requirements* of ICC complementarity."[194] According to Mahony, "the creation of a witness protection programme is a critical element of ICC

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[190] Ellis, *Sovereignty and Justice*, 113. Elsewhere, Ellis has also argued, that, "If [s]tates desire to retain control over prosecuting nationals charged with crimes under the ICC Statute, they must ensure that their own judicial systems meet international standards. At a minimum, states will have to adhere to standards of due process found in international human rights instruments, particularly as they relate to the rights of defendants." See Mark S. Ellis, "The International Criminal Court and its Implication for Domestic Law and National Capacity Building," *Florida Journal of International Law* 15 (2002), 241.

[191] Mark S. Ellis, "International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions," *Hague Journal on the Rule of Law* 1 (2009), 84. In the same article, Ellis also calls for the creation of an International Technical Assistance Office, whose purpose would be to "provide technical and unbiased assistance to domestic war crimes courts," 82.

[192] Ibid., 85.

[193] See OHCHR: Uganda, "Judicial Workshop on Victim and Witness Protection in Uganda" (August 2011), at http://www.uganda.ohchr.org/EN/Pages/DisplayNews.aspx-NewsID=JuditialWorkshop.htm. The quoted material was included in OHCHR's concept note for the workshop (on-file).

[194] Chris Mahony, "The justice sector afterthought: Witness protection in Africa" (Pretoria: Institute for Security Studies, 2010), xi (emphasis added).

complementarity considerations," as it "may well be a future driver of African protection mechanisms."[195]

The "requirements" of complementarity, as Mahony puts it, underscores the centrality of compliance to this catalytic framing. Materials that domestic NGOs circulate in countries like Kenya, Uganda, and the DRC reinforce this discourse. The Ugandan Coalition for the ICC, for instance, urges Uganda's "compliance with the Rome Statute,"[196] while a study on the DRC prepared by Protection International"—an international NGO dedicated to the protection of human rights defenders—notes that the passage of domestic implementing legislation would "enable the DRC to comply with its obligation … to integrate the Rome Statute in its internal legislation."[197] A convening of government officials throughout southern Africa (supported by the University of Pretoria's Centre for Human Rights, International Criminal Legal Services, and the Konrad Adenauer Foundation) even notes in its workshop report that the "[p]erception that [Rome Statute] crimes *can* be prosecuted as ordinary crimes"[198]—itself a correct statement of the law—is an "obstacle" for promoting greater domestication of the Statute.

Framing complementarity as a duty for states, and the bridge that this builds to compliance, offers a way to route broader governance objectives through the authority of the ICC. Indeed, Ellis' suggested questions are themselves reflected in the views of the Ugandan government, which states that, "Complementarity is … envisioned and approached more broadly in Uganda, encompassing the adoption of relevant institutional, legal and judicial measures to strengthen the rule of law institutions and the administration of justice more generally."[199] Rather than a constraint on the ICC, then, complementarity effectively extends the Court's authority.

3. Networks and the Social Production of a (New) Norm

Complementarity's transformation from constraint to catalyst represents a significant evolution away from the carefully negotiated compromises that informed the Rome Statute's drafting. Rooted in the grammar of compliance, this evolution is noteworthy both for the relative speed with which it has evolved (given that it imposes a greater burden on states parties), and the degree to which it has come to dominate the public discourse about complementarity. But how should the uptake and proliferation of this new norm be understood?

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[195] Ibid.

[196] Uganda Coalition for the International Criminal Court (UCICC), "Strategic Plan 2011-2013," 6. The plan adds that "Uganda being the host ought to be a good example in implementing the [Kampala] Declaration that was passed."

[197] Isabelle Fery, "Executive summary of a study on the protection of victims and witnesses in D.R. Congo," (Brussels: Protection International, July 2012), 11.

[198] Workshop Report, "Expert Workshop: Giving Effect to the Law on War Crimes, Crimes Against Humanity and Genocide in Southern Africa," Workshop Report (University of Pretoria: 13-14, June 2011) (emphasis added), at http://www.iclsfoundation.org/wp-content/uploads/2012/02/final-workshop-report-english.pdf.

[199] "The Role of Specialised Courts in Prosecuting International Crimes and Transitional Justice in Uganda," Remarks of the Honorable Minister of State and Deputy Attorney General at the UNDP Policy Dialogue on 'Complementarity' and Transitional Justice (New York: 12-13 October, 2011), at http://www.jlos.go.ug/old/index.php/document-centre/news-room/archives/item/213-the-role-of-specialised-courts-in-prosecuting-international-crimes-and-transitional-justice-in-uganda.

3.1 Norm Entrepreneurs

In her commanding study of complementarity's "catalytic effect" in Uganda and Sudan, Sarah Nouwen persuasively focuses on the efforts of norm entrepreneurs, whom she defines as "activists, often foreigners working in cooperation with local actors, who promote the adoption of international norms (or what in their view should be international norms) at the domestic level."[200] Driven by a "pro-ICC" ideology, Nouwen argues that these activists have in turn sought to build a network of actors—ICC officials, diplomats, domestic human rights advocates, rule-of-law and development experts—who have increasingly turned to complementarity not as a rule of admissibility, but as a normative ordering principle.[201] Significantly, however, she also suggests that the latter understanding is not only the work of entrepreneurs but also of norm "hijackers," whom she accuses of "misrepresentation" when invoking complementarity in the literal sense—to describe, for instance, a division of labor between the ICC and national jurisdictions, or to endorse certain standards and benchmarks for domestic proceedings that "are laudable from a human rights perspective, but do not fit complementarity."[202]

There is a growing literature on norm diffusion, much of which helpfully illustrates the means by which a broader understanding of complementarity – one that imposes a range of duties upon states – has acquired such currency in the public's imagination. In particular, by focusing on the role that non-state actors have played as agents of this new discourse, the significance of the network of ICC supporters, rather than the Court as an institution in itself, comes more clearly into focus. Aaron Boesenecker and Leslie Vinjamuri note that, "International human rights NGOs are quintessential [norm] facilitators; they both participate in global networks and discussions on justice and accountability and work locally in conflict and post-conflict situations to diffuse norms through a power of socialization."[203] Many of these organizations, ranging from Human Rights Watch to Avocats sans Frontieres, and Amnesty International to the International Center for Transitional Justice, also maintain national offices in key ICC situation countries, creating a vital, network between those sites where international criminal law is produced—The Hague, Brussels, Geneva, New York—and enacted.

The motivations of these influential "trans-sovereign entrepreneurs"—the interpretive community they inhabit[204]—is informed through the views advanced by scholars like Burke-White, Kleffner, and Stahn, who have sought to expand the earlier consensus around complementarity and explore more deeply the policy dimensions of this new ordering principle. In part, these efforts offered new readings of the Rome Statute (through systematic and teleological interpretation), but their purpose in doing so was the same as those working within the ICC: to magnify the Court's influence. These

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[200] Nouwen, *Complementarity in the Line of Fire*, 23; see also Subotic, *Hijacked Justice*, 4.
[201] Nouwen defines this ideology as based on three interrelated beliefs: (1) that international courts "mete out better justice than domestic systems"; (2) that international crimes must be prosecuted as such; and (3) because, "at a minimum, once the ICC is involved the fledgling Court must be seen to succeed." She further suggests that this ideology has been "at times more powerful than complementarity," to the detriment of its catalyzing effect. See *Complementarity in the Line of Fire,* 13.
[202] Ibid., 192. For a similar critique, see McAuliffe, "From Watchdog to Workhorse."
[203] Aaron P. Boesenecker and Leslie VInjamuri, "Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms," *International Journal of Transitional Justice* 5 (2011), 359.
[204] See Julie Mertus, "Considering Nonstate Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application," *NYU Journal of International Law and Politics* 32 (2000), 554.

"teleological impulses" also match well with the community of NGOs engaged in developing the "cascading" international accountability norm that Sikkink has described. Indeed, as she and Martha Finnemore have noted, "Ideational commitment is the main motivation when entrepreneurs promote norms or ideas because they believe in the ideals and values embodied in the norms"; in so doing, they construct new "cognitive frames," which, when successful, "resonate with broader public understandings and are adopted as new ways of talking about and understanding issues."[205]

The desire to diffuse and entrench more deeply a norm of international accountability dovetailed with the desire to think about complementarity not merely as a principle of admissibility but as the basis of a new "Rome Statute System." Thus, while many of the entrepreneurs advancing this new, more ambitious norm may have initially wished more for the ICC —that it, too, would be a court of primacy like the ICTY and ICTR—this shortcoming was progressively reinvented post-Rome. Complementarity as a "catalyst" became the new cognitive frame.

3.2 Transnational Networks

While complementarity's intellectual history is important to understand, so too is the sociology of its transformation. Here, Emanuel Adler's work on transnational "communities of practice" is instructive as it points to the dense array of ICC-engaged actors who helped advance the complementarity-as-catalyst framework.[206] Adler's work is illuminating insofar as it examines the social construction of shared norms and ideas, as well as how a group of actors "develops a common body of knowledge and common practices by engaging in their field in relation with each other."[207] Extrapolating this insight to the transnational, Adler suggests that "we can take the international system as a collection of communities of practice"— diplomats, human rights activists, lawyers— who may share "a sense of joint enterprise that is constantly being renegotiated," as well as shared practices, which "are sustained by a repertoire of communal resources, such as routines, words, tools, ways of doing things, stories, symbols, and discourse."[208] In a similar vein, Margaret Keck and Sikkink point to the role of "transnational advocacy networks," which can be understood as one component of Adler's communities of practice. Keck and Sikkink define such a network as "those actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services."[209] It is through

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[205] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52(4) (Autumn 1998), 897-898. For a similar study of norm entrepreneurship in international law, see Peter Hilpold, "Intervening in the Name of Humanity: R2P and the Power of Ideas," *Journal of Conflict & Security Law* 17(1) (2012).

[206] Adler builds on the work of Etienne Wenger, whose theory of communities of practice was rooted in his observation that people develop knowledge socially, i.e., through others who are engaged in similar activities and motivated by shared concerns. Etienne Wenger, *Communities of Practice: Learning, Meaning, and Identity* (Cambridge University Press: 1998).See also see Julie Mertus, "From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society," *American University International Law Review* 14(5) (1999), 1335-1389.

[207] Elena Baylis, "Function and Dysfunction in Post-Conflict Judicial Networks and Communities," *Vanderbilt Journal of Transnational Law* 47 (2014), 643.

[208] Emanuel Adler, "Communities of practice in International Relations," in *Communitarian International Relations: The epistemic foundations of International Relations* (Routledge Press, 2005), 15

[209] Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998), 2. Pertinent to complementarity, they note that such networks are "most prevalent in issue areas characterized by high value content and informational uncertainty, although the value-content of an issue is both a prerequisite and a result of network activity." Ibid.

participation in these relationships that information is not only transmitted, but also where meaning itself develops. These relationships and repertoires underscore "the role of knowledge communities, communities of discourse, and, more generally, 'communities of the like-minded' in the structuration and dynamic evolution of social reality."[210]

An attention to communities and networks resonates in the general context of international criminal law, which remains a specialized field (if one that enjoys significant influence), and in the context of a singular body like the ICC, popularly seen as the institutional apex of the international justice "movement." ICC staff not only share a sense of joint enterprise (to combat impunity), but so do the transnational communities of human rights NGOs, advocates, and academics that played a pivotal role in the Court's establishment. As Gerry Simpson argues, "Never before had non-state actors played such a prominent role in bringing a treaty into existence. NGOs such as Amnesty International, No Peace Without Justice and Human Rights Watch were highly influential – providing expertise and advice, drafting and circulating proposals and cajoling delegates."[211]

Marlies Glasius' monograph on the establishment of the ICC also captures well the development of these network ties and the sense of community among them. Describing the "organization of national and international conferences, expert meetings, public debates, seminars, symposia, and workshops" that were organized in the years leading up the Rome conference, she writes that the conferences were "characterized by an intermingling of officials with the NGO and the activist communities, and by high-level legal debates, rather than political confrontations."[212] International, regional, and national meetings alike "often boasted one or more international guests drawn from the ranks of the NGO Coalition, the Yugoslavia and Rwanda tribunals, or from the academic community."[213] This intermingling of networks focused on the normative growth of ICL and the institutional growth of the ICC endures post-Rome, concomitant with the expansion in complementarity's definition and meaning.[214] In Elena Baylis' words, "in the ICL tribunal context, [networks] are also acting as the framework for a transnational community that conceives of itself as building the field of ICL."[215]

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[210] Adler, *Communitarian International Relations*, 4.

[211] Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), 36. For detailed profiles of key actors and organizations, see Benedetti, Bonneau, and Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998,* 68-117; Claude E. Welch, Jr. and Ashley F. Watkins, "Extending Enforcement: The Coalition for the International Criminal Court," *Human Rights Quarterly* 33 (2011), 927-1031.

[212] Glasius, *The International Criminal Court: A global civil society achievement,* 39.

[213] Ibid.

[214] Academic collections about the Court regularly include contributions from Court officials and human rights advocates alike; academic institutions house a number of legal training projects that seek to enhance the impact of the "Rome Statute System"; and many former staff members of the *ad hoc* tribunals were part of the initial vanguard within the ICC (later moving to academia themselves). In short, to an unusual degree, "network ties and communal identity exist with and across organizational boundaries" in the field of international criminal law." See Baylis, "Function and Dysfunction in Post-Conflict Judicial Networks and Communities," 633.

[215] Ibid., 649. In defending international criminal justice, David Koller makes a related point: "[t]he ultimate value of international criminal law may rest … in its role in identity construction, in particular in constructing a cosmopolitan community embracing all of humankind." See David S. Koller, "The Faith of the International Criminal Lawyer," *NYU Journal of International Law and Politics* 40 (2008), 1060.

The dominant framing of complementarity as a catalyst for compliance/rule-following amongst these transnational communities of practice is also significant in illuminating their vertical engagement with advocates and civil society organizations at national level. As Adler argues, "learning means redefining reality by means of 'contextual' community knowledge, from which [practitioners] borrow in order to get their bearings."[216] Here, the transmission of information has also helped redefine the meaning of complementarity away from a technical rule of admissibility to a normative ordering principle, one that emphasizes the obligation of states to undertake domestic investigations and prosecutions in conformity with the Rome Statute. The pursuit of this framework has, in turn, brought international and domestic actors together in a series of joint "capacity-building" projects, a number of which were highlighted at the ICC Review Conference in 2010. From Avocats sans Frontieres' "Integrated Project on Fighting Impunity and the Reconstruction of the Legal System in the DRC" to "Danish Support to the War Crimes Court and the Judiciary in Uganda," these efforts have collectively furthered the cognitive framing of complementarity as a catalyst for accountability.[217]

4. Conclusion

Over the past decade, complementarity has become the normative site and an adaptive strategy for realizing a broad array of ambitious goals, wherein the ICC is meant to not only complement national forums, but to actively encourage domestic proceedings as well. As mediated by a dense, interconnected web of non-state actors—NGOs, ICC officials, human rights advocates, and academics—complementarity has thus become increasingly polysemous, imbued with multiple meanings (admissibility rule, as well as catalyst) and dimensions (cooperative, as well as coercive). Furthermore, in the shift towards a more "positive," policy-based vision for complementarity, states are understood to have not only the right to investigate and prosecute international crimes under the Rome Statute, but the duty to do so. Rather than a concession to sovereignty, then, the popular understanding of complementarity now sees it more as a condition of sovereignty, i.e., a series of benchmarks that states must satisfy in order to successfully challenge the ICC's control over a case. The following chapter examines the juridical nature of these challenges in further detail.

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[216] Adler, *Communitarian International Relations*, 20. Writing in another context, the legal scholar Annelise Riles' description of a discourse community is equally apt. As she notes, "'language' is quoted and reprinted from one conference document to the next and as states begin to conform their practices, or at least their discourse, to the norms expressed therein, some of what is agreed upon at global conferences gradually will become rules of 'customary international law.'" Annelise Riles, *The Network Inside Out* (University of Michigan Press, 2001), 8.

[217] For descriptions of these (and other) projects, see "Focal points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes," RC/ST/CM/INF.2, 30 May 2010 (see examples D and I). See also Jelena Subotic, "The Transformation of International Transitional Justice Advocacy," *International Journal of Transitional Justice* 6 (2012), 106-125.