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

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SUMMARY

This study deals with how to organize legal pluralism occasioned by the emerging four-tiered justice paradigm. I seek to shift attention away from universalism by interrogating specific organizing principles for legal pluralism. Secondly, I 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. I establish that there is a system of 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. I aim to show that 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 thesis 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.

The study establishes that the more our justice system advances, the greater the need for new organizing principles. In the Council of Europe, the margin of appreciation and deference have been the concept that allows the European Court of Human Rights to preserve its place within the many courts that exist in the domestic judicial systems without interfering with sovereignty of states.³¹ In order to then preserve the autonomy of the regional mechanism, I advocate a move away from the ICC-hierarchical approach of complementarity to a functional approach based on a different understanding. For instance, I propose that we go beyond the ICC same person, same conduct and inaction tests in determining an admissibility challenge where there is a dispute of jurisdiction between the ICC and a regional mechanism, and between regional mechanism and domestic systems. I propose principles relating to collaboration, consultation, division of labor,

³¹ J. Gerards 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 1, 80-120.

sequencing, deference and the likes, beyond the narrow tests in the ICC. The current understanding of complementarity can be expanded to accommodate genuine prosecutions before a regional or sub-regional mechanism, thus making a case relating to the same conducts and persons inadmissible before the ICC. This study takes a holistic look at the four-tiered model and principles governing the relationship between ICC and regional courts, on the one hand, regional courts and domestic courts on the other hand. The relationship between the ICC and domestic courts has already been extensively discussed in literature. This study however brings together the relationship between these four levels of court that has been identified. The study goes beyond the partial study of regional complementarity that only looks into the relationship between regional mechanisms and the ICC. It provides a more comprehensive account of the idea of regional complementarity that goes beyond these classical complementarity criteria like inaction, unwillingness or inability test. The research proposes a more holistic framework in order to organize these relationships based on certain organizing principles.