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Regional complementarity in international criminal law: making sense of the four-tiered justice paradigm

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CHAPTER 2. NEGLECT OF REGIONAL COMPLEMENTARITY IN THE JURISPRUDENCE AND PRACTICE OF THE ICC

Introduction

In this chapter, I answer the question: what implication does the jurisprudence and practice at the ICC have for the notion of regional complementarity? Primarily, I aim to ascertain whether the ICC opens or closes itself to the idea of regional complementarity through its jurisprudence, practice and policy directions. I examine ICC's jurisprudence and practice in order to show two things: First, the roles that the OTP and the Chambers in the ICC have played in diversifying our concept of complementarity. I show that while our understanding of complementarity has now moved from a very strict and restrictive conception as a legal device to a broader conception of the concept as a structural principle, the ICC continues to be trapped in an 'ICC-centric' approach of the concept, whereas, an alternative concept may be polycentricity. Second, in the operation of the ICC, the existing practice is not so open towards the idea of regional complementarity. I argue that an exploration of complementarity as currently applied by the ICC shows a Court that always wants to take priority and whose approach has not been inclusive of national mechanisms. The analysis shows a Court that wants for itself more and more powers despite the fact that its first Chief Prosecutor expressed hopes that the Court's success will be assessed by the fewer number of cases it deals with. I show the difference in approach between the OTP and the chambers. My main thesis in the chapter is that the jurisprudence of the ICC shows a court that expresses hopes for domestic systems to take charge of international crimes prosecution, but in practice, it has not always encouraged prosecutions by states. The Court continues to be driven by institutional self-interest, which dictates its preference for the ideals of cosmopolitanism and universality. This has negative implications for regional complementarity – which is in essence the idea that states, acting under a regional arrangement, can take charge of international crimes investigation and prosecution. How the ICC became trapped in this restrictive and ICC dominant concept of complementarity is the main point of this chapter. Structurally, I begin with a discussion on the practice of complementarity in the jurisprudence of the ICC. I trace how the OTP's conception of complementarity shifted from a restraining tool to a catalysing force. I also discuss the Chambers' jurisprudence that appears to restrain the shift. Thereafter, I analyse ICC's extension of judicial constructs. In this regard, I focus on the important jurisprudence, practice and policy direction of

the Court to argue that the ICC closes itself to the idea of regional complementarity. I conclude by urging the ICC to open itself more to the ideals that underpin regional complementarity.

1. ICC jurisprudence on complementarity

From its earliest days, one of the biggest concerns of the ICC has been how it would manage the likely-contentious relationship between itself and national mechanisms that perform similar or overlapping roles of punishing international crimes. This much was revealed through the charged and contentious discussions at the Rome Conference, which led to the adoption of the Rome Statute. This concern was partly responsible for the detailed and long discussions on the complementarity provisions of the Rome Statute. At this early point in history, complementarity existed as a restrictive conception that exists to protect the sovereignty of states. This restrictive conception of complementarity has two sides to it: admissibility and the *ne bis in idem* principle. These two concepts jointly serve to implement the principle of complementarity. However, while the ICC has a developing jurisprudence on admissibility, it is yet to pronounce itself on *ne bis in idem*. I will therefore only focus on ICC's developing jurisprudence on admissibility to trace how complementarity shifted from a restraining tool to a catalysing force.

Based on the language of article 17 of the Rome Statute, complementarity was meant to be a legal rule that organises the relationship between the ICC and national mechanisms. However, as practice began to evolve at the ICC, the need to clarify this, as well as other concepts, began to arise. This then gave rise to the notion of positive complementarity. What, however, led to this shift from complementarity as a restraining tool to a catalysing force? What roles did state, non-state actors and scholars play in the shift and how have those roles heavily impacted our current understanding of the concept of complementarity? This section attempts to answer these questions. In so doing, it identifies the factors that have generally led to this shift, as well as the roles played by theorisation and legal scholarship. I argue that the shift is evidence that ICL is alive and it is a prototype and ground-breaking precedent for things to come: the notion of regional complementarity. I show that the latter understanding of complementarity as a catalysing force is more akin to the idea of regional complementarity that this work promotes.

1.1. Complementarity as a restraining tool in the period before the shift

The common understanding of the notion of positive complementarity as one that involves efforts to catalyse states to prosecute international crimes within their territories, was not always so common, particularly in the early days after the coming into force of the Rome Statute.¹ This was a period when the new statute was experiencing its fair share of trials and errors, in an attempt to put its provisions into practice. At this time, it was fairly expected that stakeholders would experience a measure of uncertainty in their efforts to operationalize the statute. These stakeholders consist of a fair blend of writers, theorists, activists, diplomats and civil society practitioners. They have played a lot of roles in the Court's work.² Their activities helped to shape the direction of the concept of complementarity during the early days of the Court. In drawing attention to this period, Stahn observes that "the 'enabling' side of complementarity emerged only step-by step."³ At this time, the traditional concept of complementarity was variously understood by states, as useful for limiting ICC's involvement in matters that should fall within the purview of states, and a right to challenge ICC's actions where the Court is perceived to have encroached on the sovereignty of states.⁴ Thus, as far as states are concerned, the concept is a restraining tool, usable for limiting the powers of the ICC, with the resultant effect of preserving a state's sovereignty and powers to investigate and prosecute crimes within its jurisdiction. On its part, as noted by Stahn, the ICC viewed the concept as a tool to cover, mitigate or overcome its own weaknesses.⁵ In this regard, it relied on states to enforce its decisions through promoting a regime of partnership and cooperation, and also promoted the idea as one to ensure that fewer cases proceed to the court.⁶

¹ C. M. De Vos 'A Catalyst for Justice? The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo' (2016) PhD Thesis, Leiden University, 33.

² For the role that civil society has played in the Court's work generally, see for example C. Bjork & J. Goebertus 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya' (2014) 14 *Yale Human Rights and Development Journal* 5.

³ C. Stahn "Taking complementarity seriously: On the sense and sensibility of 'classical', 'positive' and 'negative' complementarity" in C. Stahn & M. El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011) 234.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

Thus, whether as a restraining or a shielding tool, these traditional ideas of complementarity presented a limited understanding of the concept's inherent potential. This necessitated a need to strike a balance between the understanding that complementarity is both a restraining tool and a catalysing force. As it turned out, the balance was not sufficient to reflect the full potential of complementarity.

The drafting history of the Rome Statute reveals that this traditional understanding of complementarity informed all the discussions that led to the formal insertion of the concept into the Rome Statute. Discussions at the ILC, the UNGA through its Ad Hoc and Preparatory Committees as well as discussions during the Rome conference sufficiently showed that the major concern was the need to limit the powers of the ICC in order to preserve state sovereignty.⁷ It is therefore not surprising that from its early days, many commentators referred to the Statute in derogatory manner. For instance, a scholar had opined that the Statute is a document that 'pays too great a tribute to state sovereignty'.⁸

1.2.How the OTP signals the shift

Despite the balance and compromises reached at Rome, the adoption of the Rome Statute was heavily criticised.⁹ In an attempt to mitigate this, the OTP began to articulate a more benign understanding of complementarity. As early as 2003, even when the work of the court had yet to come into full gear, the OTP sensed the need to clarify many aspects of the Statute's complementarity provisions, which may pose a challenge to the work of the Court. Thus, it convened 'an expert consultation process on complementarity in practice for the benefit of the future Chief Prosecutor and the staff of his Office.'¹⁰ The purpose was 'to prepare a reflection paper on the potential legal, policy and management challenges which are likely to confront the OTP as a consequence of the complementarity regime of the Statute.'¹¹ The outcome of this process was the 'Informal Expert Paper', which stressed that the success of the ICC would be seen

⁷ See Chapter 1 of this dissertation.

⁸ F. Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court", 19 *Leiden Journal of International Law* 4, 1096

⁹ On the criticisms of the Rome Statute, see for example, A. Teitelbaum 'Statute of the International Criminal Court: A Critique' (1999) 26 *Social Justice* 107-114.

¹⁰ ICC-OTP 'The principle of complementarity in practice' (2003).

¹¹ *Ibid.*

from ‘the establishment of an international order wherein national institutions respond effectively to international crimes, thereby obviating the need for trials before the ICC...’¹² This approach to complementarity only served to expatiate the prosecutor’s statement that ‘as a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.’¹³

This approach to complementarity signified a shift from the earlier understanding that its purpose was to limit the powers of the ICC from descending into an arena meant for states. In the Informal Expert Paper, the need for cooperation and partnership between states and the ICC was stressed. The authors expressed hopes that the ICC’s effectiveness can be seen through encouraging consistent and rigorous national proceedings. It hopes to achieve this, not through prosecution by the Court, but instead, ‘through encouragement and co-operation; the prospect of the ICC exercising jurisdiction; its own exemplary and standard-setting proceedings; and through ICC’s moral presence, which will shape perspectives and strengthen resolve on the need for accountability.’¹⁴

1.3.How the Chambers’ jurisprudence on complementarity restrains the shift

While the OTP might have been the frontrunner in the race to signal a shift from restraint to cooperation, it was at the chambers that a firmer approach - which effectively balances the flexibility that the OTP’s spearheaded-shift might have occasioned – was developed and communicated. In a number of decisions, the earliest of which were between September 2008 to September 2009, the court signalled the direction it wished to follow, in relation to admissibility.

The early practice of the court did not provide a deep understanding of the admissibility principle, nor did it give sufficient clarity for its application.¹⁵ The Court’s first opportunity to consider the issue of admissibility arose in 2005, where as noted by Batros, the Court only stated that the case

¹² ICC-OTP ‘The principle of complementarity in practice’ (2003) 3.

¹³ Statement by Mr. Luis Moreno-Ocampo, at the Ceremony for the Solemn Undertaking of the Chief Prosecutor, 16 June 2003.

¹⁴ ICC-OTP ‘The principle of complementarity in practice’ (2003) 4-5.

¹⁵ M. Konfort & M. Vajda ‘The Principle of Complementarity in the Jurisprudence of the ICC’ (2014) 3 *ZPR* 1, 9-27 at 10.

against the defendants ‘appears to be admissible’.¹⁶ In that case, admissibility was not addressed in detail by the court.¹⁷

However, in the 2006 case of Thomas Lubanga Dyilo¹⁸ and Bosco Ntaganda¹⁹ in the *Situation in the Democratic Republic of the Congo (DRC)*, the court delved into a greater analysis of the admissibility question. In this case, Pre-Trial Chamber I considered that the admissibility test was an integral prerequisite for an arrest warrant. The court then ruled that admissibility test has two parts. In its words, PTC I observed that:

The Chamber considers that the admissibility test of a case arising from the investigation of a situation has two parts. The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case, or are unwilling or unable, within the meaning of article 17 (1) (a) to (c), 2 and 3 of the Statute. The second part of the test refers to the gravity threshold which any case must meet to be admissible before the Court.

Accordingly, the Chamber will treat them separately.²⁰

In the end, PTC I ruled that the case against both suspects is admissible under the first part, as the conducts the ICC sought to try are different from the conducts tried in the national proceedings (the same person/same conduct test).²¹ On the second part of the test, while the court found that the case against Lubanga was of sufficient gravity, it found otherwise for Ntaganda.²² This ‘two

¹⁶ *Prosecutor v. Kony et al.*, ICC -02/04-01/05-1-US-Exp, 12 July 2005, 2 (unsealed pursuant to ICC-02/04-01/05-52, 13 October 2005).

¹⁷ Ben Batros ‘The evolution of the ICC jurisprudence on admissibility’ in C. Stahn & M. El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011) at 560.

¹⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-8-Corr (reclassified as public pursuant to ICC01/04-01/06-37), 9 March 2006, para. 33 (‘Lubanga Arrest Warrant Decision’).

¹⁹ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-20-Anx2, 21 July 2008.

²⁰ *Situation in the Democratic Republic of the Congo*, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58. ICC-01/04-02/06-20-Anx2 21-07-2008 3/69 SL PT, at para. 29.

²¹ On this, see R. Rastan ‘What is ‘Substantially the Same Conduct’?: Unpacking the ICC’s ‘First Limb’ Complementarity Jurisprudence’ (2017)15 *Journal of International Criminal Justice* 1, 1–29, particularly at 2, where the author summarizes the bulk of existing literature as suggesting that “the ‘same person/same conduct’ test is too narrow, that it subverts the meaning of Article 17 ICC Statute, including its object and purpose, and that the ‘substantially the same conduct’ variant has confused the test further.”

²² Batros (n. 17), 561.

steps test' approach to admissibility has been the subject of multiple scholarly analyses²³ and was further solidified by the Appeals Chamber decision in the Gbagbo case.²⁴

It was not until 2009, in the case of *Prosecutor v. Katanga and Ngudjolo* that the ICC experienced its first admissibility challenge by an accused person.²⁵ Katanga argued against the application of the same conduct test to his case. He also contended that even if the court was to apply the same conduct test, the government of DRC was already investigating him for the same conduct that the ICC was trying. In the end, both the Trial Chamber and the Appeals Chamber dismissed Katanga's challenge and held that the case against him was admissible.²⁶ The Katanga admissibility challenge was quickly and closely followed by the Bemba admissibility challenge, which was decided in the same manner as the Katanga admissibility challenge. The Chamber decided that the 'challenge is without foundation.'²⁷

A number of 'settled laws' have emerged from the Appeal Chamber's Katanga admissibility decision. For one, it is now clear that the chambers entertaining an admissibility challenge must first consider the questions as to whether the national authorities are investigating or prosecuting, or in the alternative, have investigated and decided not to prosecute the alleged crimes. The words employed by the Chambers were quite clear to this effect:

Therefore, in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the

²³ See for example, T. Hamilton, 'Case Admissibility at the International Criminal Court' in (2015) 14 *The Law & Practice of International Courts and Tribunals* 2, 305-317.

²⁴ Appeals Chamber, 27 May 2015, ICC-02/11-01/12-75-Red ("Simone Gbagbo Judgment").

²⁵ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-949, of 11 March 2009 ('Katanga Admissibility Challenge').

²⁶ See *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-T-67-ENG ET, 12 June 2009 and *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1497, 25 September 2009.

²⁷ Situation in the Central African Republic in the Case of *The Prosecutor V. Jean-Pierre Bemba Gombo*: Decision on the Admissibility and Abuse of Process Challenges.

cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.²⁸

In essence, it is now settled that the ‘same conduct test’ is what must be carried out first, before the test on unwillingness and inability, and the latter analysis is unnecessary where the previous test has failed. But, in spite of this settled aspect, other grey areas remain. For example, as expressed by Ben Batros,

The Appeals Chamber in Katanga thus clarified one element of the test for admissibility under Article 17(1)(a) and (b) – the primary role of the activity, or inactivity, of the state. However, it expressly declined to rule or provide guidance on another critical aspect: inactivity with respect to what? Article 17(1)(a) and (b) state that a case will be inadmissible where ‘the case is being investigated or prosecuted’, or ‘the case has been investigated’ (emphasis added). But what constitutes ‘the case’ for the purpose of admissibility under these provisions?²⁹

Not only do these grey areas remain, what was earlier thought to be settled was shown to be otherwise. In the *Gaddafi case*,³⁰ the same conduct test was not satisfied, and at that point, the Libyan challenge to admissibility ought to have failed. Yet, the PTC still turned to address inability, in a move that clearly departed from the Appeal Chamber’s position.³¹ Perhaps the PTC’s intention was to give a stronger basis for its decision, but it unsettled an otherwise ‘thought to be settled’ position of the law. Additionally, the admissibility challenge against the second defendant,

²⁸ ICC-01/04-01/07 OA 8. *Situation in The Democratic Republic of The Congo: 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, para. 78.

²⁹ Batros (n. 17) 571.

³⁰ ICC-01/11-01/11 *The Prosecutor V. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*. Decision on the admissibility of the case against Saif Al-Islam Gaddafi.

³¹ M. Tedeschini, ‘Complementarity in Practice: the ICC’s Inconsistent Approach in the Gaddafi and Al-Senussi Admissibility Decisions’ (2015) 7 *Amsterdam Law Forum* 1.

Abdullah al-Senussi was allowed.³² The Al-Senussi's case was hailed as pushing the Chambers' jurisprudence towards positive complementarity.³³ It was one case where the Chambers upheld a defendant's admissibility challenge. The Chambers, through the decisions earlier discussed, have always been cautious to entertain an expansive interpretation of the complementarity clause. In the present case, however, the PTC and the Appeal Chambers' decisions granted an expansive interpretation of the admissibility provisions of the Statute.³⁴

In a 2011 decision, the ICC Appeals Chambers rejected Kenya's admissibility challenge which was brought pursuant to Article 19(2)b of the Rome Statute. It was the first time that a state asserted that the ICC had no jurisdiction because the state was investigating the alleged crimes.³⁵ On an analysis that compares Kenya's argument with that of the Appeals Chambers, Jalloh submitted that:

The Kenya conception finds support in the Rome Statute and in the drafting history of the complementarity provision during the Rome Conference as well as the preparatory committees, where the preservation of national sovereignty was a primary goal. The Court's conception appears to rest primarily on a broader, more interventionist and perhaps unrealistic vision of the ICC.³⁶

The Chamber's strict interpretation appears to have turned complementarity into primacy.³⁷ The Court continues to interpret and apply the admissibility provisions of the Statute in a way that discourages states from prosecuting international crimes in their own territories.³⁸ An analysis of the information provided by the Kenyan government to support its position suggest that there was

³² ICC-01/11-01/11. *In The Case of The Prosecutor V. Saifal-Islam Gaddafi and Abdullah Al-Senussi*. Decision on the admissibility of the case against Abdullah Al-Senussi dated 11 October 2013.

³³ Y. Rees, 'Towards Positive Complementarity', *PhD Studies in Human Rights Blogpost*, 26 July 2014 [available at <https://humanrightsdoctorate.blogspot.com/2014/07/towards-positive-complementarity.html> - accessed 6 February 2024].

³⁴ See ICC-OI/II-OI/IIOA6. *In The Case of The Prosecutor V. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*. Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi' dated 24 July 2014.

³⁵ C. Jalloh, 'Kenya vs. The ICC Prosecutor' (2009) 53 *Harvard International Law Journal Online* 270.

³⁶ *Ibid*, 277.

³⁷ *Ibid*, 276.

³⁸ See generally K. Jon Heller, 'A Sentence-Based Theory of Complementarity', (2012) 53 *Harvard International Law Journal* 1.

no investigatory inaction.³⁹ The dissenting opinion found that the Court ‘did not give sufficient weight to the sovereign rights of Kenya in balancing the interests at stake.’⁴⁰

The much-criticized admissibility jurisprudence of the Court⁴¹ is propelled by cosmopolitanism. One of the strands of cosmopolitanism is the assumption that national mechanisms are incapable of carrying out investigation and prosecution that meets the standard provided by the Statute. This assumption goes against the fundamental intent of states when the Rome Statute was agreed upon by states. This also lends credence to my submission that it appears that the ICC, while holding itself out as a court that wants states to prosecute international crimes occurring in their own territories, its jurisprudence suggests otherwise. This is also a pointer to the court’s likely approach towards the idea of regional complementarity.

The OTP articulates complementarity as a positive tool for the advancement of cooperation between states and the Court. The Chambers have however consistently interpreted it as a tool for restraining states in exercising their investigative or prosecutorial powers. The role of the Chambers in this regard has been tailored towards checking the tendency of states to interpret the positive complementarity notion from the OTP as a liberty to conduct non-genuine investigation or prosecution. The Chambers decisions on admissibility continue to cast the Court as one monolithic universal organisation. What the Chambers pronounce, irrespective of the articulation by other organs of the Court, is the jurisprudence of the court. According to Holmes, “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”⁴² It is therefore proposed that the Chambers need to align itself with the OTP’s articulation of complementarity in order to be able to give more roles to states and regions in the investigation and prosecution of crimes.

³⁹ T. Obel Hansen ‘A Critical Review of the ICC’s Recent Practice Concerning Admissibility Challenges and Complementarity’ (2013) 13 *Melbourne Journal of International Law*, 16.

⁴⁰ ICC Doc: No. ICC-01/09-01/11 OA ‘Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute Dissenting Opinion of Judge Anita Ušacka, para. 28.

⁴¹ See for example P. Clark *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press 2018).

⁴² O. W. Holmes, Jr., ‘The Path of the Law’, (1987) 10 *Harvard Law review*. 457, 460-461.

2. ICC's extension of judicial constructs and jurisdictional overreach

Its jurisprudence aside, the practice at the ICC, including its policy directions, may also suggest that the Court may be reserved towards to the idea of regional complementarity. The way the court has extended judicial constructs, its move towards interventionism and how it has translated itself to a workhorse, from the initial conception of the court as a watch dog,⁴³ all suggest that the court may not be exactly be open to the idea of giving states and regions more roles in the investigation and prosecution of international crimes in their territories.

Article 1 of the Rome Statute is clear that the ICC 'shall be complementary to national criminal jurisdictions.' The ICC was never intended to be the primary forum for prosecution of international crimes. It is only in exceptional cases, where certain conditions are met, that the ICC ought to have jurisdiction over international crimes. The conditions were meant to guard against ICC's arbitrary extension of its powers.⁴⁴ However, practices in the court suggest that the ICC has been extending its powers by a mix of judicial activism and extension of judicial constructs. It had gradually become a court that prioritizes interventionism to judicial restraint.⁴⁵ Two examples will suffice.

In the Lubanga case, the Chamber's decision as it relates to commission of crime and command responsibility was criticized by scholars,⁴⁶ defence lawyers⁴⁷ as well as ICC judges who gave dissenting opinions.⁴⁸ The criticisms are to the effect that the Chamber was reluctant to apply the principle of command responsibility. Instead, the Court invented a new theory of individual responsibility by holding commanders and their subordinates as co-perpetrators.⁴⁹ The Appeals

⁴³ P. McAuliffe 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism' (2014) 13 *Chinese Journal of International Law* 294-295.

⁴⁴ M. Newton 'The Quest for Constructive Complementarity' in Stahn & El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011) 304.

⁴⁵ See generally Ignaz Stegmiller 'Positive Complementarity and Legitimacy – Is the International Criminal Court Shifting from Judicial Restraint Towards Interventionism?' in N. Hayashi & C. Bailliet (eds) *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017).

⁴⁶ *Ibid*, 309-310. Newton calls the decision 'an erosion of the law of command responsibility'. See also A. Appazov 'Judicial Activism' and the International Criminal Court' (2015) 17 *iCourts Working Paper Series*, 11-12.

⁴⁷ Defence lawyers argued that the decision went 'beyond the clear terms of the Statute and was not supported by customary international law.' Lubanga (ICC-01/04-01/06-803-tEN), Decision on the Confirmation of Charges, 29 January 2007, para. 330.

⁴⁸ Both Judges Adrian Fulford and Christine van den Wyngaert gave dissenting opinions, although Judge Van den Wyngaert's opinion was given in a different case before the court. See Judge Van den Wyngaert's opinion in Ngudjolo Chui (ICC-01/04-02/12-4), Judgment Pursuant to Article 74 of the Statute, 18 December 2012.

⁴⁹ Newton, (n. 44) 311.

Chambers of the ICTY, in a different case, had declared that co-perpetratorship is alien to the settled jurisprudence of the Tribunal.⁵⁰ The Chamber declared that ‘this mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law, or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers.’⁵¹ This example suggests that the court’s practice in this case, as in others, does not bode well for the idea of regional complementarity.

In another example, ICC’s ‘Decision Pursuant to Article 15 on the Authorization of an Investigation into the Situation in the Republic of Kenya’⁵² has been criticized as lowering the threshold of crimes against humanity.⁵³ The decision appeared to have muddled up the distinction between ‘crimes against humanity, as a category of international crimes, and serious national crimes.’⁵⁴ The effect of the decision is that it expanded the scope of the crimes that the ICC could deal with to include those that states should prosecute. Judge Hans-Peter Kaul, in his dissenting opinion stated that ‘The qualitative requirement of "State or organizational policy" in article 7(2) (a) of the Statute distinguishes crimes against humanity from other common crimes which are to be prosecuted at the national level only.’⁵⁵ He goes further to warn against a broad interpretation of ‘article 7(2) (a) of the Statute infinitely beyond its conceptual confines.’⁵⁶

Surprisingly, in these two decisions, there was no lacuna or ambiguity in the law. The position of the law on the two issues are supposedly clear. Yet, the Chambers found a need to ‘artificially inject its own view of the law rather than sustain strict fidelity to the intent of states parties’⁵⁷ as expressed in the Rome Statute. Even if there were lacuna or ambiguity in the law, opinions are divided on whether international criminal judges should fill those lacunae in their interpretation and application of the law. There are those who argue that it is not judges’ duty to fill those

⁵⁰ Prosecutor v. Milomir Stakic, Case No. IT-97-24-A, Judgment, 22 March 2006, para. 62.

⁵¹ *Ibid.*

⁵² Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 on the Authorization of an Investigation into the Situation in the Republic of Kenya (31 March 2010).

⁵³ A. Appazov ‘Judicial Activism’ and the International Criminal Court’ (2015) 17 *iCourts Working Paper Series*, pg. 15.

⁵⁴ *Ibid.*

⁵⁵ Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, para. 54 (31 March 2010).

⁵⁶ *Ibid.*, para. 55.

⁵⁷ Newton (n, 44) 311.

lacunas.⁵⁸ There are others who believe judges should do so.⁵⁹ I would support the view that judges should fill lacunae in the law, wherever it is appropriate. However, this should not be interpreted as a freedom to introduce their own views into the law, especially where what they introduce goes against settled principles of law as in the command responsibility case earlier discussed, or where it stands settled law on its head. In filling lacunae also, judges should refrain from an interpretation that goes against the intents of the drafters of the law. This is what is wrong with judicial activism and ICC judges' extension of judicial construct. This is also as judicial activism, in this case, portends the court as a mechanism that is not open to the idea of regional complementarity.

There are arguments that support the introduction of judicial activism into international criminal justice. First, that ICL supports and complements national jurisdictions suggest that it may need to improvise in order to surmount different legal, practical and logistic hurdles, hence the need for activism or the progressive development of law.⁶⁰ Second, ICL is an emerging body of law – unclear and incomplete, thus necessitating 'judicial creativity'.⁶¹ Third, ICL's interaction with various national mechanisms and systems sometimes require broad interpretations that accommodate jettisoning judicial restraint. Fourth, certain provisions in the statute are left to the discretion and progressive interpretation of the judges. The Rome Statute has a number of lacunas that were left by the drafters to be filled by creative interpretation of the judges.⁶² Lastly, some of the more regular subjects of ICL are senior political and military leaders, including leaders of armed groups, issues arising from trials are often complex and require activism to address them.⁶³

My position is that judicial activism ought to be embraced, in principle. In fact, without activism, ICL may not have developed to the point it is today. The establishment and practice at the Nuremberg, Tokyo and the UN *ad hoc* Tribunals were steeped in activism.⁶⁴ However, the problem

⁵⁸ See D. Jacobs, 'International Criminal Law', in J. Kammerhofer and J. D'Aspremont, *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014) 473.

⁵⁹ See for example G. Maučec 'The International Criminal Court and the Issue of Intersectionality—A Conceptual and Legal Framework for Analysis' (2021) *International Criminal Law Review*, pg. 32.

⁶⁰ S. Zappalà *Judicial Activism v. Judicial Restraint in International Criminal Justice* (The Oxford Companion to International Criminal Justice 2009) 4.

⁶¹ See generally S. Darcy & J. Powderly *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press 2009).

⁶² See M. Delmas-Marty 'Ambiguities and Lacunae: The International Criminal Court Ten Years on' (2013) 11 *JICJ* 3, 553.

⁶³ Zappalà, (n. 60) 5.

⁶⁴ *Ibid.*

with judicial activism as has been seen in the ICC context is that it opens judges to the possibility of substituting the law with their personal opinions. It also increases the risk of suspending settled principles of law. Recent example of judicial activism by the Chambers has been described as ‘an unreasonable encroachment on the OTP’s discretion.’⁶⁵ Where judicial activism has had the effect of extending the Chambers’ powers beyond the intent of states and the drafters of its statutes, it may reveal an institution that is more concerned with protecting and extending its powers without giving states sufficient room to function. This does not bode well for the idea of regional complementarity. The ICC must show itself as a court of last resort that it was established to be. It must give room for states acting singly or jointly, where possible, to investigate and prosecute, without arrogating those powers to itself.

3. Burden sharing and self-referral as OTP policies

Flowing from the idea that the ICC was never intended to be the primary court for prosecuting international crimes, is the understanding that states are expected to be monitored and supported by the ICC in the performance of this duty. However, it appears that the ICC has gradually rejected a monitoring role for active involvement in crimes investigation and prosecution. Two examples of this in the Court’s policy direction is the adoption of ‘burden-sharing’ as a strategy; and the commitment to the policy of ‘self-referral’. In a 2003 report to the ASP, the Prosecutor introduced the ideas of burden sharing and self-referral when he stated that his office’s ‘role could be facilitated by a referral or active support from [a state]. The Court and the territorial State may agree that a consensual division of labour could be an effective approach.’⁶⁶ I do not necessarily oppose self-referral and burden sharing as international criminal law strategies. It is the idea that the ICC actively solicits cases by encouraging states to commit to these strategies that negates the intent underlying the Rome Statue. These policies suggest that the ICC may not be open to the idea of regional complementarity. It reveals a court that wants to take on more roles while reserving lesser roles for states or a conglomeration of states acting under a regional arrangement.

⁶⁵ See L. P. Rossetti ‘The Pre-Trial Chamber’s Afghanistan Decision: A Step Too Far in the Judicial Review of Prosecutorial Discretion?’ (2019) 17 *JICJ*, 586.

⁶⁶ ICC Doc: ICC Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, 8 September 2003.

Recent examples of collective referrals of situations to the ICC by groups of states, appear to support the notion that states can collectively take an action that each of them, acting independently, can undertake – which is one of the strands of regional complementarity. For instance, 43 states had jointly referred the Ukrainian situation to the Chief Prosecutor of the ICC.⁶⁷ Also, in 2018, a group of states referred the Venezuelan situation to the ICC.⁶⁸ Suffice it to say that the idea that states can collectively refer a situation to the ICC mirrors the idea that such roles should be undertaken by states acting collectively., particularly when they act as a regional group, either to prosecute using their own mechanism, or to ‘outsource’ that duty to another mechanism.

3.1.Burden-sharing

The OTP summarises its position on burden sharing as follows:

The Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand, it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.⁶⁹

Burden-sharing was not mentioned in the Rome Statute and was not considered at the Rome Conference. It was a creation of the OTP. It emerged partly as a result of early self-referrals by African states. The OTP consciously turned it to a policy to further the Court’s cosmopolitan status. As a policy of the Court, the OTP concludes a Memorandum of Understanding on Burden-Sharing with states.⁷⁰ Aside from the need to remain relevant and busy, the OTP conceives of burden-sharing as a policy because of its belief that the ICC is a better forum for prosecuting serious international crimes.⁷¹ The import of this for regional complementarity is that the Court continues to see itself as the primary avenue for international criminal trials. With this in mind, the ICC will

⁶⁷ ICC ‘Situation in Ukraine’ [available at <https://www.icc-cpi.int/situations/ukraine> - accessed 7 February 2024].

⁶⁸ ICC ‘Situation in the Bolivarian Republic of Venezuela’ [available at <https://www.icc-cpi.int/venezuela-i> - accessed 7 May 2022].

⁶⁹ ICC-OTP ‘Paper on some policy issues before the Office of the Prosecutor’ (2003).

⁷⁰ For example, see ICC Doc: No.: ICC-01/11-01/11 Public Redacted version of ‘Request for Disclosure of Memorandum on Burden Sharing between the ICC Office of the Prosecutor and the Government of Libya’.

⁷¹ P. McAuliffe ‘From Watchdog to Workhorse: Explaining the Emergence of the ICC’s Burden-sharing Policy as an Example of Creeping Cosmopolitanism’ (2014) 13 *Chinese Journal of International Law* 294-295.

not give sufficient room to states, even if they are acting jointly, under a regional arrangement. The Court will continue to contest the realm of international criminal justice with States whose primary function it is to prosecute international crimes. The burden-sharing policy, just like its subset policy of self-referral, continues to show the court as a cosmopolitan project that consistently strives for cosmopolitan ideals. These ideals oppose the tenets of regional complementarity.

3.2. Self-referral

The policy of self-referrals has been strongly promoted by the ICC and easily accepted by states.⁷² In its ‘Report on the activities performed during the first three years’, the OTP stated that ‘the Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court.’⁷³ Article 14 of the Rome Statute stipulates self-referral. Scholars have argued that what was contemplated by the drafters of the Rome Statute is state-to-state referral, and not a situation where a state refers a situation in its own territory to the ICC.⁷⁴ The idea of state-by-state referral is what is currently playing out where more than forty state parties have referred the situation in Ukraine to the ICC.⁷⁵ The validity of the argument on state-by-state referral is premised on the fact that the two other referral systems in the Rome Statute are that of the Security Council and the *proprio motu* referral by the Prosecutor. These two appear to have been put in place to fill the gap where states fail to refer other states to the Court.⁷⁶ It is also questionable if the drafters of the Rome Statute imagined a situation where a state would refer itself to the new court. Not even with the strenuous debates that attended the thinking that the new court would compromise state sovereignty. Moreover, the Statute does not mention the possibility of the OTP or the Court, fashioning self-referral as a proactive tool through a policy direction of the Court. Schabas had argued that self-referral was the creation of the OTP and not a result of any creative interpretation of the Statute.⁷⁷ He also contended that nowhere in the discussions leading

⁷² A. Mueller & I. Stegmiller ‘Self-Referrals on Trial: From Panacea to Patient’ (2010) 8 *JICJ*, 1293.

⁷³ ICC-OTP ‘Report on the activities performed during the first three years (June 2003 – June 2006)’.

⁷⁴ See for example P. Kirsch & D. Robinson ‘Initiation of Proceedings by the Prosecutor’ in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* Vol. 1 (Oxford University Press 2002) 622–623.

⁷⁵ Situation in Ukraine (n. 67).

⁷⁶ Cassese and others (n.74).

⁷⁷ W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 309.

to the adoption of the Statute at Rome was it contemplated as a strategy for the new Court.⁷⁸ There are other scholars who also question the idea of actively seeking self-referrals from states by the OTP.⁷⁹ For all of its merits, self-referral has its inherent demerits. One of them is the possibility of states employing it as a tool to abdicate responsibility and dump cases on the ICC.⁸⁰ Secondly, states have used this to refer cases of their political opponents, thus using the ICC to score political points against opponents.⁸¹ How then, can national mechanisms develop if the ICC gives them a leeway to escape from their responsibility? It is even more worrisome that the OTP encourages self-referral as a policy, considering that it can be abused in a manner that fundamentally flaws the complementarity provisions of the Rome Statute. Self-referral and the ideas underpinning positive complementarity appear to be contradictory. It is irreconcilable to argue, on the one hand, that states be encouraged to take the duty of prosecuting international crimes seriously, while at the other end, encouraging the same states to refer cases to the ICC. A court that preaches the gospel of self-referral appears as one that goes cap in hand to solicit and beg for cases from states, often catalysing them to self-refer, instead of seeking to help them develop their capacity for handling international crimes in their territories. This is a court in search of relevance, and that relevance extends to erroneously contesting the space with states, whether acting singly, bilaterally or jointly in the prosecution of crimes within their territory.

The Chamber also appeared to have endorsed self-referral. For example, in its reaction to the challenge against self-referral in the Katanga Appeal, the Chamber ruled that it was not convinced by the Appellant's argument that states relinquishing their jurisdiction in favor of the ICC negates the Rome Statute.⁸² The Chamber concluded that it 'may decide not to act upon a State's relinquishment of jurisdiction in favor of the Court.'⁸³ Here, the Chamber not only approved of

⁷⁸ W. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2009) 6 *JICJ*, 751.

⁷⁹ See for example K. Ambos *Treatise on International Criminal Law - Volume III: International Criminal Procedure* (Oxford University Press 2016) 257.

⁸⁰ D. Robinson 'The Rome Statute and its Impact on National Law' in A. Cassese & others (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 5.

⁸¹ S. Nouwen & W. Werner 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21 *European Journal of International Law* 4, 941-965.

⁸² *Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07OA 8, 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, para.85.

⁸³ *Ibid.*

such relinquishment, it also leaves the ICC with the sole choice of which cases to pick and those to discard, as if the ICC is the primary jurisdiction for international crimes prosecution.

Some of the earlier practical justifications for self-referral appears to be the need for the court, as an emerging institution, to build its case load and justify its existence;⁸⁴ the need to start an investigation promptly without a need for a PTC 1 authorization and the effectiveness of the OTP's work if its work in a particular state is supported by that state.⁸⁵ However, these justifications cannot continue to avail this practice as the court continues to develop. The Court can no longer be referred to as a baby in the international legal space, having survived for more than two decades.

A preferable approach therefore is for the court to reluctantly accept self-referral. Accepting self-referral must be based on strict conditions that do not leave room for states to deliberately dump cases on the Court. This can be done by avoiding open-ended referrals or as part of a completion strategy. This then poses the question to what extent the OTP should have room to 'negotiate' the terms of referrals. The Court must realize that one of its key duties is to encourage states to fulfil their duty of international crimes investigation and prosecution. That duty was not imposed on states by the Rome Statute. States inherently possess the power to punish offenders in their own territories, in line with national and international standards. However, states have a duty to cooperate imposed upon them by the Rome Statute. Without this cooperation, the ICC may not be able to function. For example, the ICC has no police of its own, and as such cannot effect arrest of defendants, without support from states. This is where it becomes necessary to contend that the goal of the ICC should relate more to encouraging and empowering states to prosecute crimes in their territory. Any effort to centralize this duty at the ICC still requires the support of states, including on arresting and surrendering defendants to the Court.⁸⁶

This practice of encouraging states to self-refer suggests that the ICC wants more powers for itself. The practice reveals a court that continues to encourage states to rely on it for international crimes investigation and prosecution. This approach shows a court that is reluctant to yield grounds to states, rather, it is contesting grounds that are originally meant for states to function. This could

⁸⁴ C. Stahn 'Perspectives on Katanga: An Introduction' (2010) 23 *Leiden Journal of International Law* 2, 5.

⁸⁵ P. Gaeta 'Is the Practice of "Self-Referral" a Sound Start for the ICC' (2004) 2 *JICJ*, 950.

⁸⁶ P. Hobbs 'The Catalysing Effect of the Rome Statute in Africa: Positive Complementarity and Self-Referrals' (2020) 31 *Criminal Law Forum* 346.

mean that the ICC may be reluctant to open itself to the idea of regional complementarity. Its current practices and direction suggest a court that is closed to the idea of allowing states (even if they choose to act under a regional arrangement) to take on more roles and responsibilities in international criminal justice. ICC's protectionism has also been observed in the debate over the court's co-existence with the proposed Special or Hybrid Tribunal for Ukraine.⁸⁷

In a number of other situations before the Court, including the Ugandan situation, other authors have previously narrated the ICC's fierce resistance to attempts at amicable domestic resolution through a peace deal between the Ugandan government and the LRA rebels.⁸⁸ This is in addition to the idea that the ICC often elevates politics above the interests of justice.⁸⁹ This is why some TWAIL authors have argued that the ICC's application of international criminal law 'often appears to be more driven by the perpetuation of global power asymmetries and old patterns of subjugation.'⁹⁰ Surprisingly though, while these views about the ICC persist, it has also shown itself as a court that consistently refers to and relies on human rights jurisprudence from regional human rights courts across all the Court's judicial divisions, albeit, in an inconsistent manner.⁹¹ What is not in doubt, however, is that the ICC uses the jurisprudence of other courts, including that of regional human rights tribunals to build its own case law. Thus, it can be argued that the ICC has a selective engagement with regionalism. It chooses when and how it engages with regional institutions, often without 'a clear methodology for reference to regional human rights jurisprudence in the reasoning of the chambers.'⁹² It has previously acknowledged the important role that regional courts may play in international criminal justice. In a judicial seminar organized and moderated by the judges of the court, the ICC noted that

The role of regional courts within the framework of the Rome Statute was discussed. The UN Charter, for example, contemplates and encourages regional

⁸⁷ P. Butchard and N. Walker *Potential merits of a Special Tribunal on Ukraine* (House of Common's Library Debate Pack 2023) 4.

⁸⁸ S. Nouwen & W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan,' (2010) 21 *European Journal of International Law* 4, 941–961.

⁸⁹ *Ibid.*

⁹⁰ O. Okafor & U. Ngwaba 'The International Criminal Court as a 'Transitional Justice' Mechanism in Africa: Some Critical Reflections' (2014) 9 *International Journal of Transitional Justice*, 1-19.

⁹¹ A. Jones 'Insights into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court (2016) 16 *Human Rights Law Review* 4.

⁹² *Ibid.*, 728.

arrangements to deal with international peace and security. This may encourage States to pool together sovereignties to solve problems which cannot be resolved individually. This is deemed to be a particularly important issue given the Rome Statute's silence on regional jurisdictions. The ICC judges refer frequently to decisions of regional courts (notably human rights courts) in their decisions, fostering a positive relationship between the judicial bodies.⁹³

This suggests that the Court ought to prepare itself for the inevitable: a more concrete role for regional courts in ICL. ICC's comments also underscore that we have witnessed an increasing level of cooperation and contribution to international crimes prosecution from regional bodies, either as commitments to support through logistical and financial aids or even outright attempts to prosecute at a regional level. This may not be surprising given that some have contended that while international criminal law is universal in theory, its practice is regional.⁹⁴

Given this background, there is no doubt that this engagement with regional mechanisms, that is based on power relations, requires a review. The analysis above suggest that the ICC has continually adopted an 'ICC-centric' interpretation of its relationship with other institutions, including national mechanisms that may choose to jointly operate under a regional arrangement. This excludes the virtue of regional complementarity and perpetuates the hierarchical notion of complementarity. If the current ICC-centric practice of complementarity was to be applied between ICC and any regional mechanism, that relationship will be criticized in the same manner that the current ICC and states relationship is being criticized. The thinking that the ICC should exist alone in the international justice firmament, as evidenced by the Court's application of complementarity, will not bode well for the practice of regional complementarity.

In the alternative, there are scholars who have posited that the ICC ought to embrace a polycentric vision of international criminal justice.⁹⁵ By this, I agree with the proposition that a justice system

⁹³ Judicial Seminar: Complementarity and Cooperation of Courts in an Interconnected Global Justice System. International Criminal Court (ICC) 18 January 2018, The Hague, Netherlands. Summary of seminar proceedings Welcoming remarks by Judge Silvia Fernández de Gurmendi, ICC President, 3.

⁹⁴ W. Schabas 'Regions, Regionalism and International Criminal Law' (2007) *New Zealand Yearbook of International Law* 2.

⁹⁵ C. Stahn "Re-imagining the ICC in a Multipolar World" in Stahn C (ed) *The International Criminal Court in its Third Decade: Reflecting on Law and Practices* (Brill Nijhoff 2024) 562.

‘is not monocentric, but can have different centres that interplay.’⁹⁶ ICL’s value is seen in the interplay between the different justice models and institutions that make up the ICL landscape.⁹⁷ The implication of adopting greater polycentricity is that regional or national justice institutions do not necessarily need to model themselves after the ICC.⁹⁸ Secondly, it implies that complementarity should not be viewed only as a ‘form of emancipatory interaction with the ICC as a model, but as a form of cooperative justice that respects the need for legitimate difference, contextual adjustment and greater regional input.’⁹⁹

Conclusion

Complementarity has advanced from its previous status as a mere legal principle to a tool for encouraging state and non-state parties to the Rome Statute, to take the business of accountability more seriously. While this is the OTP’s articulation of positive complementarity, the Chamber seem to have applied the admissibility wing of complementarity as a tool to restrain states from being the primary forum for international criminal trials. As this chapter has shown, the ICC needs to open itself more in its complementarity jurisprudence and practice. As has been shown, the court continues to close itself to the possibility of allowing states to take on more responsibility on international criminal trials. It has continued to conclude cooperation agreements with regions like the EU¹⁰⁰ and the Inter-American¹⁰¹ regions. It continues to explore the possibility of cooperation agreements with others like the Asia Pacific region.¹⁰² It sometimes holds high-level regional seminar on cooperation.¹⁰³ However, these agreements amount to nothing where the ICC continues to hold itself out as a cosmopolitan project that gives lesser roles to states. The Court’s jurisprudence has shown that it has a preference for trials within its Chambers, rather than allow states whose primary duty it is to prosecute international crimes. Through its decisions, the Court

⁹⁶ *Ibid*, 570.

⁹⁷ *Ibid*.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*, 571.

¹⁰⁰ ICC-PRES/01-01-06 Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, 10 April 2006.

¹⁰¹ OAS, IACHR Signs Cooperation Agreement with International Criminal Court [available at https://www.oas.org/en/iachr/media_center/PReleases/2012/039.asp – accessed 21 May 2022].

¹⁰² ICC-ASP, Report of the Bureau on the Plan of action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court, ICC-ASP/18/24, 20 November 2019 para. 15.

¹⁰³ ICC, ‘High-Level ICC Regional Seminar on Cooperation opens in Romania’, 21 March 2016.

has extended judicial constructs, and applied the law in a manner that reveals an obsession with cosmopolitanism. The OTP has implemented policies that gives it more responsibility to intervene in areas where states should have primacy. The policy of burden sharing and its sub-policy of self-referral negates the OTP's articulation of positive complementarity. The Court therefore continues to show itself as an institution that is closed to the idea of regional complementarity. The analysis in this chapter reveals a Court that wants more powers for itself. The court's jurisprudence and practices need to return to the original intent of the drafters of the Rome Statute. The practice so far at the ICC seem to support the view that the Court is actively and deliberately dissuading states from taking the frontal stage in prosecuting international crimes. Primacy for international criminal trials lies with states, whether acting individually, or under a regional arrangement. To that end, the question as to 'what implication does the jurisprudence and practice at the ICC have for the notion of regional complementarity' was aimed at ascertaining whether the ICC opens or closes itself to the idea of regional complementarity through its jurisprudence, practice and policy directions. The analysis in this chapter shows a court that needs to do more to embrace the ideals underpinning regional complementarity. One of such ideals is the concept of polycentricity which prescribes that different decision making centres can exist in a whole, with substantial independence and autonomous prerogatives, while striving toward common goals.