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Symposium

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THE INTERNATIONAL CRIMINAL COURT
AND COMPLEMENTARITY: FIVE YEARS ON

Five years after the entry into force of the Rome Statute of the International Criminal Court (ICC), the principle of complementarity is at the heart of legal debate. Complementarity has been addressed by various policy documents of the Office of the Prosecutor (OTP) and several ICC decisions. The first practice of the Court has brought some innovation and unexpected developments. The Prosecutor has adopted a ‘policy of inviting and welcoming voluntary referrals by territorial states’, instead of making active use of his *proprio motu* powers under Article 15. New ideas, such as the concept of ‘positive complementarity’ have emerged and are in need of further clarification. The gravity requirement under article 17 (1) (d) has been applied in different and sometimes inconsistent ways by the OTP and Chambers.

The choices and policies of the Court on complementarity are of considerable importance for the future of international criminal justice, since they shape the very essence of the relationship of the Court to domestic jurisdictions as well as the interaction of states in the exercise of criminal jurisdiction.

This symposium is based on papers presented at a COST Action Workshop, which was organized and hosted by the Ludwig Boltzmann Institute of Human Rights in Vienna, 8–10 September 2006. The essays collected in this volume are designed to shed a critical light on the contemporary treatment and conceptualization of comple-

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mentarity and gravity. They examine different themes which require further scrutiny in the future.

The two opening contributions assess the merits and shortcomings of the Court's first practice. William Schabas revisits the legality and strategic value of the OTP's practice concerning self-referrals and gravity. Schabas challenges the existing practice from different angles, including its compatibility with the drafting history of the Statute, its deterrent effect and its overall consistency. He argues that the nascent practice of the Court has been inconsistent from a systemic point of view and unable to clarify the relationship between complementarity and the primacy of domestic jurisdiction.

Mohamed El Zeidy analyzes the origin and emergence of the gravity threshold in international criminal law and its treatment by the OTP and the Pre-Trial Chamber. He points out contradictions in the internal practice of the Court and limitations in the exercise of judicial review over prosecutorial discretion. He argues that the Pre-Trial Chamber should be mindful of the balance between prosecutorial discretion and judicial supervision in its future case-law.

The following two articles examine the concept of 'positive complementarity', which has been introduced by the OTP policy paper on complementarity in practice. William Burke-White takes a constructivist stance on 'positive complementarity'. He endorses the idea that the Court should actively encourage domestic investigations and prosecutions. He argues that a proactive policy is inherent in the system of justice established by the Rome Statute and necessary to align the Court's mandate to its resources and capacity. He develops a differentiated policy scheme, which distinguishes strategies concerning (i) states unwilling to prosecute, (ii) states unable to prosecute and (iii) potential divisions of labor between the Court and domestic jurisdictions.

Carsten Stahn revisits the normative features of 'positive complementarity' and its distinction from classical complementarity. He submits that the notion of 'positive complementarity' encompasses a spectrum of normative propositions with different degrees of support. He argues that the individual elements of this concept should be assessed in light of their impact on the impartiality and independence of the Court and the effectiveness of justice.

The last two contributions focus on themes related to the impact of complementarity on domestic jurisdictions. Joanna Kyriakakis revisits the exclusion of private corporations from the jurisdiction of the Court in light of the complementarity principle. She shows how

complementarity was used by different stakeholders in the negotiation of the Rome Statute to argue against ICC jurisdiction over legal persons. She challenges this assumption in light of the growing regulation of corporate criminal liability. She argues that complementarity provides a compelling argument to extend ICC jurisdiction to corporate misconduct.

Cedric Ryngaert examines the application of the ICC's 'able-and-willing' test in the exercise of universal jurisdiction by states. He analyzes cases in which states entitled to exercise jurisdiction have given priority to the territorial State or the State of the nationality of the offender by virtue of the 'subsidiarity principle'. He concludes that customary international law requires a state to defer its jurisdiction to a state with a closer nexus to the case. He submits that deference may be warranted by the principle of reasonableness. He pleads for a greater harmonization of the modalities of complementarity and 'subsidiarity'.

It is our hope that the contributions in this issue will encourage further critical research and reflection on the conception and treatment of a principle, which is gradually developing into a structural framework for the organization of relations among overlapping jurisdictions in the contemporary international legal order.