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

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CHAPTER 6. REGIONAL COMPLEMENTARITY IN OTHER NOTIONS OF COMPLEMENTARITY

Introduction

In this chapter, I answer the question: how does regional complementarity mirror the other existing notions of complementarity? I aim to show how different dimensions of complementarity that we have seen in the ICC are also relevant to the idea of regional complementarity. The chapter provides the theoretical foundation on how we should practically construct regional complementarity. I start with the meaning and functions of complementarity, while arguing that description is preferable to definition. The chapter also includes analysis of the existing theories of complementarity that have been articulated in international criminal justice. My argument is that the existing notions of complementarity already support the theories underpinning regional complementarity. My claim that regional complementarity relates to other existing notions of complementarity was established by showing the similarities between regional complementarity and strands in the other notions of complementarity. The chapter shows that regional complementarity also has both classical and positive dimensions. In its classical dimension, it can be understood simply as an organizing principle for competing jurisdiction. In its positive dimension however, it facilitates a regime of cooperation between regional courts and the ICC, as well as regional courts and states. There is also a focus on a number of organizing principles that can be employed in arranging the relationship between a regional mechanism and the ICC on one hand; and regional mechanism and states, on the other hand. My main thesis in the chapter is that regional complementarity is a new notion but it is related to other notions of complementarity that have emerged. Structurally, I begin the chapter with a description of complementarity. Thereafter, I examine the existing notions of complementarity to establish the similarities between them and the ideas that underpin regional complementarity. Lastly, I conclude with an exploration of the classical and positive dimensions of regional complementarity, while emphasizing some organizing principles to operationalise positive regional complementarity.

1. Defining complementarity

Complementarity was not defined in the Rome Statute.[1] During the drafting, 'several delegations felt that an abstract definition of the principle would serve no useful purpose and found it preferable to have a common understanding of the practical implications of the principle for the operation of the international criminal court.'[2] As a continuously evolving concept, its exact meanings are difficult to ascertain; hence the desirability of describing, instead of defining it. It has been variously described as a 'technical concept and a systemic feature of the ICC',[3] 'an organising principle for the regulation of concurrent jurisdiction,' and 'one of the cornerstones of the architecture of the Rome Statute'.[4] Politi refers to it as 'one of the key features (if not the key feature) of the Court.'[5] Kleffner calls it one of the three fundamental cornerstones of the ICC, the others being its permanent nature and its jurisdiction over the most serious crimes of international concern.[6]

The concept serves at least four different functions *to wit*:

a) It protects sovereignty, by reaffirming the primary role of States in exercising criminal jurisdiction over international crimes; b) it promotes effective investigation and prosecution, by encouraging states to make genuine efforts to hold perpetrators accountable in line with their duty to investigate and prosecute crimes; c) it facilitates a certain division of labor between different layers of jurisdiction, i.e. by resolving conflicts of jurisdiction and limiting cases that come before the

[1] See UN Doc A/50/22 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' General Assembly Official Records · Fiftieth Session Supplement No. 22 (A/50/22); para 30.
[2] *Ibid.*
[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] C. Stahn 'Introduction: bridge over troubled waters: Complementarity themes and debates in context' in Stahn & El Zeidy (CUP 2011) 1.
[5] M. Politi, 'Reflections on complementarity at the Rome Conference and beyond' in Stahn & El Zeidy (CUP 2011) 142.
[6] J.K. Kleffner 'Complementarity in the Rome Statute and National Jurisdictions' (Oxford University Press 2008) 4.

ICC; and d) it stimulates cooperation and sharing of good practices between international and domestic justice actors.[7]

The Rome Statute establishes the ICC as a judicial body complementary to national criminal jurisdictions.[8] This complementary relationship is not only based on respect for the primary jurisdiction of States, but also on practical considerations of efficiency and effectiveness since States will most likely have the best access to evidence, witnesses and resources,[9] as well as their law enforcement capacities. It is in this respect that there exists a marked difference between the jurisdiction of the ICC and that of the UN *ad hoc* tribunals (ICTY and ICTR). While the ICC can only act when there is an inaction, unwillingness or an inability of the national jurisdiction to act in the prosecution of crimes within the jurisdiction of the Court, the situation before the *ad hoc* tribunals presents a different picture: the primacy of the tribunals vis-à-vis national courts.[10] This implies that 'at any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal.'[11]

As per the Rome Statute, the circumstances that may constitute 'unwillingness' or 'inability' are outlined in article 17, which has been described as the 'centrepiece' of the principle of complementarity.[12] Such circumstances may include instances where proceedings are carried out for the purposes of shielding a person from criminal responsibility,[13] unjustified delay in the proceedings at the domestic level,[14] lack of impartiality and independence, as well as conducting proceedings in a manner not consistent with bringing the accused person to justice.[15] These circumstances suggest that the existence of proceedings at the domestic level is not in itself a bar to an ICC intervention, except if the proceedings at the domestic level fulfil certain requirements. On the other hand, inability may be established where there is a total or substantial collapse or

[7] See generally C. Stahn 'Fair and Effective Investigation and Prosecution of International Crimes, Inventory and State-of-the-Art: Context, Cluster 1 and Cluster 2 (International Nuremberg Principles Academy 2018*)* 5.
[8] Article 1 of the Rome Statute
[9] R. Cryer & Ors *An Introduction to International Criminal Law and Procedure* 3rd edn, (CUP 2014) 154.
[10] See article 9(1) and (2) of the ICTY Statute and article 8 of the ICTR Statute.
[11] *Ibid.*
[12] D. Robinson 'Three Theories of Complementarity: Charge, Sentence or Process?' (2012) 53 *Harvard International Law Journal Online* at 177.
[13] Article 17(2)(a) of the Rome Statute.
[14] Article 17(2)(b) of the Rome Statute.
[15] Article 17(2)(c) of the Rome Statute.

unavailability of the domestic judicial system, which may be exemplified by the State's inability to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[16]

The primary duty to exercise jurisdiction over the core crimes defined under the ICC Statute lies on national institutions. The ICC only steps in to remedy the deficiencies resulting from the failure of one or more States to fulfil their duties.[17] As El Zeidy puts it, 'the ICC is intended to supplement the domestic punishment of international violations, rather than supplant domestic enforcement of international norms [by] balancing its supranational power against the sovereign right of States to prosecute their own nationals without external interference.'[18] Thus, if a State with jurisdiction possesses a functional criminal adjudicatory mechanism and also demonstrates the will to investigate and prosecute, it would be given the opportunity to act before there could be an ICC intervention.[19] In this regard, the concept has become a bridge that connects, as well as a structure that enables, the distinctive and autonomous international and domestic justice systems working together, while it also gives rise to some challenges. The challenges are partly because the concept has broader implications and continues to shape various dimensions of the ICC and domestic practice.[20]

2. Existing theories of complementarity and regional complementarity

There is no shortage of legal scholarship and significant academic publications on complementarity,[21] but there remain many grey areas in its theorisation and understanding. The concept has undergone significant transformation,[22] perhaps because, like the Greek Hydra god,[23] it 'has many faces'.[24] It appears simple, but it is extremely complex such that the ICC has been

[16] Article 17(3) of the Rome Statute.
[17] M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers 2008) 4.
[18] *Ibid* 158.
[19] A. Okuta 'Smallest Share of the Pie? Accountability for International Crimes at the Domestic Level: Case Studies of Kenya, Uganda and Cote D' Ivoire' (Unpublished PhD Thesis, University of Amsterdam 2016) 34.
[20] Stahn, *(*n. 4) 1.
[21] See footnote 61 in the Introduction.
[22] Stahn, (n. 3) 233.
[23] E.M. Berens, *The Myths and Legends of Ancient Greece and Rome* (MetaLibri 2009) 199.
[24] Stahn, *(*n. 4) 1.

faced with pressing questions regarding its interpretation.[25] Since its formal insertion into the Rome Statute however, different notions of complementarity have emerged. Accordingly, the following notions have been theorised in available academic literature:[26] positive complementarity,[27] classical complementarity,[28] proactive complementarity,[29] horizontal complementarity,[30] negative complementarity,[31] constructive complementarity,[32] radical complementarity,[33] and regional complementarity.[34] The emergence of these notions remains one of the direct consequences of the heavy academic scrutiny that the concept has been subjected to. It has [generally] been "theorized in antagonisms, such as 'global' versus 'local or regional' interests, 'policy' versus 'judicial' issues, 'vertical' versus 'horizontal', 'negative' versus 'positive' or 'passive' versus 'proactive' complementarity."[35] I will focus on the negative versus positive, as well as the global versus regional theorisations of the concept. I present a short discussion on the theories underpinning each of the already identified notions. I then present regional complementarity as an example of a wider and more strategic interpretation of the concept. I distinguish classical complementarity from positive complementarity and note that this distinction remains the traditional theorisation of the concept.[36]

2.1. Positive complementarity

Positive complementarity 'foresees a coordinated approach to the prosecution of crimes by the ICC and national authorities.'[37] It implies that the ICC will not only prosecute persons who bear the most responsibility for crimes under its investigation, but also that the Court will encourage and support national trials where possible.[38] The ICC's Office of The Prosecutor (OTP) noted that

[25] El Zeidy (n. 17) 1.
[26] Stahn (n. 7) 5.
[27] ICC-OTP 'The principle of complementarity in practice' (2003).
[28] C. Stahn 'Complementarity: A Tale of Two Notions' (2008), 19 *Criminal Law Forum* 87-113.
[29] W. Burke-White 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008), 49 *Harvard International Law Review* 53-108.
[30] C. Ryngaert 'Horizontal complementarity' in Stahn & El Zeidy (CUP 2011) 855-887.
[31] Stahn, (n. 4) 1.
[32] M. Newton 'The Quest for Constructive Complementarity' in Stahn & El Zeidy (CUP 2011) 304-340.
[33] K. Heller 'Radical Complementarity' (2016) 14 *Journal of International Criminal Justice* 637-665.
[34] M. Jackson 'Regional Complementarity: The Rome Statute and Public International Law' 14 *Journal of International Criminal Justice* 1061-1072.
[35] Stahn, *(*n. 4) 7.
[36] Stahn, (n. 3) 233.
[37] F. Donlon 'Positive Complementarity in Practice' in Stahn & El Zeidy (CUP 2011) 920-954.
[38] *Ibid.*

the Court's approach to complementarity may be guided by principles of partnership and vigilance.[39] This partnership dimension, as different from the admissibility loop,[40] requires the ICC to maintain a constructive and positive relationship with States that are genuinely investigating and prosecuting international crimes.[41] In practice, the OTP can variously encourage States to initiate national proceedings; can help to develop cooperative anti-impunity strategies; provide advice and assistance to facilitate national efforts as well as agree with States that a consensual division of labour will serve the best interests of justice.[42]

General approaches towards implementing the idea of positive complementarity include partnership and dialogue with States through encouraging national actions, promoting anti-impunity measures and providing direct assistance and advice to States. Here, the OTP commits to actively reminding States of their obligation to adopt and implement effective legislation either in public statements or in private bilateral meetings; commits to exchange information and evidence to facilitate a national investigation or prosecution; commits to motivate genuine national proceedings by committing funds and resources to these activities; commits to proceed gradually on trainings for officials at the national level; commits to providing technical advice and broker other assistance that may be appropriate within the mandates of the OTP.[43]

The ICC's Assembly of State Parties (ASP) defined positive complementarity as 'all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute.'[44] It involves legislative assistance from the ICC to national mechanisms and these may include 'assistance with drafting appropriate legislative frameworks, assistance in overcoming domestic hurdles for passing such legislations and also, assistance in ratification of an Agreement of Privileges and Immunities and other legal instruments pertaining to investigating and prosecuting the most serious crimes.'[45]

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[39] ICC-OTP (n. 27) 3.
[40] M. Hosain 'Positive Complementarity: An Approach to Enhance Cooperation with States and end Impunity under International Criminal Court' (2013) 2 *AALCO Journal of International Law* 2 at 206.
[41] ICC-OTP, (n. 27) 3.
[42] *Ibid* 4.
[43] *Ibid* 5-6.
[44] ICC-ASP 'Report of the Bureau on Stocktaking: Complementarity' (2010) at para. 16, ICC-ASP/8/51, 18 March 2010.
[45] *Ibid* para. 17.

Additionally, it connotes technical assistance and capacity building with regard to domestic judicial systems. Examples of such assistance may include 'training of police, investigators and prosecutors, capacity building with regard to protection of witnesses and victims, forensic expertise, training of judges and training of defence counsel, security for and independence of officials.'[46] Lastly, the notion also entails 'assistance with construction of physical infrastructure, such as courthouses and prison facilities, and the sustainable operation of such institutions.'[47]

The notion is grounded in 'certain legal aspects, such as cooperation of the ICC with domestic jurisdictions under article 93(10), managerial duties of the OTP under article 54, as well as policy considerations.'[48] It 'implies interdependency between two fora rather than the complete independence of the ICC from domestic courts'[49] and 'introduces an element of flexibility and a managerial division of labour into the relationship between the Court and domestic jurisdictions.'[50] It has been referred to as the 'more gentle side [of complementarity], which defines the relationship between the Court and domestic jurisdictions in a positive fashion (e.g. burden-sharing on the basis of the comparative advantages and assistance from the Court to States).'[51]

Positive complementarity began with its articulation in the 2003 OTP's expert informal paper.[52] In 2004, the Prosecutor noted in an address to the Diplomatic Corps in The Hague, that one of his office's key strategic priorities would be to take a positive approach to complementarity and that instead of competing with national systems for jurisdiction, the OTP would encourage national proceedings wherever possible.[53] In the 2006 Report on Prosecutorial Strategy, the OTP reiterated its understanding of positive complementarity to include encouragement of genuine national proceedings, reliance on national and international networks as well as participation in a system of international cooperation.[54] In his address to the ICC-ASP in 2009, the Prosecutor summarized

[46] *Ibid*.
[47] *Ibid.*
[48] Stahn (n. 7) 6.
[49] H. Takemura 'A Critical Analysis of Positive Complementarity' in *Max Planck Encyclopedias of International Law* (Oxford Public International Law – undated).
[50] Stahn (n. 28) 88.
[51] *Ibid* 89.
[52] ICC-OTP (n. 27).
[53] 'Statement of the ICC Prosecutor to the Diplomatic Corps, 12 February 2004.
[54] ICC-OTP 'Report on Prosecutorial Strategy' (2006).

the focus of positive complementarity as 'the role that different stakeholders can play to ensure the achievements of the goals defined by the Rome Statute.'[55]

In paragraph 17 of the ICC-OTP Prosecutorial Strategy 2009-2012, the OTP stated that 'the positive approach to complementarity means that the Office will encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance.' The Strategy outlines the OTP's approach in this regard to include: a) providing information collected by the Office to national judiciaries upon their request pursuant article 93 (10), subject to the existence of a credible local system of protection for judges or witnesses and other security-related caveats; sharing databases of non-confidential materials or crime patterns; b) calling upon officials, experts and lawyers from situation countries to participate in OTP investigative and prosecutorial activities, taking into account the need for their protection; inviting them to participate in the Office's network of law enforcement agencies; sharing with them expertise and trainings on investigative techniques or questioning of vulnerable witnesses; c) providing information about the judicial work of the Office to those involved in political mediation such as UN and other special envoys, thus allowing them to support national/regional activities which complement the Office's work; and d) acting as a catalyst with development organizations and donors' conferences to promote support for relevant accountability efforts.[56] It was however at the 2010 Kampala Review Conference that the most visible development of the notion of positive complementarity was enunciated and elaborated upon.[57] The 2023 Draft Policy on Complementarity and Cooperation has further built on the work done in Kampala in 2010.[58]

Similar to positive complementarity, my theory of regional complementarity also anticipates that a region ought to be prepared to prosecute, but must also support and encourage national trials. In the Hissène Habré case, as has been shown in Chapter 4, the African Union supported the prosecution of the former ruler in the territory of Senegal. Such supports are recommended as part of efforts to activate regional complementarity. Regional complementarity espouses the virtues of partnership, vigilance, assistance and burden sharing between states and the regional tribunal.

[55] 'ICC Prosecutor's Address to the Assembly of State Parties' (18 November 2009) 9.
[56] ICC-OTP 'Prosecutorial Strategy 2009-2012' (2010) 5, para. 17(a-d).
[57] Hosain *(*n. 40) 208. See also ICC-ASP (n. 44).
[58] ICC-OTP, OTP Draft Policy on Complementarity and Cooperation (2023), para. 19.

Implementing regional complementarity will require dialogue between the region and states, in an effort to provide support and partnership to themselves, where necessary.

2.2. Classical or negative complementarity

Classical complementarity is the notion that complementarity is 'an instrument to overcome sovereignty fears against the exercise of jurisdiction by the Court and a tool to remedy shortcomings or failures of domestic jurisdiction through application of the criteria listed in article 17 of the Rome Statute.'[59] It is sometimes referred to as the 'negative' notion of complementarity.[60] By this latter reference, it exists as a theoretical counterpart to the notion of positive complementarity[61] and proceeds from the understanding that 'positive complementarity could not exist without negative complementarity.'[62] The notion 'does not suffice to explain the relationship between the Court and domestic jurisdictions.'[63] In theory, the notion is the '"threat-based" side of complementarity which is designed to foster compliance through a sophisticated system of carrots and sticks.'[64] It is also the 'competition' and 'dispute-settlement' based perception of the role of complementarity as a principle under international law.[65]

The origin dates to the idea of settling disputes through 'delineation of competencies.'[66] Its objectives are 'to preserve State sovereignty and to reconcile it with the judicial independence of the Court.'[67] These objectives were to address two concerns that arose during the negotiations that preceded the adoption of the Rome Statute. In the first place, it was believed that 'complementarity would provide solution to various dimensions of the "primacy dilemma" of the *ad hoc* tribunals, i.e., to concerns relating to the authority of international criminal tribunals, and their limited

[59] Stahn, *(*n. 28) 88.
[60] G. Boffey 'Assessing Complementarity: The ICC and Human Rights Policy in Colombia' (Unpublished Ph.D. Thesis, University of Western Australia 2015) 66.
[61] Stahn, (n. 3) 260.
[62] See ICC Review Conference, 'Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap, Informal Summary by the Focal Points', RC/ST/CM/1 (22 June 2010), para. 4.
[63] *Ibid.*
[64] *Ibid*.
[65] *Ibid* 93.
[66] Stahn, *(*n. 3) 251-252.
[67] *Ibid.*

capacity.'[68] Secondly, this notion of complementarity was to address the fears about the Court's independence, particularly the *proprio motu* powers of the Prosecutor.[69]

The classical notion espouses the three ideas behind the 'backstop' role of the Court. First is the idea that the ICC is a sword while the domestic jurisdiction is a shield. The underlying assumption here is that 'international and domestic jurisdiction operate as competing layers of jurisdiction' and the Court should intervene as a guardian where there is non-compliance from States. It is a buffer for domestic jurisdictions against ICC intervention, through challenges of jurisdiction and admissibility. Secondly, it focuses on the idea that the ICC is meant to compensate for the weaknesses of domestic jurisdiction. This proceeds from the understanding that it is the failure of national mechanisms that triggers an ICC intervention. The role of the ICC would be limited to acting when the national jurisdiction, which is the first forum for investigation and prosecution, fails to act. The ICC is then called upon to complement the weakness of the national mechanisms. Thirdly, it focuses on the idea that the ICC should enhance compliance through threat. States are not only expected to act by investigating and prosecuting where necessary, their compliance is also expected to undergo continuous monitoring and supervision or as 'checks and balances' from the ICC.[70]

2.3. Proactive complementarity

Given the ICC's limited legal mandate, resources and capacity, and in the light of the high hopes and expectations that were invested in the Court at its inception, a policy approach that allows 'the ICC to participate more directly in efforts to encourage national governments to prosecute international crimes themselves' is what Burke-White calls 'proactive complementarity.'[71] It emphasizes the Court's ability to 'motivate and assist national judiciaries', 'cooperate with national governments' and 'use political leverage to encourage States to undertake their own prosecutions of international crimes.'[72] The Court can only fulfil its mandate where States have fulfilled their obligations to hold international crimes perpetrators accountable. While admitting

[68] *Ibid* 252.
[69] *Ibid*.
[70] *Ibid* 252-253.
[71] Burke-White (n. 29) 54.
[72] *Ibid*.

that this notion is similar to the notion of positive complementarity, Burke-White argues that the current notion 'better reflects the nature of the policy and better highlights its distinction from the Court's present approach that might be termed "passive complementarity."'[73] The notion 'recognizes that the ICC can and should encourage, and perhaps even assist, national governments to prosecute international crimes.'[74] With an understanding that the Rome Statute does not only limit the Court's power, but also creates a system that allows the prosecution of crimes at both domestic and international levels, proactive complementarity seeks to put in place a system where the Court can 'catalyze national judiciaries to fulfill their own obligations to prosecute international crimes through the use of the Court's legal and political powers.'[75] The underlying idea here is that the Rome Statute envisages that national mechanisms and the ICC would be involved in various interactions for the purposes of accountability for international crimes. It provides mechanisms for regulating the allocation of authority between them.[76] This system of cross-interactions is the basis for proactive complementarity as it envisages ICC's ability and potential to encourage prosecutions at the national level, and also contribute effectively to functional domestic judiciaries thereby reducing the number of cases that the ICC would prosecute to the ones where there is no available domestic alternative.[77] Thus, ICC's efforts would be expected to spur or incentivize national governments to action in fulfilling their primary legal obligation to investigate and prosecute crimes. This notion admits that national efforts can not only be catalyzed, but also supported by external assistance.[78]

Regional complementarity mirrors proactive complementarity in the sense that a region or its tribunals could participate more directly in all efforts to encourage a state to prosecute international crimes in their national courts. Given the homogeneity that often exists between states in the same region, regional complementarity may better achieve the same aims as proactive complementarity. Interventions from states within the same region may enjoy more legitimacy as it would reduce

[73] *Ibid* at footnote 4.
[74] *Ibid* 56.
[75] *Ibid* 57.
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*

the tendency to accuse the regional tribunal of imperialism – a charge that had been leveled against the ICC.[79]

2.4. Horizontal complementarity

The notion of horizontal complementarity takes a departure from the vertical nature of the relationship between States and the ICC wherein compliance entails the ICC's duty to 'supervise the investigative and prosecutorial work of states, and assume its responsibilities if that work proved to be below acceptable standards.'[80] Ryngaert examines the proper legal relationship between 'bystander' states (those states that do not have a strong nexus with an international crime situation) and 'territorial' states (states on the territory of which a crime has been committed). This relationship is horizontal in the sense that it does not involve a vertical relationship between ICC — a supranational entity — and states. Rather, it is an examination of the proper relationship between two or more 'equal' states, which are at par, under international law. The notion attempts to answer the question: "are 'bystander' states that have no link with those crimes but nevertheless want to prosecute them required to defer to states that have a stronger link and that are able and willing to investigate and prosecute?"[81] Put differently, should there be a principle or a notion of horizontal complementarity?

To explain this, the principle of universal jurisdiction 'is understood as the exercise of jurisdiction over a crime by… a State in the absence of a territorial, personal, or other nexus to the crime. It is jurisdiction that is based solely on the (heinous) nature of the crime.'[82] The principle allows states to prosecute a crime irrespective of the location of the crime and the nationality of the perpetrator or the victim.[83] Now, where a State attempts to exercise its obligation under this principle, likely questions that may arise would include: what will be the nature of the prosecutorial role played by

[79] F. Cowell 'Inherent Imperialism: Understanding the Legal Roots of Anti-imperialist Criticism of the International Criminal Court' (2017) 15 *JICJ* 4, 667-687.
[80] Ryngaert (n. 30) 855.
[81] *Ibid.*
[82] C. Ryngaert 'The International Criminal Court and Universal Jurisdiction' (March 2010) *Working Paper* No. 46 Leuven Centre for Global Governance Studies 3.
[83] X. Philippe 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (2006) 88 *IRRC* 862 at 377.

such a state; which state would have precedence in a situation where a territorial state is willing and able to investigate and prosecute same crime?

In an attempt to answer some of these questions, Ryngaert turns the vertical nature of the relationship between the ICC and States into a horizontal one between States and submits that, just like the ICC is only able to step in when a State has failed in its duty to prosecute, a bystander State should only step in where a territorial state has failed. He admits that this is however problematic when examined under certain elements of the international legal system.[84]

First, from a sovereignty perspective, States are equals and, 'the jurisdiction of the bystander State is concurrent with, and not complementary to, the jurisdiction of the territorial or national state.'[85] Under the principle of universal jurisdiction, if violation was in respect of 'a peremptory norm of general international law', all States could, in principle, have an interest or obligation to prosecute, irrespective of their status as bystander or territorial States. This means that horizontal complementarity negates the principle of universal jurisdiction and thus enjoys little support. In the separate opinion of some Judges of the ICJ in the *Arrest Warrant* judgment of 2002, it was noted that '[a] State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned.'[86] Secondly, there is the absence of *ne bis in idem* principle. The principle holds very strongly at the domestic level but 'there is as yet no universally accepted *ne bis in idem* rule available at the international level'.[87] In essence, at the transnational level, the principle does not seem to hold the same force of law as it does at the domestic level. The UN Human Rights Committee in *AP* v. *Italy* stated *inter alia* that '[t]he Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.'[88] Now, if a

[84] Ryngaert, (n. 30) 859.
[85] *Ibid*.
[86] See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, ICJ, Separate Opinion of Judge Higgins *et al*., Judgment, 14 February 2002, para. 59.
[87] See V. Bockel & W. Bastiaan *The Ne Bis in Idem Principle in EU Law' European Monograph Series* (Kluwer Law International 2010). See also COE *Extradition: European Standards: explanatory notes on the Council of Europe convention and protocols and minimum standards protecting persons subject to transnational criminal proceedings* (Council of Europe Publishing 2006) 140.
[88] See Communication 204/1986, pg. 67 at para. 7.3 in CCPR/C/OP/2 International Covenant on Civil and Political Rights' Selected Decisions of The Human Rights Committee under The Optional Protocol Volume 2 Seventeenth to Thirty-Second Sessions (October 1982-April 1988).

territorial state had indeed investigated and prosecuted a certain crime, a subsequent trial of the same defendant and crime, by a bystander State would not be invalid given this position.[89] Thirdly, there is the absence of a credible threat posed by a bystander State. The classical notion of complementarity contextualizes the threat-based side of complementarity, which is designed to foster compliance. The resultant effect cannot obviously be the same where a bystander State attempts to enforce compliance from a territorial State for the former's requests to arrest and deliver a defendant. A bystander State can probably not muster enough international support to enforce cooperation from the territorial State. Even the ICC with all its international weight often lacks cooperation from States, for the purposes of executing an arrest warrant.[90] Fourthly, although positive complementarity implies that States and the ICC can cooperate effectively and may even share tasks, there is no evidence 'that positive complementarity is approached *in a systematic fashion* by States.' For example, bystander States would probably not (and in previous examples, did not) directly encourage territorial States to prosecute crimes, as the ICC would do to States. Asking for information on investigation and prosecution would not qualify as encouraging territorial States to prosecute.[91] Lastly, Ryngaert asks whether it is discernible from state practice that States 'generally apply the principle of horizontal complementarity and consider themselves to be bound by it as a matter of law'.[92] He found that there is 'little practice of States conducting complementarity analysis and it cannot reasonably be stated that States concerned consider a complementarity analysis to be mandated by law.'[93] He then concluded that 'there is no strong legal requirement of horizontal complementarity [but that] nevertheless, it amounts to proper criminal policy [for bystander State] to defer to 'territorial' States that intend to embark in good faith on their own investigations and prosecutions.'[94]

Regional complementarity does not anticipate a horizontal relationship between regions and states, although it prescribes a horizontal relationship between a regional mechanism and the ICC, considering that each of these mechanisms is a conglomeration of states, properly constituted. However, the relationship between regions and states, as well as the relationship between the ICC

[89] See generally Ryngaert (n. 30).
[90] *Ibid.*
[91] *Ibid* 865-866.
[92] Ryngaert (n. 30) 871.
[93] *Ibid* 871.
[94] *Ibid* 855.

and member states is vertical. However, the vertical nature of the relationship does not suggest that regional tribunals will be in a situation to dictate to states. That would contradict the tenets underpinning the positive dimension of regional complementarity. This dimension requires that mutual respect, assistance and partnership are the guiding principle of the vertical relationship between states and regional tribunals.

2.5. Constructive complementarity

Constructive complementarity proposes a framework of cooperative synergy that allows States to work with the Court to help end impunity.[95] This framework anticipates 'ICC working with States to enhance their domestic capacity and defer to domestic investigations or prosecutions in any feasible conditions.'[96] In practice, this implies that the Court can defer to the 'good faith reasoning' of national officials applying the local law, 'even where the form of the domestic charges varies from the prosecutorial preferences of the OTP or the Pre-Trial Chamber'.[97] It cautions against the development of the ICC's jurisprudence and practice to such an extent that domestic efforts are replaced with ICC prosecutions thereby giving the impression that 'domestic investigation or adjudication is somehow less desirable than ICC disposition.'[98]

Through an analysis of three emerging trends, with examples from past practices of the ICC, Newton observed that a model of 'a healthy and cooperative synergy' between the ICC and States risked being replaced by a model of competition. He noted that while the Rome Statutes demands and expects cooperation with the Court from States, the Statute contains no requirement from the Prosecutor or the Registry to cooperate with States.[99]

In his discussion on the first of the three trends, Newton examined the ICC's extension of judicial constructs beyond those envisioned by states. He noted that the Court's early cases show a court straining to expand its own jurisprudential boundaries. He cited the example of the Court's reticence to employ the doctrine of command responsibility against non-state actors.[100] In the

[95] M. Newton 'The Quest for Constructive Complementarity' in Stahn & El Zeidy (CUP 2011) 304-340.
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid.*
[99] *Ibid.*
[100] *Ibid.*

Lubanga case for instance, he argued that the Court resorted to a theory of individual responsibility known as 'co-perpetratorship', instead of applying the principle of command responsibility, which has provisions in the Statute. This is in spite of the fact that the Court found that 'there are reasonable grounds to believe that the perpetrator founded the military organization and served as its Commander-in-Chief throughout the relevant time period.'[101] In the Darfur situation, the Court also found that Omar Al Bashir played essential roles, alongside other leaders, in the crimes against civilians, but only issued the warrant on the basis that he acted as an 'indirect perpetrator'.[102] He concluded that with these positions, 'the ICC is artificially injecting its own view of the law rather than sustaining strict fidelity to the intent of states parties.'[103] On the second trend, Newton analysed the nature of complementarity and asked whether the Court is corroding the concept. He submitted that the concept is meant to serve as a limiting principle rather than an affirmative tool for an aggressive prosecutor to target non-state parties or their nationals. Defining this concept in the context of legal mechanisms has become one of the greatest challenges of the Court. Having established that the subjective nature of the words constituting the admissibility framework may generate non-cooperation by States, he concluded that 'the appropriate power of the ICC Prosecutor will be sustained only by a relationship based on respect and an authentic partnership with sovereign authorities.'[104] In the third place, excessive politicization of charging decisions is a trend that may jeopardize a regime of cooperation between States and the ICC. The danger is that when prosecutorial charging powers of the States are brought under ICC prosecutorial discretion and subordination, it completely negates the purpose of complementarity and turns the principle on its head.[105] He then proposed certain textual amendments to the Rome Statute in order to revitalize constructive complementarity.[106]

Regional complementarity also proposes a regime of cooperation between states and the regional tribunal on one hand, and the regional tribunal and the ICC, on the other hand. A regional tribunal sits in a midpoint position to both the ICC and the states. It is capable of bridging the gap between these jurisdictions. As with constructive complementarity, regional complementarity may be

[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*

applied to function as a tool to enhance the domestic capacity of states to investigate and prosecute. This will also imply that irrespective of the prosecutorial strategy that a state employs, the regional tribunal can defer to 'the good faith reasoning' of states in the application of their national laws to international crimes.

2.6. Radical complementarity

According to Heller, '[r]adical complementarity is the idea that as long as a state is making a genuine effort to bring a suspect to justice, the ICC should find his or her case inadmissible regardless of the conduct the State investigates or the prosecutorial strategy the State pursues.'[107] Heller argues that the ICC is struggling and may never fulfil its lofty aspirations until it has fundamentally re-considered its relationship with national institutions. On the basis of inconsistency with complementarity, he criticized the ICC's decision that Simone Gbagbo's case remains admissible on the ground that her domestic prosecution was not for the same crimes as those charged by the OTP.

The theory criticizes the 'same person' and 'same conduct' requirements as being too restrictive and inconsistent with complementarity. Heller argued that there is a need to review the 'substantially same conduct' test which had earlier been 'adopted in the *Kenya* cases to determine whether national and international prosecutions involve the same case, as required by article 17(1) of the Rome Statute.'[108] In that case, the Appeals Chamber had held that an admissibility challenge could not succeed unless the State is actively investigating the same suspects as the OTP is investigating. This was criticized on the basis that the Appeals Chambers invented the extraneous requirement that investigative steps being taken by the State must be 'progressive' as well as 'concrete', whereas article 17 only requires that '[t]he case is being investigated', without more.[109] This suggests 'that *any* investigative step involving the same suspect will satisfy the investigation requirement.'[110]

[107] K. Heller 'Radical Complementarity' (2016) 14 *Journal of International Criminal Justice* 637-665.
[108] *Ibid.*
[109] *Ibid.*
[110] *Ibid.*

The 'substantially same conduct' test is applied by the Appeals Chamber in two circumstances: one, in the context of a state's admissibility challenge on OTP's request to open investigation and two, when a State or a suspect makes an admissibility challenge in relation to a specific case.[111] Heller argued that the effect of applying this test is that 'States are completely at the mercy of the OTP. If the OTP is sufficiently committed to prosecuting a suspect itself, it will almost always be able to do so. This is not complementarity — it is primacy.'[112] Heller argued that the application of this test may 'needlessly undermine sound national prosecutorial strategies', discourage development of national capacity, hinder state cooperation with the ICC and may not be cost-effective for the ICC itself.[113]

This theory mirrors the idea behind constructive complementarity, in the sense that both theories anticipate the ICC deferring to national mechanisms for the overall goal of ending impunity. However, unlike the proponents of constructive complementarity, Heller identifies the notorious difficulties inherent in amending the Rome Statute and instead proposes that the ICC judges can relax the 'same conduct' test by allowing "pyramidal (and similar) investigative strategies and eliminating the 'substantially the same conduct' requirement as a matter of law."[114]

Radical complementarity also shares similarities with regional complementarity. Jackson had earlier argued that one way through which a state can make genuine efforts to bring a suspect to justice is through a regional tribunal.[115] In that regard, the ICC ought to find such a case inadmissible. Beyond that, regional complementarity agrees with radical complementarity that when states or any competent regional tribunal are making genuine efforts to prosecute a case, the ICC must find the same case inadmissible. Radical complementarity goes further to state that it will find a case inadmissible if either the ICC or a state is making genuine efforts to investigate and prosecute such conducts. This will be on the basis of clear rules as are contained in the regional tribunal's enabling laws.

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[111] Ibid.
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid*.
[115] M. Jackson 'Regional Complementarity: The Rome Statute and Public International Law' (2016) 14 *JICJ* 5, 1071.

3. Regional complementarity and other supporting notions of complementarity

Drawing from the coinage of radical complementarity, I propose regional complementarity as the idea that 'if a regional judicial mechanism is prosecuting or investigating a particular crime within the jurisdiction of the ICC, the ICC ought to find the prosecution of the suspect's case inadmissible, *in so far* as the regional mechanism displays genuine will and ability to properly investigate and prosecute the same case.'[116] This definition anticipates that there could be instances where there is an overlap of cases of international crimes, or difference in cases where for example, international and transnational crimes are mixed in the same case. These may necessitate the need to defer to the jurisdiction of the relevant Court, based on certain criteria as to whether the individual is a subject of investigation by the prosecutor. Such criteria might include the seriousness of the offence, the status of the accused at the time of the alleged offences, and/or the general importance of the legal questions involved in the case. This definition of regional complementarity is a narrow admissibility related definition and represents one of the strands of a broader understanding that I propose.

On the flip side, regional complementarity also anticipates that 'as long as a state is making genuine efforts to bring a suspect to justice, the regional tribunal would find the case inadmissible regardless of the conduct the state investigates or the prosecutorial strategy the state pursues.'[117] There is already an assumption that the conduct the state is investigating falls within the jurisdiction of the regional tribunal.

These two sides of regional complementarity are proposed as a way to ensure that there is no friction between the regional tribunal and the ICC, on the one hand; and on the other hand, that there is no friction between states and the regional tribunal, based on division of labour. The notion attempts to underscore the advantages of investigation and prosecution at the regional level. It also argues that regional prosecution of crimes could help close the impunity gap, thus fulfilling the overall goal of the Rome Statute. Regional complementarity agrees with other notions that allocate lesser roles to the ICC, while encouraging more efforts at the national and regional level. It advocates a regime of positive and constructive relationship between the ICC and regional courts,

[116] This is my coinage as adapted from the notion of radical complementarity.
[117] My coinage as adapted from the notion of radical complementarity.

on one hand, and similar relationship between the regional mechanism and states, on the other hand. For the purposes of this work, a regional judicial mechanism is defined more broadly as mechanisms of supranational institutions whose memberships consist of governments or authorities from the same geopolitical region. These judicial mechanisms often include the human rights systems of the specific regions.

As has been argued earlier, regional complementarity agrees with positive, proactive, constructive and radical complementarity. The principles that it espouses are found in these conceptions of complementarity. Similar to positive complementarity, it encourages interdependence, flexibility, burden-sharing, division of labour, partnership, vigilance, mutual assistance, interaction between regional tribunals and the ICC, on the one hand, and the regional tribunal and states, on the other hand. These are all principles that should govern the interactions between these levels of court. In its proactive connotation, regional complementarity requires a regional tribunal to be more directly involved in all measures to encourage prosecution of international crimes by national mechanisms. As a constructive concept, regional complementarity envisages cooperation between states and the regional tribunal, as well cooperation between regional tribunals and the ICC, in order to help fulfil the goal of ending impunity. Lastly, as a notion that reflects the ideas underpinning radical complementarity, regional complementarity holds that the ICC ought to find a case inadmissible if a regional judicial mechanism is investigating or prosecuting the case. It also requires a regional judicial mechanism to hold itself to the same standards by finding a case inadmissible if a state is genuinely investigating or prosecuting a case.

In summary, all the theories earlier discussed reveal certain common denominators. First is the idea of a lesser role for the ICC and a greater role for national and – in this case - regional institutions. Secondly, they variously emphasize the ICC's ability to encourage, incentivize, catalyze and assist national (or regional) efforts at crimes prosecution. Thirdly, they all favour a regime of cooperation between the states or the conglomeration of states and the ICC for the purposes of furthering the goals of the ICC.

4. Exploring the classical and positive dimensions of regional complementarity

Regional complementarity has both positive and classical dimensions**.** In its classical dimension, it can be understood simply as an organizing principle for competing jurisdiction between the ICC

and a regional tribunal, on the one hand, and between a regional tribunal and states on the other hand. In its positive dimension however, it could mean a regime of cooperation between regional courts and the ICC, as well as between the regional tribunal and states.

4.1.Classical notion of regional complementarity

Classical complementarity is the original notion of complementarity as enshrined in the Rome Statute. The notion has been fully discussed in section 1.2 of this chapter. A classical notion of regional complementarity therefore refers to the idea that states would be forced to carry out national investigation and prosecution of international crimes in their territories, to avoid intervention by the regional tribunal. Three normative assumptions underpin the classical notion of complementarity – 'preservation of domestic jurisdiction', 'domestic failure activates the ICC's jurisdiction' and 'compliance is enhanced through threat.'[118] These assumptions could be transposed into regional complementarity.

A classic interpretation of regional complementarity views complementarity as a tool to preserve state sovereignty and jurisdiction over international crimes. This implies that states will have to continuously fend off the regional tribunal by asserting their primary responsibility to investigate and prosecute international crimes in their territory. This competition-based relationship is not proposed. Secondly, the idea that a state's failure to investigate or prosecute is what activates a regional tribunal's jurisdiction belongs in the classic notion of regional complementarity. This negative approach requires that a regional tribunal monitors the states' activities for unwillingness, inability or failure. Thirdly, regional complementarity could be interpreted to mean that a regional tribunal will step in if a state fails to perform its duty of enforcing international criminal law in its territory. The state failure could be a potential source of embarrassment, hence the threat-based inducement to ensure genuine investigation or prosecution.

This notion interprets regional complementarity as an organizing principle for competing jurisdictions between a regional tribunal and states. While it preserves state's sovereignty, it also reserves roles for regional tribunals, based on the failure of states. It aims to delineate roles for

[118] C. Stahn 'Complementarity: A Tale of Two Notions' (2008), 19 *Criminal Law Forum* 96-98.

each mechanism, as well as clarify limitation. The goal is to reduce the possibility of frictions between these mechanisms.

4.2.Positive dimension of regional complementarity

The positive dimension of complementarity requires that a global criminal justice institution like the ICC works collaboratively with states to achieve the aim of international criminal justice. As currently proposed, regional complementarity flows upwards and downwards. In its upward flow, it seeks to establish a regime of cooperation between a regional tribunal and the ICC. On the other hand, it also seeks cooperation between a regional tribunal and states. The relationship between the tribunal and the ICC is open to a debate. Depending on the interpretation adopted, the relationship could be vertical or horizontal. However, the relationship between the tribunal and states is vertical in nature. The underlying assumptions in their relationship are that: the regional tribunal and states are working for a common goal; comparative advantage is the basis for intervention by any of the mechanisms and parties are willing and ready to offer help and assistance where it is needed.[119]

The core elements of positive complementarity, that could be transposed to regional complementarity are burden sharing or division of labour, support for national prosecution and capacity building.[120] Others are mutual deference, monitoring and regulation, collaboration and cooperation, among others.

4.2.1. Burden sharing or division of labour

At the ICC, division of labour in relation to positive complementarity has consistently been interpreted as the strategy whereby the OTP concentrates on those who bear greater responsibility and are alleged to have committed the most serious crimes, while other defendants are left to be dealt with by the national mechanism.[121] This strategy appears to have originated from the Nuremberg tribunals which focused largely on 'major war criminals'.[122] This concurrent jurisdiction is also proposed for regional tribunals. An approach that allows burden sharing

[119] *Ibid*, 101-102.
[120] Takemura (n. 49).
[121] *Ibid*, para. 18.
[122] *Ibid*.

between a regional tribunal and states will support the positive dimension of regional complementarity.

Another approach to burden sharing is self-referral of cases or situations. Self-referral of cases by states is one of the effects of positive complementarity.[123] It has been instrumental in creating a partnership between states and the ICC, instead of a competitive relationship.[124] Regional complementarity also encourages self-referral of cases by states to the regional tribunal where a state deems it fit to do so. On the flip side, a regional tribunal, may, under certain circumstances, refer cases to either a state or the ICC. Considering that regional complementarity could flow upwards and downwards, the regional tribunal which sits in a midpoint between states and the ICC could also exercise its powers to be able to refer cases upwards or downwards.

The idea of transfer of cases from a tribunal to national mechanism is not novel. It has been observed in the ICTY and ICTR.[125] At the time of writing, a total of eight cases involving thirteen persons have been transferred from the ICTY to national mechanisms in former Yugoslavia.[126] The ICTR referred four cases to the national mechanism in Rwanda.[127] A region that proposes to establish a regional criminal tribunal may include provisions in the tribunal's statute and rules of procedure and evidence that would allow transfer of cases between the tribunal and other mechanisms like states and the ICC. Where the relevant state is not a party to the Rome Statute, the regional tribunal would not be able to refer such cases to the ICC, unless the state has made an article 12.3 declaration. Secondly, as there is no provision in the Rome Statute that stipulates a transfer of cases from the ICC to a regional tribunal, and in the absence of a textual amendment to the Rome Statute, it may be that a state itself, or other member states of the regional tribunal would be the entity that refers the situation or case to the ICC.

[123] P. Hobbs 'The Catalysing Effect of the Rome Statute in Africa: Positive Complementarity and Self-Referrals' (2020) *31 Criminal Law Forum* 345-376.
[124] K. Marshall 'Prevention and Complementarity in the International Criminal Court: A Positive Approach' [available at https://tinyurl.com/hykda478 - accessed 21 February 2024].
[125] Relevant provisions in the Rules of Procedure and Evidence of both ICTY and ICTR is found in Rule 11*bis*.
[126] ICTY 'Transfer of cases' at https://www.icty.org/en/cases/transfer-cases.
[127] UNICTR 'cases referred to national jurisdictions' at https://unictr.irmct.org/en/cases/key-figures-cases.

4.2.2. Support for national prosecution

It is the idea that the ICC should employ various methods to ensure that states are encouraged to prosecute international crimes domestically. This dimension aims to strengthen national capacities to achieve the ultimate goal of deterring future commission of international crimes.[128] The support and encouragement that the ICC gives is to ensure that states are able to undertake genuine investigation and prosecution of international crimes in their territories. The support given by the ICC could include information sharing, knowledge sharing and training, as well as partnership that encourages states to take action and own the process of international crimes investigation and prosecution. The support given by the ICC may vary between states who are willing but unable, those unable but willing, those unwilling and unable, and finally, those willing and able. For those states that are able but unwilling, ICC's intervention may take the form of pressure that leaves the state with no choice than to act on a particular case. For those willing but unable, support may involve measures to enhance the national mechanism's ability.

A broad-based positive interpretation of regional complementarity requires a regional tribunal to work in collaboration with states and the ICC to achieve the aim of ending impunity. As it is possible for the ICC to employ different measures to encourage states, so is it for regional tribunals. Instances abound where regional organizations have helped states in their region to establish and activate the jurisdiction of a criminal tribunal. For instance, the role played by the AU in the Hissène Habré trial is well-documented.[129] The positive dimension of regional complementarity also foresees a situation where evidence gathered by a regional tribunal can be used before a national mechanism, or indeed the ICC. Article 93(10)(b)(i)(1) of the Rome Statute already provides this in the ICC context. A regional tribunal may include similar provisions in its statute.

4.2.3. Capacity-building

Positive complementarity also anticipates that global bodies institute measures to develop the capacity of national mechanisms to investigate and prosecute international crimes in their

[128] Marshall, (n. 124).
[129] R. Brody 'Bringing a Dictator to Justice: The Case of Hissène Habré' (2005) 13 *JICJ* 2, 209-217.

territories.[130] Capacity-building could entail legal assistance, legislative assistance, training for judges and judicial officers in the states, exchange of officers, etc. The ICC itself has committed to 'enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern'.[131] It has promised financial contribution,[132] technical assistance,[133] and various other capacity building activities for states.[134]

In the same manner, capacity building as a core element of the positive dimension of regional complementarity suggests that the regional tribunal may be in a position to support national mechanisms with legal assistance, training and other capacity building activities. Dialogue is proposed as one approach towards understanding the state's capacity need. A regional tribunal must be ready to engage states in dialogues in order to offer the necessary support in the area of capacity building.

5. Other organizing principles for positive regional complementarity

5.1. Mutual Deference

To reiterate, my notion of regional complementarity prescribes that 'if a regional judicial mechanism is prosecuting or investigating a particular crime within the jurisdiction of the ICC, the ICC ought to find the prosecution of the suspect's case inadmissible, *in so far* as the regional mechanism displays genuine will and ability to properly investigate and prosecute the same case.' This immediately raises questions as to what organizational concepts do we use to arrange such relationship? Am I, for instance, suggesting the application of 'deference' thereby requiring that the ICC automatically defers to the jurisdiction of the regional court where there is genuine will and ability to investigate and prosecute? Also, what are my indicators for genuine will and ability that and what criteria will we use to assess those?

[130] O. Bekou, 'The ICC and Capacity Building at the National Level' in C Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 1245–58.
[131] See generally ICC ASP Doc: ICC-ASP/16/33 'Report of the Bureau on complementarity' (2017).
[132] *Ibid*, para 6.
[133] *Ibid* para 13.
[134] *Ibid*, para 41.

In response, it is now clear that the positive notion of regional complementarity will better serve the purpose of a cooperative regime between a regional tribunal and the ICC on one hand, as well as the relationship between a regional tribunal and states on the other hand. On the face of it, it appears that my concept of regional complementarity mirrors the classical notion of complementarity where the ICC is expected to automatically defer to states in respect of primacy in the exercise of jurisdiction. However, a closer analysis suggests that a positive-based conception of regional complementarity does not envisage an automatic withdrawal from exercising jurisdiction, by the ICC. The conditions that must be met before a regional tribunal can exercise jurisdiction at the expense of the ICC is included in my coinage. As such, thorough analysis that takes into account the unwillingness and/or inability of the regional tribunal must be ascertained. Even more so, the idea of deference of the ICC to domestic prosecution has been criticized.[135] If the same deference were to automatically apply between regional mechanisms and the ICC, such approach will open itself to the same criticisms that have attended the classical notion of complementarity.

In a different scenario, the idea that a forum that has a comparative advantage over the other, in a specific situation, should be the appropriate forum for prosecution, is also embedded in the notion of positive regional complementarity. For example, if the case is more complex or comprehensive at the regional level, where for instance, we have transnational crimes charges in addition to atrocity crimes charges, it would probably make more policy sense for such case to be prosecuted at the regional tribunal. Additionally, it could also be that the regional tribunal is better placed to handle a case given its proximity to the crime scenes, among other factors.

There are many other instances where the regional mechanism might be better placed to prosecute a case, but this should be guided by 'the opportunity principle'. This implies that, for example, either a regional mechanism, or the ICC who is seized of a matter, can give notice to the other mechanism, where it perceives that the other mechanism is better placed. It will operate as a provision of notice, cooperation and an opportunity for that other mechanism to act. But there is always a cut-off point where the mechanism that provides opportunity for the other to act, steps in, where no action has emanated from the mechanism. It operates more like a right of refusal. The

[135] C. Stahn 'Complementarity: A Tale of Two Notions' (2008), 19 *Criminal Law Forum* 109.

converse, where the ICC gives a national mechanism 'a fair opportunity to exercise jurisdiction', has been earlier proposed, in the Yekatom Defence Appeal Brief on Admissibility.[136]

My idea of regional complementarity should therefore not be based only on the unwillingness and inability tests. This could be the beginning of the analysis, but it goes beyond the ICC text and takes into consideration the broader structural principles of mutual deference where necessary, capacity building and collaboration, cooperation, consultation and division of labour, rather than the strict ICC-text test of unwillingness and inability.

Mutual deference mirrors the idea behind 'qualified deference' that Mark Drumbl's work promotes,[137] and that has been supported by Professor Stahn.[138] In an admissibility assessment before the ICC, for instance, Stahn had argued that judges should be prepared to 'award the state reasonable time to investigate and build the case after the notice of an admissibility challenge and prior to a final decision on admissibility.'[139] The concept is also different from subsidiarity and cannot be applied in the same way as subsidiarity is applied between the EU and states.

On the second question as to the indicators for assessing unwillingness and inability to prosecute, I will again take the ICC text and the Court practice as a starting point. The OTP informal expert paper on the principle of complementarity already identifies 'unjustified delay', 'lack of independence of the judiciary', 'lack of impartiality', and several other indicators as 'background context issues that may be gathered in order to inform an admissibility assessment.'[140] Inability may be established through lack of judges and other personnel, lack of judicial infrastructure, among other factors.[141] However, as with my earlier proposition on how to implement regional complementarity, any assessment on admissibility should go beyond these factors. Such assessments must also contextualise the level of support, cooperation and capacity building that have been provided to the regional mechanism, where the ICC, for example, moves to make an

[136] ICC Doc: ICC-01/14-01/18-523 'Yekatom Defence Appeal Brief – Admissibility' in *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, para. 59.
[137] See M. Drumbl *Atrocity, Punishment and International Law* (CUP 2007). See also M. Drumbl, 'Policy Through Complementarity: The Atrocity Trial as Justice' in Stahn C and El Zeidy M, (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011) 222-224.
[138] C. Stahn, "Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?" in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015) 228.
[139] *Ibid*
[140] OTP 'Informal expert paper: The principle of complementarity in practice' (2003) 28-29.
[141] *Ibid.*

assessment of admissibility. This same approach applies if for instance, the assessment is being made in respect of an interaction between a regional mechanism and the state. What this requires therefore, is that an assessment based on these factors alone, should not result in establishing unwillingness and/or inability against a mechanism, if adequate support had not been given to that mechanism. The advantage of this approach lies in the catalysing effect that such approach will have on a mechanism's capacity to investigate and prosecute.

5.2.Monitoring and regulation

The idea of monitoring and regulation in the application of complementarity flows from the classical understanding of complementarity and prescribes that a mechanism is subservient to the other and would need to be monitored and regulated so that they could deliver effectively on their mandate. Monitoring and regulation are closely tied to the idea of compliance through threat.[142] However, monitoring and regulation, as envisaged within the context of regional complementarity suggests that a regional mechanism may require regular and periodic reports on status of activities in relation to cases before domestic mechanism from states. This is not altogether novel. It had been proposed in the earlier years of the court, and continues to be utilized by the Assembly of State Parties to the ICC.[143] The periodic reports to be submitted were to identify gaps and needs in the domestic system, that could form the basis for support from the ICC. In this regard, if such approach were transposed to regional complementarity, monitoring and regulation will operate to provide what Stahn has termed 'an incentive for implementation.'[144] Also, the important point to note is that the motivation for regulation and monitoring remains an effort to support and incentivize prosecution at the domestic level, and not necessarily, to take over investigation and prosecution. If monitoring and regulation operate within that context, there will be less acrimony in the way regional complementarity is operationalized.

[142] C. Stahn 'Complementarity: A tale of two notions' (2008) 19 *Criminal Law Forum* 97.
[143] See Report of the Bureau on cooperation, ICC-ASP/8/44, 15 November 2009.
[144] C. Stahn 'Complementarity: A tale of two notions' (2008) 19 *Criminal Law Forum* 87–113 at 97.

5.3.Collaboration and cooperation

The other organizing principle is collaboration and cooperation. There already exists an understanding of the prime place of other stakeholders, especially regional organisations, in the work that the ICC does. In a 2016 report of the court on cooperation, the ASP stated that 'the Court continued to develop its interaction and cooperation with international and regional organizations in order to maintain and foster further support for its activities.'[145] It specifically noted cooperation between the court and a number of other regional organizations including the Inter-American Court of Human Rights and the EU, among others.[146] This is already a template for cooperation and collaboration between states and regional mechanism on one hand, and also between regional mechanism and the ICC on the other hand. The ICC has already perfected the art of entering into cooperation and collaboration Memorandum of Understanding (MOUs) with states in order to avoid jurisdictional friction and to enhance cooperation. Recent examples include the OTP's MOU with the state of Guinea.[147] Article 1 of the MOU binds the parties to 'work actively and collaboratively to further the principle of complementarity'.[148] Other older examples include MOU regarding administrative arrangements between the ICC and the SCSL;[149] Cooperation Agreement between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia;[150] MOU with Sudan on the trial of Ali Kushayb; MOU with the government of Venezuela,[151] among others. The use of MOUs and cooperation agreements as tools to enhance collaboration between levels of courts in order to clarify the relationship and avoid jurisdictional friction appears to have become an acceptable practice that can be transposed into the cooperative regime of regional complementarity.

[145] ICC-ASP/15/9 'Report of the court on cooperation' (2016) para. 2.
[146] *Ibid*, para. 5.
[147] 'Memorandum of Understanding between the Republic of Guinea and the OTP' 28 September 2022.
[148] *Ibid*.
[149] ICC-PRES/03/01/06, MOU Between ICC and SCSL.
[150] Cooperation Agreement between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia 28 October 2021.
[151] Press Release, ICC Prosecutor, Mr. Karim A.A. Khan QC, opens an investigation into the Situation in Venezuela and concludes Memorandum of Understanding with the Government, 5 November 2021.

One other approach to collaboration and cooperation that has emerged in practice is the use of joint investigative teams between two or more states for conducting criminal investigations.[152] In this regard, in the field of ICL, a JIT consisting of the OTP and relevant organs within the domestic system or the relevant tribunal, have been proposed and utilized, albeit, with attendant challenges. While it is clear that neither the ICC nor the regional tribunal has police officials with enforcement powers at their disposal, such joint investigative teams will increasingly depend on enforcement officials from states, especially where the terms of such engagement is clearly spelt out in such MOUs or other enabling instruments of the tribunal. The Special Criminal Court of the Central African Republic (SCCCAR) offers a good example in this regard.[153] Recall also that a JIT under the EU framework, consisting of domestic organs of several EU states and the OTP has existed since March 2022.[154]

It is part 9 of the Rome Statute that contains provisions on cooperation between the court and states. However, cooperation between international tribunals and states have been traditionally construed as one-sided.[155] Stahn had theorized on 'reverse cooperation' and 'mutual cooperation'.[156] In operationalizing regional complementarity, mutual cooperation is proposed. Its application ensures that a regional tribunal supports states while a state does the same where the case is before a regional mechanism or the ICC. This cooperative regime puts the regional mechanism at a mid-point to be able to offer assistance, help and support to either the ICC or the state, wherever the need arises. It forestalls competition and friction, as all parties engage with a sense of shared responsibility. The idea of shared responsibility proposes that each mechanism sees itself as part of a whole ecosystem of international criminal justice, with the same goal as the other constituent parts of the ecosystem. Mutual cooperation will require a regional mechanism to be able to expect, demand and rely on cooperation from states and the ICC in the same manner as the ICC expects from states and a regional organization.

[152] On the use of JITS in ICL, see A. Furger 'Can they deliver? The practice of Joint Investigation Teams (JITS) in core international crimes investigations' (2024) 22 *JICJ* 3, 43-58.
[153] See Article 37 of the Organic Law of the SCCCAR.
[154] Furger (n. 152).
[155] C. Stahn 'Taking complementarity seriously: On the sense and sensibility of 'classical', 'positive' and 'negative' complementarity' 249.
[156] *Ibid.*

Conclusion

In this chapter, I have delved into the meaning, function and existing theories of complementarity. I have also argued that while regional complementarity is the newest notion of complementarity, it shares some features with many of the existing notions of complementarity- positive, proactive, constructive and radical complementarity. It advocates more restricted roles for the ICC in international crimes investigation and prosecution. I argued that regional complementarity also has both classical and positive dimensions. In its classical dimension, it can be understood simply as an organizing principle for competing jurisdiction between a regional tribunal and states, as well as between regional tribunals and the ICC. In its positive dimension however, it facilitates a regime of cooperation between regional courts and the ICC, as well as regional courts and states. I have shown that a regional tribunal must be ready to support national prosecutions, build capacities and work collaboratively with states in an atmosphere of partnership, mutual assistance and comparative advantage. The proposal therefore is to interpret regional complementarity from its positive dimension.