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

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CONCLUSION

1. Beyond the state-of-the-art

In this study, I have shown that there is a need to organize legal pluralism occasioned by the emerging four-tiered justice paradigm. In shifting attention away from universalism, I interrogate specific organizing principles for legal pluralism. I also introduce the idea of system of justice which seeks to organize the relationships between different levels of courts and tribunals that exist as different parts of an ecosystem of criminal justice. Beyond the ICC, this system of justice approach presents a normative framework for analysis of principles to navigate the chaos that would attend the interaction between domestic, hybrid, regional and international courts with similar and overlapping jurisdictions. As there is now a maturation of the justice system which should involve encouraging and clarifying the role of regional mechanisms in international criminal justice, the study shows that regionalism is not a challenge to international criminal justice. While some aspects are challenging, it is a progress to have this four-tiered model that encourages different levels of courts dispensing justice in the spirit of cooperation and mutual deference. I show that regionalism is not a challenge to international law, rather, it is an asset. I argue that regionalism should therefore not be seen as opposition to the universal conception of international criminal justice, but as a concept that promotes the latter in a different language and in a more contextualised way. I submit that a polycentric idea of international criminal justice bodes well for regional complementarity, instead of a monocentric or an ICC-centric approach.

Also, there is a need to regulate regional complementarity itself. Many of the challenges that the application and practice of other notions of complementarity have presented between states and the ICC relate to the proper approach towards regulating the relationship between these levels of court. This goes beyond the initial question on whether regional complementarity should be regulated or not. There is no doubt that the answer to that question is in the affirmative. Regulating regional complementarity is also important, if its application will not be subjected to the same criticisms that other notions of complementarity have been subjected to. As has been shown, in theory, we now have this four-tiered model of justice. International tribunals like the ICC; regional tribunals like the ACC; hybrid tribunals that continue to be established to deal with specific atrocity situations; and domestic systems, whose primary duty it is to prosecute international crimes in their territory, are all existing side by side. The overarching question that I have tried to answer in this research is: to what extent is regionalism a challenge to the universality or coherence of international criminal law? I focused on how different levels of court can work together in a harmonious and complementary fashion, instead of working as competitors. How to make a sense of this four-tiered justice paradigm is the theoretical macro-point of this dissertation. As I have shown, the identification of regional complementarity may involve at least three elements namely complementarity through division of labor, deference in prosecutorial strategies and cooperation on many levels.

The idea of legal pluralism occasioned by the fragmentation of international law and the notion of regional complementarity as a tool to make sense of the four-tiered justice paradigm are the two broad themes of the study. While regionalism contributes to the fragmentation of international law, regional complementarity can be employed as a tool of relational coordination. Recent development is not the first time that regionalism is interacting with international law. Since this had happened in the context of international human rights law, ICL could draw certain lessons from how human rights addressed the issue. There are no doubts that there are already scattered efforts at regionalizing ICL, in at least four regions. It would appear that these efforts have now brought us to the point where there are now attempts to upscale the involvement of regions in international criminal justice, through the establishment of independent ICL mechanisms.

A historical venture to inquire why regionalism came so late in the development of ICL and complementarity reveals that there are at least four factors that could explain why the continuous reshaping of complementarity as a concept, did not accommodate the notion of regional complementarity. The failure of ICL to embrace regionalism earlier in its development, ties to some of the narratives on why the drafters of the Rome Statute ignored regionalism during the negotiations at Rome. ICL's obsession with universality and cosmopolitanism; the liberal foundation of ICL; the understanding that ICL is an enemy of sovereignty and the fact that ICL had developed more slowly and less dynamically are some of the factors responsible for the neglect of regionalism and regional complementarity in the history of ICL. At the discussion in Rome, there was a general belief that the Security Council could still establish tribunals similar to the ICTY and the ICTR, hence, there was no need for a regional tribunal. Recent development relating to regional *jus cogens* at the ILC appears to suggest some openness to the idea of regional complementarity.

Moreover, whether the ICC opens or closes itself to the idea of regional complementarity through its jurisprudence, practice and policy directions deserves some attention. While our understanding and perhaps the practice of complementarity has now moved from a very strict and restrictive conception as a legal device to a broader conception as a structural principle, the ICC continues to be trapped in an 'ICC-centric' approach of the concept. Secondly, in the operation of the ICC, the existing practice are not so opened towards the idea of regional complementarity. 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. This view is tempered with the discovery that there is a difference in approach between the OTP and the chambers. As the court continues to be driven by the ideals of cosmopolitanism and universality, it has negative implications for regional complementarity. The ICC needs to open itself more to the ideals that underpin regional complementarity. It is in this regard that polycentricity is proposed as an alternative approach to the current monocentric ideals that underpin the ICC's approach to international criminal justice.

Hybrid and regional tribunals previously emerged as new accountability models in ICL. Hybridity appeared to have been a necessary precursor to regionalism. There are two strands of regionalism and two models of hybridity. The models of hybridity are the purely international hybrid tribunals that owe their establishment to the UN, and the second are those that owe their establishment to the activities of a regional organisation. The latter is what I termed regional-hybridity. There are also two observable strands of regional involvement in ICL. The first is the assistance-driven strand where the hybrid is embedded in the domestic system of a state, or where it applies domestic law, in addition to international law. The EAC and the KSCSPO are examples of this. The second strand relates to the fully independent model, where a region purports to establish a stand-alone criminal chamber within its regional court. Unlike the previous strand where the hybrid is created for a specific past atrocity or conflict situation, this strand sees the establishment of a tribunal to deal with future crimes, and its jurisdiction is activated by accession and ratification of member states. Hybridity points to the fact that the future of international criminal justice is in its past, where hybrid tribunals are created to address specific atrocity situation, in spite of the existence of the ICC. This development has now led us to the possibility of the existence of a full-fledged regional criminal tribunal. Regionalism in ICL is inevitable. One reason for this is that the turn to regionalism in ICL is not novel. It is rooted in UN Charter's provisions on states responsibility to take joint actions within a regional arrangement to ensure global peace and security. Development in different regions also suggest that there is a progressive move towards the second strand of regionalism: the establishment of regional courts to deal with transnational and international crimes. Other regions might be encouraged by the steps taken by the African Union in the adoption of the Malabo Protocol. As states continue to face common transnational crimes in their region, their joint responses may continue to deepen regional interaction with international criminal justice.

Regional hybridity or the assistance-driven strand of hybridity is what the EAC and the KSCSPO signify. The EAC and the KSCSPO were both silent on any possible relationship between them and the ICC. These regionally backed tribunals had convicted and indicted past heads of state. This symbolically demonstrates the capacity of regional tribunals to dispense justice quicker than perhaps, a universal institution like the ICC could do.

With the Malabo Protocol comes the probable practice of regional complementarity in the full and independent strand of regionalism. As an instrument, the Malabo Protocol contains a number of innovative features. These features are included, probably to address some of the fundamental structural critiques of international criminal justice. While the universal system has concentrated largely on civil and political rights, the protocol has also brought social and economic rights into perspective through its criminalization of offences relating to these. The Protocol is ahead of its time and appears a little more advanced that the ICC system in certain respects. It shows that regional institutions can be a lot more modern and innovative, while they incorporate regional contexts much better than a universal mechanism. There are also a few dangers, including the tendency to over-criminalize conducts and out-perform, in a bid to justify the regional mechanism's existence. New mechanisms often appear as though they are in competition with existing mechanisms. If the African court becomes operationalized, the protocol provides a rare opportunity for African countries to address crimes that are well known to the continent, but which are subjects of very few trials and convictions at the international level. A rationale for the protocol's inclusion of them alongside 'core crimes' would be that 'many of them are capable of destabilizing a state, which in turn leads to the proliferation of core crimes.' Criminalizing and prosecuting these conducts may 'have a preventative or deterrent consequence…' thus helping to fulfil the overall goal of ICL which is to close the impunity gap. This ties closely to the idea of regional complementarity and the possibility of a regional court dispensing justice within its territory.

Additionally, regional complementarity mirrors other existing notions of complementarity. Some of these notions of complementarity already support the theories underpinning regional complementarity. Regional complementarity, like other notions, has both classical and positive dimensions. The positive dimension is a more functional model. That dimension has the capacity to facilitate a regime of cooperation between regional courts and the ICC, as well as regional courts and states, especially when certain organizing principles that are useful for arranging these relationships are employed.

Interpretation of statutes also helps to find support for the notion of regional complementarity. In addition to interpretation, there are other means of solving disputes which includes formation of new organizing principles like mutual deference, division of labor, monitoring, regulation, collaboration and cooperation. The ICC indeed ought to develop a different complementarity reading that agrees with the Vienna Convention. Article 17(1) of the Rome Statute could be interpreted to support the view that the ICC should consider a genuine action before a regional tribunal as sufficient to preclude the admissibility of a case before the ICC. We can also apply the VCLT to the Rome Statute in order to provide some support for the theory of regional complementarity. With five possible relationship dimensions in the operationalization of regional complementarity comes proposals on addressing conflicts that may arise in the relationship dimensions.

2. Making sense of the four-tiered justice paradigm: Looking behind

The analysis in this thesis already shows that we have moved towards a four-tiered model of justice system in international criminal law. We must now think of the relationship in terms of cooperation and in terms of admissibility, as against a relationship based on competition. I have examined the extent to which we can we have division of labor and some of the principles on which such divisions can be organized. I have also analysed, for instance, whether we should focus on the gravity of the crime or on the most responsible perpetrators. I have shown that both approaches have their downsides. As we have seen in the SCCCAR, I have argued more about consultations between prosecutors, including joint investigative teams between the ICC and domestic systems.

Moreover, we need to have monitoring structures to ensure that if one level of court does not perform, another level can step in, while ensuring that we keep track of cases and progress made in an atmosphere of self-reporting.[1] The principles that should inform further debates are mutual deference, division of labour, burden sharing, cooperation and collaboration, monitoring and regulation, among others.[2] To further make sense of the four-tired justice paradigm that has emerged, I have shown that we clearly have bits and pieces of this system in place. For instance, the Special Criminal Court in CAR offers an example of what is in place, and that could fit into the framework that I have attempted to develop. Article 37 of the Organic Law of the SCCCAR makes provision for coordination between the prosecutor of the ICC and the SCCCAR prosecutor. This provision has been criticized for its potential to prevent the tribunal's prosecutor from exercising prosecutorial discretion, without first asking for permission from ICC's prosecutor.[3] In spite of this criticism, this provision, if properly operationalized, has the capacity to reduce jurisdictional conflicts between those courts. In another interesting example from SCCCAR, it has been reported that the early investigations by the tribunal were made possible because prosecutors of the ordinary courts in CAR handed files over to the SCCCAR prosecutor.[4] This regime of cooperation between institutions given to similar or overlapping jurisdictions is what I advocate in this dissertation. Additionally, the use of MoUs and similar tools between the ICC and domestic systems on one hand, and between the ICC and regional judicial mechanisms, on the other hand, are examples of existing practices that can be enhanced and transposed into arranging regional complementarity. Of course, MOUs are soft laws that do not have the same force as treaties. If

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[1] Chapter 6.
[2] Chapter 6.
[3] P. Labuda 'The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity' (2017) 15 *JICJ* 193.
[4] P. Labuda 'Institutional design and Non-Complementarity: Regulating Regulations between Hybrid Tribunals and other Judicial and Non-Judicial Institutions in K. Ainley and M. Kersten (eds), *Hybrid Justice: Innovation and Impact in the Prosecution of Atrocity Crimes* (Oxford University Press 2020) 3.

there is therefore a conflict between such MOUs and treaties, the treaty shall prevail. It is however the exact reason why such MOUs are crafted carefully to avoid ambiguity and to clarify roles.

In the discussion on the Criminal Chamber of the African Court, I have highlighted some of the problems that emerge in the interplay between the ICC and regional institutions. I have differentiated between these different relationship dimensions and have, made recommendations in relation to each of those relationships. I have, for instance, advocated for the African court to apply positive complementarity in its relationship with domestic courts. I made the provisions of the Rome Statute the starting point and recommended that admissibility challenges be resolved by going beyond the textual provisions to accommodate other organizing principles. Moreover, I have proposed a textual amendment to article 17 to provide for Rome Statute's accommodation of prosecution before a regional tribunal, in order for the ICC to find such case inadmissible.[5] In another breath, I had identified that in the case of the Malabo Protocol and indeed, any future regional tribunal's instrument, provisions that spell out a clear relationship between the ICC and such mechanism would be useful to address the possibility of jurisdictional clash. This three-pronged approach of textual amendment to the Rome Statute, use of MOUs and an inclusion of relevant provisions in the instruments of the regional court will provide a holistic approach to resolving jurisdictional clash while enhancing cooperation between levels of courts in this four-tiered justice paradigm.

3. Making sense of the four-tiered system: Looking ahead

There is no doubt that hybrid tribunals will continue to be established. In the last decade alone, many examples exist of proposals to create such institutions.[6] More recently, especially in the context of the Russian-Ukrainian conflict, there are already debates about the merits and demerits of establishing a Special Hybrid Tribunal to prosecute the crime of aggression, for which the ICC

[5] Chapter 7.
[6] See different examples in the introductory chapter of this study.

lacks jurisdiction. Different proposals and opinions exist on this.[7] There are scholars who argue for[8] and against[9] the establishment of such tribunal for Ukraine.

For the avoidance of doubt, there is nothing wrong with this approach of establishing a hybrid tribunal to address specific atrocity situations, even in cases where the proposed tribunal is to be established by a regional body. While some may have questioned the legality or the motive of establishing regional mechanisms, especially since the ICC exists for the same purpose, there are a few grounds upon which to justify the latter's establishment.

First, I share the view that there is nothing wrong with any region seeking to establish regional mechanisms to prosecute international crimes within that region.[10] In fact, it is consistent with the principles of the UN Charter as enshrined in Article 52(1) of the UN Charter.[11] Experiences from Africa and other regions have shown that violent conflicts often threaten international peace and security. These conflicts sometime overwhelm national mechanisms and may make it impossible for justice to be served to the perpetrators of international crimes in the context of those conflicts. One way to ensure peace and security in that context is to hold perpetrators accountable through a regional arrangement. One of such arrangements could be the establishment of a hybrid or full regional criminal court in order to ensure justice for victims of crimes. Further, in relation to the International Court of Justice, article 95 of the UN Charter provides that 'Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future'. While regional criminal courts may not fall under this formula, this

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[7] T. Dannenbaum 'Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine' *Just Security*, 10 March 2022 [available at https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/ - accessed 12 January 2023].

[8] 'Statement calling for the creation of a special tribunal for the punishment of the crime of aggression against Ukraine' [available at https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf - accessed 12 March 2023].

[9] S. Vasiliev, 'Aggression against Ukraine: Avenues for Accountability for Core crimes', *EJIL:Talk*, 3 March 2022 [available at https://www.ejiltalk.org/aggression-against-ukraine-avenues-for-accountability-for-core-crimes/ - accessed 12 March 2024]; Heller J, 'Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea' *OpinioJuris*, 7 March 2022 [available at https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/ - accessed 12 March 2024].

[10] A. Abass 'The Proposed International Criminal Jurisdiction for the African Court: Some problematic aspects' (2013b) *Netherlands International Law Review* 27-50.

[11] F.K. Tiba 'Regional International Criminal Courts: An Idea Whose Time Has Come?' (2016) 17 *Cardozo Journal of Conflict Resolution* 52, 535.

Charter provision suggests that regional efforts at resolving challenges, including those that are of an international criminal nature, is not incompatible with the UN Charter. A broad interpretation of article 95 suggests that regional tribunals – whether of a civil or criminal nature- may be established by UN member states. The interpretation suggests that the UN Charter does not foreclose the possibility of states establishing future tribunals to address future problems, including those relating to a resolution of their differences as the ICJ does.

If a case is made about possible conflict between article 52(1) of the UN Charter and any other rule which may otherwise make the establishment of a regional criminal court illegal, Article 103 of the UN Charter becomes appropriate. It provides as follows '[I]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' Thus, the effect of the combined reading of Articles 52(1) and 103 of the UN Charter is that it is not impermissible for states within a region to organize themselves together with a view to prosecuting international crimes within their region.[12] This appears a self-evident thesis – it is legal to establish regional institutions to combat crimes.

Furthermore, there is no provision in the Rome Statute that forbids, precludes or forecloses the existence of a regional mechanism for the purposes of international crimes prosecution. The ICC has also not made any pronouncement on this issue. However, it is already a matter of settled practice in international law that states, acting under the umbrella of a regional or sub-regional entity can establish a regional court – be it the more common regional human rights entities, or even an international criminal prosecution mechanism. As far back as during the trials at the Nuremberg Tribunal, the judges had declared that the Allies, through the creation of the IMT had 'done together what anyone of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.'[13]

Seeing then that we might continue to witness the establishment of hybrid and regional tribunals, the enduring question remains: how do we arrange the relationship between these levels of courts to reduce the likelihood of jurisdictional clashes? Finding answers to this, is what this dissertation has attempted. This task invites us to rethink the entire debate around legal pluralism and the

[12] *Ibid*.
[13] *France & ors v. Goring & ors* (1948) 22 IMT 411, 461.

fragmentation of international law. As I have attempted to show, regionalism and fragmentation are not curses to international law. If anything, they promote international criminal law in a different language and in a more contextualised way. Van den Herik and Stahn previously argued that 'fragmentation is an inherent part of international criminal law in part because it reconciles 'the "universalist" aspirations of public international law, the ''humanist'' dimensions of human rights law and the legality and fairness-oriented foundations of criminal law'.[14] They concluded their thoughts by inviting us not to view fragmentation of international criminal law as a challenge, but 'as an opportunity in that it offers a lens to view developments in the discipline… from a pluralist perspective.'[15] I do not only share this view, I also assert that in this era of multiplicity of hybrid and regional tribunals, the ICC must see itself as one of many options to dispense international criminal justice. The court's practices and jurisprudence must therefore reflect this understanding.

4. Thinking ahead: The proposed Special Tribunal for Aggression in Ukraine

Returning to the debate about a possible aggression tribunal for Ukraine, how would complementarity look where the ICC lacks jurisdiction over aggression but goes after the same perpetrators or participants in the same conflicts that a proposed tribunal on aggression will investigate and prosecute? The ICC is interested in prosecuting perpetrators of genocide, war crimes and crimes against humanity in the Ukraine-Russian conflict.[16] The ICC however does not have jurisdiction over the crime of aggression in Ukraine.[17] The only exception is if the situation were to be referred to the ICC by the Security Council as per the combined reading of article 15 *ter* and article 13b of the Rome Statute.[18] This is not likely to happen as Russia would use its veto

[14] L. van den Herik and C. Stahn "'Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?'' in L. van den Herik and others (eds) *The Diversification and Fragmentation of International Criminal Law (Martinus Nijhoff* 2012), 23.
[15] F. Lattanzi 'Introduction' in L. van den Herik and others (eds) *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff 2012) 4.
[16] ICC 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation', 2 March 2022.
[17] Article 15 *bis* (5) of the Rome Statute specifies that the Court would not have jurisdiction over aggression committed by nationals of states that are not parties to the Statute.
[18] Article 15 *ter* of the Rome Statute.

power against such referral. This is why a special tribunal on aggression had been proposed. The proposal has been made and supported by different countries and scholars.[19]

If the proposal comes to fruition, and a special tribunal on aggression is indeed established for Ukraine, such tribunal would exist side by side with the ICC, over the same conflict. Again, how will the relationship between the two courts be arranged, especially with the existence of national courts in Ukraine, who may also be interested in prosecuting defendants from the same conflict. In order to add further elements of complexity to this, assuming the aggression tribunal is established or backed by the Council of Europe or any other relevant regional organization, to bring the regional element to the whole debate.

For starters, there are at least four possibilities for prosecuting the atrocities committed in the context of the Russian-Ukrainian conflict. These are 'the International Criminal Court, an ad hoc international tribunal (whether along the lines proposed at Chatham House or pursuant to a General Assembly resolution), a domestic court exercising territorial jurisdiction (in Russia, Belarus, or Ukraine), or a domestic court exercising universal jurisdiction.'[20] The limitation with the ICC's involvement is that while the ICC may be able to indeed prosecute perpetrators of the conflict for the three core crimes, it lacks jurisdiction over the crime of aggression. After Ukraine accepted the court's jurisdiction under article 12(3) of the Rome Statute,[21] the ICC opened investigation on the three core crimes, upon referral from multiple states numbering over forty.[22] Aggression can only be prosecuted by a competent court or tribunal with jurisdiction. However, the road to establishing such tribunal is not straightforward. Various options have been proposed, ranging from a General Assembly-backed international tribunal[23] to different forms of hybridity, drawing on the Ukraine's domestic jurisdiction which includes aggression in its national laws.[24]

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[19] K Jon Heller 'The Best Option: An Extraordinary Ukrainian Chamber for Aggression' *OpinioJuris*, 16 March 2022 [available at http://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/ - accessed 12 May 2023].
[20] Dannenbaum (n. 7).
[21] Ukraine accepts ICC jurisdiction over alleged crimes committed since 20 February 2014, 8 September 2015.
[22] (n. 16).
[23] On powers of GA to create, see C. Stahn 'From 'United for Peace' to 'United for Justice?': Reflections on the Power of the United Nations General Assembly to Create Criminal Tribunals or Make Referrals to the ICC' (2023) 55 *Case Western Reserve Journal of International Law* 1, 251.
[24] Dannenbaum (n. 7).

Assuming that the aggression tribunal is validly established, it would exist side by side with the ICC and domestic courts, who may all be interested in prosecuting same or different categories of perpetrators from the conflict. What complementarity will look like in this circumstance requires some attention.

There are many possible proposals on what complementarity could look like in this circumstance. However, one starting point is an understanding that these levels of courts ought to proceed as partners, instead of competitors. The relationship between them must be based on partnership and cooperation, especially in matters relating to selection of cases, case prioritization, transfer of cases, evidence sharing, arrest and transfer of suspects, among others. The OTP of the ICC has recently signified a commitment to these elements in its complementarity dealings with other courts, including what it calls 'specialized accountability mechanisms', in its 'Draft Policy on Complementarity and Cooperation'.[25] This appears to be a progress as the OTP's previous 'informal expert paper on the principle of complementarity'[26] did not contain any provision on partnering with specialized accountability mechanisms, nor regional organisations. The OTP specifically committed itself to deferring to genuine proceedings before '[any] competent accountability mechanism'.[27] As such, the principle of mutual deference, especially where it is adjudged that the other court will be better placed to deal with a situation must be one of the factors that guide the relationship between the ICC and the proposed aggression mechanism. This appears to be easy, as the two courts will be dealing with different category of crimes.

Beginning with case selection and prioritization, complementarity between the ICC and the proposed aggression mechanism must be based on a division of labour that foresees the ICC prosecuting suspects reasonably suspected of committing any of the three core crimes, while the tribunal focuses strictly on defendants accused of the specific crime of aggression. The definition and contours of aggression as a crime in international law, is beyond the scope of this research, but it is sufficient to state that aggression is a leadership crime of sort.[28] In article 8 *bis* 1, the Rome Statute limits culpability for aggression to those who can 'effectively exercise control over, or direct the political or military action of a state.' This will suggest that the relevant suspects before

[25] ICC-OTP 'Draft policy on Complementarity and Cooperation' September 2023.
[26] ICC-OTP 'Informal expert paper: The principle of complementarity in practice' (2003).
[27] ICC-OTP Draft Policy on Complementarity and Cooperation, September 2023, para. 80.
[28] Dannenbaum (n. 7).

the aggression tribunal may be the more senior political and military leaders of the warring states. This provides some basis for division of labour between the ICC and the tribunal.

As a result of crime overlaps, there is the tendency for the same defendants to be culpable of both aggression and any of the other three core crimes. In that situation, it may be feasible for the ICC to defer to the jurisdiction of aggression tribunal while it focuses its attention on defendants accused of committing the other three core crimes, to the exclusion of aggression. Recall that the OTP has already committed itself to discretionary case selection and prioritization, to defer to relevant prosecutions carried out before a competent criminal mechanism.[29] Deference is grounded in prosecutorial discretion and as a policy of the ICC, it could be applied between the court and the proposed special tribunal on aggression. The ICC might therefore prioritize pursuing defendants who have committed the three core crimes, while the aggression tribunal would focus on defendants who committed the crime of aggression. This is a form of 'reverse complementarity' to the OTP's conception where it purports to focus on more senior defendants. Although, the difficult question is what happens in cases of overlap? This is because war crimes and aggression may be difficult to separate. A hypothetical question that arises is whether the ICC should defer a Putin prosecution to any aggression tribunal, even if the case before ICC may be more comprehensive? The answer to this is not as straightforward. One thing that is clear is that ne bis in idem might not bar several trials, if conduct charged is different.

With case selection and prioritization addressed, it will appear that the focus between the two courts would be cooperation on issues relating to evidence sharing. Given the points in the previous paragraphs, transfer of cases and suspects may be unnecessary as the classes of suspects will be different between the two mechanisms. Similar therefore, to the relationship that existed between the ICTY/ICTR and national mechanisms, the ICC and a specialized tribunal on aggression should be willing to share evidence between each other. To give life to positive complementarity, evidence collected by one court should be admissible and useable in the other.

The proper framework for complementarity between the proposed tribunal and the ICC will proceed from an interaction that enables admissibility questions to be addressed at the start of the investigation. Either court can raise a challenge to admissibility. This ensures that either side is not

[29] (n. 27).

starting an investigation on a perpetrator that is already being investigated by the other court. Where a court is investigating a suspect, that court should notify the other court of the progress in the case. Either court may assist the other with evidence collected during investigation and trial.

The starting point therefore, is that the rules of procedure and evidence of the aggression tribunal must contain explicit provisions on the tribunal's relationship with the ICC. Similar comprehensive provisions on evidence sharing and case transfer exist in the Rules of Procedure and Evidence of the ICTR and the ICTY.

Lastly, I am aware that simply delineating the appropriate forum for prosecution by crimes, as I have done above, may be too easy. This is because the fact that aggression is leadership responsibility does not necessarily mean ICC should automatically defer. Similar to my poser above, should the ICC drop a potential Putin case if he would face more narrow charges by a hybrid tribunal? The answer again, would depend on whether the tribunal is an international or a hybrid one. Moreover, in making a determination of the appropriate forum for prosecution, ideas relating to sequencing and differentiation of conduct could offer some guidance. Generally, factors like severity of crime, scale of atrocities, likelihood of successful investigation and prosecution, among others, are considered in case selection. Additionally, distinguishing between different criminal conducts within the same situation has also offered guidance on case selection.[30] It is therefore necessary to propose a cooperative arrangement between the ICC and any future aggression tribunal in Ukraine, for the purposes of prosecution of the defendants. This cooperative arrangement that is based on division of labour, as agreed by these different levels of courts is reflective of the ideas underpinning regional complementarity, and makes policy sense.

[30] See ICC-OTP, 'Policy paper on case selection and prioritisation' (2016).