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Positive Complementarity and the Law Enforcement Network: Drawing Lessons from the Ad Hoc Tribunals' Completion Strategy

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The International Criminal Court (ICC) Prosecutorial Strategy 2009–12 reaffirmed the commitment of the Office of the Prosecutor (OTP) to positive complementarity. The Prosecutor recognised the inability of the ICC to deal with all cases of mass atrocities and the importance of relying on national systems if international criminal justice is to be effective. The article first proposes a two-pronged approach to complementarity that distinguishes between its legal and policy dimensions. On the basis of the analysis of the situations in the Democratic Republic of Congo, Uganda and Colombia, it will be argued that the OTP has taken controversial decisions from the viewpoint of complementarity stricto sensu and positive complementarity that may undermine filling the impunity gap as well as the legitimacy of the ICC. Attention is then drawn to the common substratum of the ad hoc tribunals' completion strategy and positive complementarity. It is explained how the experience of the completion strategy offers a valuable cluster of lessons to be applied within the spectrum of positive complementarity. In concluding, the article suggests measures for the execution of positive complementarity and the Law Enforcement Network, with the intention of optimising efforts and resources within the ICC system.

Keywords: complementarity, completion strategy, International Criminal Court, capacity building, international criminal justice

1. The Dimensions of Complementarity: Law and Policy

The principle of complementarity was envisaged as reconciling the prime prerogative of states concerning the exercise of the *jus puniendi* and the quest of the international community for the accountability of perpetrators of core crimes. To this effect the Statute of Rome[1] (ICC Statute) defined the legal dimension of complementarity (hereinafter also referred to as complementarity *stricto sensu*) in Article 17. It provides for a two-step test whereby the court is allowed to step in if: (i) competent states are inactive; or (ii) domestic proceedings have been instituted but the state is unwilling or unable genuinely to investigate and prosecute. When the first condition is satisfied, the 'unwilling or unable' test is irrelevant and does not have a role to play in the assessment of admissibility.[2]

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[1] Rome Statute of the International Criminal Court (ICC Statute) (entered into force 1 July 2002) 2187 UNTS 90.

[2] Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67. Robinson explains in detail the two-step insight of art 17 whereby inactivity dictates the admissibility of cases before the ICC (if gravity requirements are fulfilled). For the opposing view (considering that the OTP and the chambers' decision, according to which the non-existence of domestic proceedings dictates the admissibility of cases, is a manifestation of judicial activism) see William Schabas, 'Prosecutorial Discretion v Judicial Activism' (2008) 6 *Journal of International Criminal Justice* 731.

In line with this view, the jurisdictions of the International Criminal Court (ICC) and domestic courts were seen as competing or opposing concepts. Yet complementarity has undergone a dynamic development, mostly as a result of the policies promoted by the Office of the Prosecutor (OTP), which appealed to 'partnership', 'dialogue' and cooperation between the ICC, and domestic authorities.[3] Thus, being more than a device to protect sovereign interests or regulate conflicts of jurisdiction, complementarity 'is increasingly recognized as a "managerial" principle which may serve to promote "effective investigation and prosecution of crimes", ensure a division of labour between the ICC and domestic jurisdictions, and enable states to carry out proceedings and overcome dilemmas of "inability" or "unwillingness"'.[4]

This scenario sets out the landscape for understanding the policy dimension of complementarity, equated with positive complementarity. The ICC Prosecutorial Strategy 2009–12 reaffirmed the commitment of the OTP to positive complementarity, which means that it is required to further proactive policies of cooperation with national authorities in order to promote the opening of proceedings at the domestic level. Positive complementarity is to be undertaken, inter alia, by:

- providing information collected by the OTP to domestic authorities under Article 93(10) of the ICC Statute and in the presence of guarantees of protection for judges, witnesses and other security caveats;
- calling upon lawyers and experts from relevant countries to participate in the OTP's Law Enforcement Network (LEN); and
- sharing with them expertise and training in investigative techniques and the questioning of witnesses.[5]

This backdrop unveils specific features of positive complementarity:

(i) it is based on the idea of burden-sharing, cooperation and shared responsibility between the ICC and domestic courts;

(ii) the decision concerning the forum for justice does not depend solely on the failure of states to undertake proceedings but may also take into account the comparative advantage of different fora;

(iii) it intends to promote, assist and incentivise the reform of national systems so that they are capable of undertaking genuine proceedings, making the ICC a true mechanism of last resort.[6]

Despite the previous considerations, the declared commitment of the OTP to positive complementarity has barely materialised in practice. Certainly, one may question why the Prosecutor

[3] See OTP, Report on the Activities Performed during the First Three Years (June 2003–June 2006), 12 September 2006, paras 2, 58, http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf.

[4] Carsten Stahn, 'Perspectives on Katanga: An Introduction' (2010) 23 *Leiden Journal of International Law* 311, 312.

[5] See OTP, 'Prosecutorial Strategy 2009–2012' (OTP Prosecutorial Strategy 2009–12), para 17, http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf.

[6] ibid para 16.

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should act differently. Why is positive complementarity so important if it does not emerge from the ICC Statute as a legal obligation binding any of the organs of the ICC? Yet the nature of positive complementarity is not so clear cut.

To start with, according to the spirit of the ICC Statute, the ICC is to be a last resort mechanism to deal with the most serious crimes when states fail to do so.[7] Only if national judiciaries are in the position of carrying out impartial proceedings in accordance with international human rights standards can the ICC serve its original mission and close exceptional gaps in accountability.

Similarly, the Prosecutor is bound to investigate and prosecute under specific circumstances.[8] However, in view of the limited resources available to the ICC, the Prosecutor can look into all situations requiring intervention only if able to rely on effective national judiciaries that will administer justice in respect of the same type of criminality. Positive complementarity allows the ICC to maximise its resources and expertise by focusing exclusively on that handful of cases the gravity of which begs for an international response – ensuring, at the same time, that domestic authorities will be in the position to serve justice effectively in all remaining cases.[9]

Other mechanisms throughout the Statute support positive complementarity. For instance, Article 89(4) provides that where a state is prosecuting an ICC suspect for a crime that is different from that with which the Prosecutor intends to charge him, the state may consult with the court with a view to maintaining jurisdiction. This solution is based on both the principle of the primacy of states and the maxim that the ICC is to oversee state action in order to prevent impunity gaps.

Finally, attention should be drawn to the concept of *legitimacy*. In accordance with Max Weber's conceptualisation of rational-legal authority, legitimacy is the conviction 'in the legality of patterns of normative rules and the right of those elevated to authority under such rules to issue commands'.[10] Applying the concept to the ICC, legitimacy is:[11]

> the extent to which people in the world perceive it as legal and are prepared to accept its commands as binding. Of course, what is most important is the extent to which officials of states who are parties to the ICC Statute comply with formal directives from the judges and prosecutors of the ICC. However, in assessing the ICC's overall legitimacy, we are also interested in the extent to which other persons expect and consider it right for such officials to comply with such commands. To that extent, the legitimacy of the ICC also rests in part on the beliefs of state officials that are not party to the ICC statute and of other persons generally.

[7] ICC Statute (n 1) art 17 and preamble, para 6.
[8] ibid art 53(1).
[9] In other words, this framework ensures that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation': ibid preamble, para 4.
[10] Max Weber, *The Theory of Social and Economic Organization* (Free Press 1957) 328.
[11] Michael J Struett, *The Politics of Constructing the International Criminal Court, NGOs, Discourse, and Agency* (Palgrave Macmillan 2008) 153.

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Legitimacy is that fundamental element that permanently renews the confidence and support of states, without which the ICC is doomed to fail.[12] Positive complementarity is crucial in this regard because, by assisting states and giving them every opportunity to exercise their primary jurisdiction, it appeals to rationally driven argumentation, which is easily accepted as opposed to technical legal reasoning. Therefore, while positive complementarity is not a legal obligation, it is also not simply a question of comity of the OTP. It is a 'binding policy' or a 'quasi legal' imposition insofar as it gives effect to core principles of the ICC Statute. Article 17 is the framework and positive complementary is the enforcement tool that enables the mandate of the ICC to materialise.

Against this background, it is easy to understand how positive complementarity and complementarity *proprio sensu* relate to each other: the former should be the rule and the latter the exception. When to go from the rule to the exception is a complex exercise within the discretion of the Prosecutor (and, on appeal, of the chambers) to be integrated *in concreto* through various subsequent levels of scrutiny.

2. Complementarity in Practice

In keeping with the previous considerations, the article continues with an analysis of how complementarity (both as a legal principle and policy strategy) has been articulated in specific situations and cases.

2.1 Democratic Republic of Congo (DRC)

After a self-referral by the DRC, the Prosecutor decided to institute proceedings against Mr Lubanga for the crime of enlistment of children under 15.[13] Importantly, Mr Lubanga had already been indicted in the DRC for crimes against humanity, genocide and other offences under national law. Notwithstanding that Mr Lubanga was facing more serious charges in the DRC, the Prosecutor decided to step in and apply the 'same conduct' test, which means that a case will be inadmissible only where the same individual is facing domestic proceedings for the same conduct with which he or she is charged before the ICC.[14] From the perspective of complementarity *stricto sensu*, the decision of the ICC is supported by the fact that situations where the same individual is being prosecuted at the domestic level for different crimes fall within the scope of Article 89(4) rather than Article 17 of the ICC Statute, with the former determining a

[12] By way of illustration, even the most vocal opponent of the ICC – the United States – has manifested its commitment to contributing to positive complementarity: Stephen J Rapp, Ambassador at Large for War Crimes Issues, United States of America, Speech to Assembly of States Parties, The Hague, 19 November 2009, http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf. Ambassador Rapp referred to a current review of US law aimed at setting out the landscape to permit cooperation. President Obama's Administration is still working on the official policy on the ICC.

[13] ICC, *Prosecutor v Thomas Lubanga Dyilo*, Warrant of Arrest, ICC-01/04-01/06, 10 February 2006, http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF.

[14] '[Mr Lubanga] must be delighted to find himself in The Hague facing a prosecution for relatively less important offences concerning child soldiers than genocide and crimes against humanity': Schabas (n 2) 743–44.

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consultation mechanism aimed at analysing the costs and benefits of prosecution in one or other forum.[15] Furthermore, concerns about the genuineness of Congolese prosecutions were justified. However, nothing would have prevented the Prosecutor from stepping in later if, in reality, the DRC acted with the intent of shielding Mr Lubanga from justice or was 'unable'. This case was a perfect example of a lost opportunity to apply the policy of positive complementarity and support domestic proceedings, train judicial personnel and share evidence.

The 'same conduct' test was also at the centre of the case against Mr Katanga, who challenged the admissibility of proceedings on the ground that the DRC had been investigating him for the same conduct with which the ICC had charged him, prior to closing the investigation in order to proceed with his surrender to the ICC. He claimed that domestic investigations covered his alleged responsibility for crimes against humanity with regard to attacks in the Ituri district and therefore did not exclude the village of Bogoro (the site of the attacks that was the basis of the Prosecutor's case).[16] The OTP maintained that national proceedings did not refer to attacks carried out in Bogoro and that, for this reason, the 'same conduct' test dictated the admissibility of proceedings.[17] The trial chamber did not rely too much on this aspect. It considered the case admissible, inter alia, because the challenge had been filed out of time. It further ruled that even if that had not been the case, the decision on admissibility would still prevail on the basis of a second form of unwillingness not stated in the Statute: where a state 'chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done'.[18] Accordingly, the chamber resorted directly to the second stage of the two-step admissibility test, applying the 'unwilling or unable' concept in the absence of proceedings.

The appeals chamber endorsed the decision of the trial chamber on different grounds. It declined to scrutinise the 'same conduct' test[19] and held inactivity to be the ground for the admissibility of the case.[20] This decision is fully in line with Article 17. Yet doubts arise under the spectrum of positive complementarity. Again, the ICC should at least have explored the possibility of judicial proceedings at the national level, mostly with regard to individuals already under investigation or prosecution in the state for crimes of equal or higher gravity.[21] Of course,

[15] Professor Robinson contends that the DRC opted not to use this avenue as the domestic file against Mr Lubanga was 'literally empty': Robinson (n 2) 101, note 109.

[16] ICC, *Prosecutor v Katanga and Ngudjolo*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga pursuant to Article 19(2)(a) of the Statute, ICC-01/04-01/07-949, 11 March 2009, paras 4–6, 9, 14.

[17] ibid paras 51–96, 108.

[18] ICC, *Prosecutor v Katanga and Ngudjolo*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-T-67-ENG, 16 June 2009, paras 77, 95.

[19] ICC, *Prosecutor v Katanga and Ngudjolo,* Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on Admissibility of the Case, ICC-01/04-01/07-1497 OA8, 25 September 2009. On the refusal of the appeals chamber to examine the 'same conduct' test, see Ben Batros, 'The Judgment on the *Katanga* Admissibility Appeal: Judicial Restraint at the ICC' (2010) 23 *Leiden Journal of International Law* 343, 347–51.

[20] ibid 75–83.

[21] The defence in Katanga called this proposal the 'test of comparative gravity': see ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui,* Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04 – 01/07, 16 June 2009.

positive complementarity is a policy designed and promoted by the OTP which has no binding effect, particularly on the chambers. Yet, as a question of policy, the different organs should be aware of the importance of close cooperation so as to not undermine the legitimacy of the ICC and promote the necessary ethos that allows the development of an effective system of international criminal justice. This is all the more so given that the ICC can easily be resorted to as a political device to address the interests of private groups.[22] Furthermore, the decision of the trial chamber is controversial. It maintained the admissibility of the case by applying a concept not enshrined in Article 17.

2.2 UGANDA

Official representatives have stated openly that the self-referral was motivated by the incapacity of state authorities to arrest Lord's Resistance Army (LRA) leaders who had fled across the border.[23] Uganda has been undertaking an important review of its legal system in order to meet the requirements of the ICC Statute, facilitate the demobilisation of the LRA and secure peace in the territory. In 2007 an Agreement on Accountability and Reconciliation between the LRA and the Government of Uganda was concluded to provide for the use of 'traditional justice mechanisms', such as *Mato Oput*, as a central part of the framework of accountability. These mechanisms could bring about challenges to the genuineness of domestic proceedings. In March 2008 Ugandan representatives stated that 'formal criminal and civil' measures would be taken against perpetrators of serious crimes.[24] In late 2008, an Annexure to the Agreement on Accountability and Reconciliation was concluded, which provided for the establishment of a Special Division of the Ugandan High Court to prosecute the LRA leadership.[25] Bearing in mind that a compromise with the LRA could greatly benefit the peace process in Uganda, it is unlikely that were Kony to sign the agreement the government would give up the opportunity of challenging proceedings before the ICC. In this regard, it is relevant to note that the Amnesty Act of 2000 was extended by the Ugandan government in May 2006 and remains fully applicable, even to ICC indictees who surrender to domestic authorities.[26] In view of these developments, the pre-trial chamber

[22] In Uganda, eg, President Museveni referred the situation to the ICC well aware of the fact that he would not face proceedings before the ICC while his opponents, sharing power at the time, would most likely be charged. Mr Lubanga was a target in the DRC of the same type of strategy. See William W Burke-White, 'Complementarity in Practice: the International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo' (2005) 18 *Leiden Journal of International Law* 557, 563–68.
[23] Kasaija Phillip Apuuli, 'The ICC's Possible Deferral of the LRA Case to Uganda' (2008) 6 *Journal of International Criminal Justice* 801, 805–06.
[24] Jane F Kiggundu, Acting Solicitor General, 'Letter to the Registrar of the International Criminal Court', 27 March 2008, as cited in William W Burke-White and Scott Kaplan, 'Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Ugandan Situation' in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijoff 2009) 79, 103 n 124.
[25] ibid.
[26] Ugandan Amnesty Act 2000, http://www.beyondjuba.org/BJP1/policy_documents/Amnesty_ ACT_Chapter_ 294.pdf.

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decided to analyse admissibility *ex officio* in accordance with Article 19(1) of the ICC Statute.[27] It pointed out, inter alia, that it was analysing admissibility at the specific moment of the decision and that it could not engage in hypothetical considerations.[28] Proceedings were therefore considered to be admissible. The defence appealed against the decision, which was confirmed by the appeal chambers.[29] LRA leaders should clearly be tried but the question remains of 'how' and 'by whom'. It has been argued that Uganda has one of the most effective legal systems in Africa.[30] It succeeded in establishing the Special Division of the High Court and in 2010 the Parliament passed the International Criminal Court Bill 2006, which enables domestic courts to prosecute most of the crimes enshrined in the ICC Statute.[31] If it further alters the remaining obstacles to genuine prosecutions, the case may be that positive complementarity should fully operate in this regard.[32] Justice Elizabeth Nahamya-Ibanda has stated that, despite the War Crimes Division being a significant development, the country was in great need of support from the perspective of positive complementarity, especially with regard to the national 'lack of capacity to investigate and prosecute international crimes [and] lack of resources'.[33] While these considerations are at present purely hypothetical, were LRA heads to surrender to Ugandan authorities, the OTP should join forces with domestic agencies in order to promote the necessary legal reforms and effective trials rather than insist on maintaining jurisdiction.[34] Indeed, the pre-trial chamber clarified that the assessment of complementarity is a continuing process:[35]

[27] ICC, *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen,* Decision Initiating Proceedings under Article 19, Requesting Observations and Appointing Counsel for the Defence, ICC-02/04-01/05, Pre-Trial Chamber II, 21 October 2008, paras 14, 15, 21, 29.

[28] ICC, *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen,* Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05, Pre-Trial Chamber II, 10 March 2009, para 9.

[29] ICC, *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen,* Judgment on the Appeal of the Defence against the 'Decision on the Admissibility of the Case under Article 19(1) of the Statute' of 10 March 2009, ICC-02/04-01/05 OA 3, Appeal Chamber, 16 September 2009.

[30] William Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts' (2008) 19 *Criminal Law Forum* 9, 18.

[31] International Criminal Court Bill 2006, http://www.coalitionfortheicc.org/documents/Uganda-ICC_Bill_2006.pdf. Conflicting news concerning President Museveni's signing of the bill (as required for its coming into force) were repeatedly reported: see, eg, Bill Oketch, 'Uganda Set for First War Crimes Trial', *Institute for War and Peace Reporting*, 14 July 2010, http://iwpr.net/report-news/uganda-set-first-war-crimes-trial.

[32] A further remaining doubt concerning the mandate of the War Crimes Division is whether it is competent to prosecute state actors. The Juba agreements implied that it could not, but the International Criminal Court Act 2010 does not prohibit it: see Michael Otim and Marieke Wierda, 'Uganda: Impact of the Rome Statute and the International Criminal Court', *International Centre for Transitional Justice*, May 2010, 3, http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-V-M.7-ENG.pdf.

[33] The Honourable Justice Elizabeth Nahamya-Ibanda of the Special War Crimes Division of the High Court of Uganda, 'The Mandate and Activities of the Special War Crimes Division of the High Court Uganda', speech given at the Seminar 'Challenges of Complementarity under the Rome Statute System and the Role of Lawyers: Lessons and Prospects', organised by Advocats Sans Frontières in collaboration with the Ugandan Law Society, 1 January 2010, Kampala (Uganda) (on file with the author).

[34] It is important to note that this proposal does not amount to suggesting that a state may withdraw unilaterally the referral made. Rather, the decision to defer to national authorities is within the exclusive competence of the ICC.

[35] *Prosecutor v Joseph Kony and Others*, 10 March 2009 (n 28) para 28.

> The corpus of these provisions delineates a system whereby determination of admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is dependent [on] review depending on the evolution of the relevant factual scenarios … the Statute as a whole enshrines the idea that a change in circumstances allows (or even, in some scenarios, compels) the Court to determine admissibility anew.

Obviously, this would not prevent the OTP from stepping in should evidence arise that supported the view that the domestic system was unwilling or unable to genuinely undertake proceedings. By following this proposal, the ICC would make clear that its intervention focused on Africa is a consequence of necessity and the interests of justice rather than a 'neo-colonialist' project.[36]

2.3 COLOMBIA

Colombia has been in extreme crisis as a consequence of the civil war that took place in the 1940s and 1950s between conservatives and liberals, which was later perpetuated in rural areas leading to violence between guerrillas, paramilitary groups and state security forces.[37] The government has increasingly resorted to paramilitary groups to back up the government security forces, which are known for being underfunded and poorly trained. The paramilitaries are often said to be the de facto force of the state.[38] They systematically resort to violence and practices prohibited under national and international law.[39]

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[36] See, eg, Ali Wasil, 'African Union Now Officially Naked before the World & Darfuris', *Sudan Tribune*, 21 July 2009, http://www.sudantribune.com/spip.php?page=imprimable&id_article=31879.

[37] There are two major guerrilla groups: (i) the ELN (*Ejercito de Liberacion Nacional*), which is inspired by the Cuban Revolution in the fight against capitalism and imperialism; and (ii) the FARC-EP (*Fuerzas Armadas Revolucionarias de Colombia – Ejercito del Pueblo*) which was born in 1964 as a Marxist-Leninist movement intended to overthrow the government and install a Marxist regime. While their message initially reflected the feelings of the people, their violent tactics eroded public support. In the 1970s and 1980s landlords and drug dealers created their own private armies to protect their economic interests. In 1997 the leaders of these paramilitary groups founded the AUC (*Autodefensas Unidas de Colombia*), a right wing movement that originated largely as a response to the FARC.

[38] Members of paramilitary groups have admitted to having worked side by side with army soldiers in the framework of projects coordinated by high-ranking members of the military: Jorge L Esquirol, 'Can International Law Help? An Analysis of the Colombian Peace Process' (2000) 16 *Connecticut Journal of International Law* 23, 34–35; International Crisis Group, 'Correcting Course: Victims and the Justice and Peace Law in Colombia', *Latin America Report*, No 29, 30 October 2008, 17, 18–19, http://www.crisisgroup.org/~/media/Files/latin-america/colombia/recting_course___victims_and_the_justice_and_peace_law_in_colombia.pdf.

[39] For example, the Inter-American Court of Human Rights (IACtHR) concluded that security forces collaborated to engage in torture, disappearances, extrajudicial killings and massacres by providing transportation, munitions and communications to paramilitaries and failing to protect the civilian population: *Mapiripan Massacre* (2006) Inter-Am Ct HR (Ser C) No 134, paras 96.32, 96.35. For a comprehensive account of human rights violations, see Human Rights Watch, 'Breaking the Grip? Obstacles to Justice for Paramilitary Mafias in Colombia', 2008, 80–90, http://www.hrw.org/sites/default/files/related_material/colombia1008web.pdf. See, eg, Amnesty International, 'Leave Us in Peace! Targeting Civilians in Colombia's Internal Armed Conflict', AI Index AMR 23/023/2008, October 2008, 25–71. See also Jennifer S Easterday, 'Deciding the Fate of Complementarity: A Colombian Case Study' (2009) 26 *Arizona Journal of International and Comparative Law* 46, 60–69.

After many failed attempts to control the conflict, President Uribe launched a plan to end hostilities based on a strong demobilisation movement and an amnesty law.[40] The Justice and Peace Law (JPL), negotiated between the AUC and the government,[41] provides for reduced sentences and several advantages to members of the paramilitary who surrender, disarm, turn over stolen assets and confess to the crimes committed.[42] Colombia has maintained that the JPL is at the core of a consistent effort of transitional justice to reconcile justice and peace.[43] Yet, as is repeatedly pointed out, the law does not meet the minimum requirements of justice. Rather, it is essentially a political mechanism to protect paramilitary groups in view of their close relationship with the government.[44] Indeed, the JPL focuses on the paramilitary movement instead of addressing all parties to the conflict. By way of illustration, the Constitutional Court has ruled that portions of the Law are unconstitutional.[45] The government then passed Decree 3391, which retained some of the provisions held to be unconstitutional.[46] Against this scenario, the 'willingness' of Colombia to comply is doubtful and it might be reasonable to contend that the JPL was intended to be a sophisticated device to appease the ICC and ensure that the government's allies escape punishment.[47] It could be argued that the government priority is to achieve peace after more than 40 years of strained conflict. Yet the political and social context of Colombia makes it hardly feasible to accept that this has been the major motive behind the government initiatives.[48]

[40] With regard to the demobilisation effort, the process is far from equitable. Most paramilitaries who have agreed to disarm are compensated with considerable legal and economic advantages without even having to fully confess to their crimes. For a comprehensive analysis of Colombia's recent efforts to fight impunity, see Easterday, ibid 71–79.

[41] Ley 975 de 2005, Ley de Justicia y Paz, *Diario Oficial* [*DO*] 45.980, 25 July 2005 (Colombia).

[42] ibid arts 11, 17, 29. The sentences range from five to eight years, to be carried out in farm-like, low-security prisons, and reduced by up to 18 months.

[43] President Alvaro Uribe, 'El Mundo esta' lleno de Leyes de Paz', Bogota, 24 June 2005 (translation by Easterday (n 39) 80).

[44] Uribe, ibid 96. On the partial approach of the government to the conflict see, eg, Lisa J Laplante and Kimberly Theidon, 'Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz' (2006) 28 *Michigan Journal of International Law* 49, 61.

[45] Sentencia [S] No C-370/06, *Diario Oficial* [*DO*] 18 May 2006 (Columbia), http://www.acnur.org/biblioteca/pdf/4276.pdf.

[46] Decreto 3391 de 2006, 29 September 2006. For example, the Decree restated art 31 JPL, which reduced sentences for time spent by demobilised persons in the so-called concentration zone while the provision had been considered unconstitutional by the Colombian Constitutional Court. Further, the court held that the 'Justice and Peace Confinement Sites' – the location where demobilised persons covered by the JPL were to serve their sentences – should be controlled by the state penitentiary authorities. Decree 3391 rules that such sites *may* be used for JPL detainees but does not elaborate on the conditions of the sites, nor does it provide that the latter are to be submitted to the authority of the state penitentiary organs. On this subject see the IACtHR 2007 Report: IACtHR, 'Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings', OEA/Ser L/V/II Doc 3, 2 October 2007, paras 50–54.

[47] Easterday (n 39) 71, arguing that 'the politics of transitional justice mask the Colombian genuine unwillingness to prosecute those responsible for mass atrocities'. See also International Crisis Group (n 38) 18–19.

[48] As previously noted, the JPL primarily addresses AUC members, whose involvement with the government is long-running. The US State Department, non-governmental organisations, and even Colombian authorities such as the Colombian Ombudsman have extensively documented the relationship between the military and the paramilitaries since, at least, 1980.

If it is considered that the JPL does not aim to shield perpetrators from justice, the judiciary in any event seems to be unable to carry out genuine proceedings. There is extensive evidence as to the overburdening of investigative and prosecutorial agencies and lack of resources and funding.[49] Victims and witnesses are intimidated and killed.[50] The AUC systematically threatens, bribes and kills judges and prosecutors.[51] It is significant that the ICC panel of experts has identified, among other factors, amnesties, lack of judicial infrastructure and obstruction by uncontrolled elements as indicative of inability or unavailability. All elements seem to be verified in the Colombian context.[52]

The intervention of the Prosecutor is desirable and warranted under the ICC Statute. In view of the number of victims and the gravity of ongoing crimes, the interests of justice can hardly support the opposite view. Were one to consider that the 'interests of justice' require the Prosecutor to step back if so advisable in order to assure peace, the reality of Colombia with its decades of war, failed attempts to resolve the conflict and the modest results of the JPL would hardly be convincing that the Prosecutor's non-intervention has facilitated the peace process. In any event, if the Prosecutor is of the view that the situation in Colombia does not justify the intervention of the ICC the OTP should urgently provide a detailed explanation. It is not enough simply to note that Colombia has been taking steps. Colombia is a striking example of how the OTP has failed to enforce Article 17.[53] The image of the ICC is not helped by the fact that after eight years the Prosecutor has not given a decision. The recent Interim Report[54] released by the OTP is to be praised as it sheds some light on the endeavours of the ICC, although it reveals a number of difficulties that further justify questions over the delay in addressing the situation in Colombia. An in-depth discussion of the Report is beyond the scope of this article; yet it is worth noting three main concerns about the approach of the OTP:

1. Its analysis is far more quantitative than qualitative, relying on data on cases and convictions without critically assessing the terms and quality of procedures, particularly in respect of compliance with human rights standards.
2. By the same token, it neglects the reality of the Colombian context where violence is a main element.

[49] US Department of State Report, 'Colombia, Country Report on Human Rights Practices', 2006, paras 1(d)–1(e), http://www.state.gov/g/drl/rls/hrrpt/2005/61721.htm. For an account of a specific example of the failure of the judiciary, see Easterday (n 39) 89–91.

[50] For a detailed account of the problems concerning the protection of victims and witnesses and their impact on investigations and prosecutions, see International Crisis Group (n 38) 30.

[51] US State Department (n 49) para 1(e).

[52] International Criminal Court, Office of the Prosecutor, 'Informal Expert Paper: The Principle of Complementarity in Practice', 2003, para 50 and Annex 4, http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF.

[53] 'The purpose of that clause in the Statute is to ensure that mass murderers and other arch-criminals cannot shelter behind a state run by themselves or by their cronies, or take advantage of a general breakdown of law and order': Secretary General Kofi Annan, 'Secretary General Urges "Like Minded" States to Ratify Statute of International Criminal Court', Press Release, 1 September 1998, UN Doc SG/SM/6686, http://www.un.org/News/Press/docs/1998/19980901.sgsm6686.html.

[54] OTP, 'Situation in Colombia, Interim Report', November 2012, http://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf.

3. The data upon which the OTP based its analysis was submitted mainly by official state authorities, which raises doubts as to its impartiality.[55]

Similarly, the Report does not reveal any robust policy for positive complementarity or strategies to support and enhance the capabilities of the national investigative and judicial systems. It is, therefore, reasonable to wonder why it is that precisely in the context of an extremely politicised judicial and legal environment the Prosecutor seems to be willing to let positive complementarity operate, even though the very basis of this policy is not fulfilled.[56]

3. BRIDGING POSITIVE COMPLEMENTARITY AND THE COMPLETION STRATEGY

While the principle of complementarity, as provided for by the ICC Statute, is a powerful novelty in terms of codification, the substratum of the idea of positive complementarity is not unknown. This article argues for a particular relationship between positive complementarity and the completion strategy pursued by the ad hoc tribunals: while operating at different stages, positive complementarity and the completion strategy share, to a significant extent, the same goal.

The statutes of the ad hoc tribunals established their primacy in relation to national courts. This notwithstanding, the Rules of Procedure and Evidence (RPE) and the praxis of the International Criminal Tribunals of the former Yugoslavia (ICTY) and Rwanda (ICTR) reveal that this priority was aimed at ensuring that sham trials and domestic irregularities would not defeat criminal justice and the efficacy of the tribunals' work.[57] The tribunals were created to complement domestic judiciaries at a time of breakdown. The ICTY was aware of the fact that it would not gather the support of states for long. Accordingly, in 2000, Judge Jorda, then President of the ICTY, designed what is

[55] For a concise but comprehensive discussion on these and other topics raised by the Interim Report, see Kai Ambos, 'Examen preliminar de la Fiscalia de la CPI al caso colombiano', *ADS – Asuntos del Sur*, *Informe*, 29 December 2012, http://www.asuntosdelsur.org/informe-examen-preliminar-de-la-fiscalia-de-la-cpi-al-caso-colombiano.

[56] OTP Prosecutorial Strategy 2009–2012 (n 5), providing that positive complementarity is to be facilitated where, inter alia, the safety of judges, witnesses and victims is assured. Obviously, positive complementarity presupposes a judicial system that is able and willing to genuinely undertake proceedings.

[57] The Statute of the International Criminal Tribunal for the former Yugoslavia (Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808(1993), UN Doc S/25704 (3 May 1993), adopted by the Security Council in Resolution 827 (25 May 1993)), art 9 provides:

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence [(RPE)] of the International Tribunal.

Rules 8 to 13 of the RPE ((entered into force 14 March 1994) UN Doc IT/32/Rev 49, 22 May 2013, http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf) expound on the primacy of the ICTY. Rule 9 provides for three circumstances upon which the Prosecutor is allowed to ask the trial chamber to issue a formal request of deferral: (i) where the act being investigated by the domestic jurisdiction is classified as an ordinary crime; (ii) the national proceedings are a sham; and (iii) the matter is closely related, factually or legally, to investigations or prosecutions before the international tribunal. See also the Statute of the International Criminal Court for Rwanda, annexed to UNSC Res 955(1994), 8 November 1994, UN Doc S/RES/955 (1994), art 8.

known as the 'completion strategy': a course of action aimed at transferring proceedings to national judiciaries as soon as possible.[58] The UN Security Council, through Resolution 1503(2003), called upon both the ICTY and ICTR to take all possible measures to complete investigations, trials and appeals by specific deadlines.[59] In this context, the transfer of cases to national courts operated a posteriori, in order to complete the jurisdiction of the ad hoc tribunals. Obviously, the implementation of the completion strategy could not amount to impunity or overlook internationally recognised human rights standards. Accordingly, the ICTY has developed, in particular by way of amendments to the RPE, a framework of cooperation with national judiciaries in order to permit devolution of cases but the tribunal maintains supervisory powers in order to ensure fairness and due process.[60] Significantly, rule 11 *bis* establishes the power of the Prosecutor to request the Referral Bench to revoke the referral order if the case is not being handled impartially and in accordance with standards of due process. The tribunal has also been improving cooperation with domestic jurisdictions, placing its expertise at their disposal.[61] This framework reveals that the threshold is the *genuineness* of criminal proceedings. The ad hoc tribunals may not refer cases to national systems where there are no guarantees of willingness and ability to duly investigate and prosecute. Where there is no such guarantee, the tribunals retain the role of correcting and filling any lacunae in the domestic systems,[62] even where this is contrary to the strict terms of the Security Council resolutions.

Within the realm of the ICC, positive complementarity operates as a first stage to ensure that the court will step in only as a last resort, thus complementing domestic jurisdictions and filling in any gaps of impunity derived therefrom. As in the case of the ad hoc tribunals in respect of the completion strategy, the ICC is to function as the ultimate surveillance device over domestic systems, ensuring that national authorities are in the position to genuinely administer criminal justice. The OTP remains empowered to oversee domestic proceedings and, if not satisfied with their standard, to request the pre-trial chamber to authorise investigations *proprio motu*.[63]

Specifically linking positive complementarity and the completion strategy is the recognition that international courts and tribunals cannot succeed without the support of states. These courts are not ends in themselves but means to fight against impunity. Yet their effectiveness is limited

[58] In the words of Fausto Pocar, former President of the ICTY, 'the Tribunal, from its inception, was established to exercise primary jurisdiction only for a short period and because of the inability of local judiciaries to deliver justice or ensure a future of peace to the region': Fausto Pocar, 'Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY' (2008) 6 *Journal of International Criminal Justice* 655, 655.

[59] See also UNSC Res 1534(2004), 26 March 2004, UN Doc S/RES/1534 (2004). As a result of delays the transfer of cases was behind schedule. Through this resolution the Security Council addressed the matter by postponing the initial deadlines but reaffirming to the fullest extent the purposes of UNSC Res 1503(2003), 28 August 2003, UN Doc S/RES/1503 (2003).

[60] The OTP monitors the transferred proceedings through the Organization for Security and Cooperation in Europe (OSCE).

[61] The ICTY's former President Pocar calls this strategy one of 'continued legacy building' rather than 'completion strategy' as it 'effectively means returning cases back to where they belong, but only after ensuring that local institutions once again have become ready, willing and able to manage them': Pocar (n 58) 661.

[62] For an overview of the completion strategy, see Erik Møse, 'The ICTR's Completion Strategy – Challenges and Possible Solutions' (2008) 4 *Journal of International Criminal Justice* 667.

[63] ICC Statute (n 1) arts 15(3), 18(6).

inasmuch as they can handle only a limited number of cases. Domestic judiciaries continue to hold primacy concerning the administration of the *jus puniendi*. In both situations national and international jurisdictions work to complement each other, with the international body holding the power to oversee domestic proceedings. What is different is the moment or stage at which the international judicial body calls upon the domestic authorities. In the framework of positive complementarity, this takes place a priori; the Prosecutor incentivises states to develop and mature their legal systems so that the ICC does not have to step in. In the context of the ad hoc tribunals, resorting to domestic courts takes place a posteriori, after the intervention of the ICTY and ICTR. This difference in timing is explained by the different legal landscapes upon which the ICC and the ad hoc tribunals operate. The former operates upon the assumption that states are generally willing and able to investigate and prosecute, which dictates the primacy of domestic courts. The latter were created as a result of specific conflicts, which allowed the establishment of the rule of primacy because the 'unwillingness' of former Yugoslavia and the 'inability' of Rwanda had been confirmed.

4. THE COMPLETION STRATEGY: LESSONS LEARNED

In view of the commonalities between positive complementarity and the completion strategy, as identified in Section 3, it is submitted that the ICC is in the privileged position of having in the experience of the ad hoc tribunals a resourceful cluster of lessons. This section identifies the main obstacles in the framework of the completion strategy[64] and, on that basis, proposes guidelines for implementing positive complementarity.

4.1 RULE 11 *BIS*

Rule 11 *bis* allows the transfer of cases from the international tribunal to domestic courts where the indictment has been confirmed. In addition, a number of other cases, which may or may not have led to an indictment, were transferred to the national authorities.[65] Upon deciding whether to transfer cases, the ICTY operated a two-stage analysis: (i) it assessed the gravity of the crimes and the responsibility of the accused, and (ii) it examined the willingness and ability of the receiving state to undertake proceedings. Rule 11 *bis* (D)(iv) allows the Prosecutor to monitor national proceedings and rule 11 *bis* (F) entitles the Referral Bench to revoke the transfer of the case and formally request deferral back to the ICTY. It is important to note that in practice the monitoring of transferred cases has been carried out by the relevant mission of the Organization for Security and Cooperation in Europe (OSCE). Neither rule 11 *bis* nor the Referral Bench provided the threshold for a formal request for deferral back to the ICTY.

[64] The analysis takes as its reference the experience of the ICTY but the conclusions reached are largely applicable in respect of the ICTR.

[65] These cases, known as 'Category Two cases', are not subject to a formalised procedure, as opposed to cases within r 11 *bis*.

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Practice has revealed that among the criteria were the rights of the accused and guarantees of due process, the willingness to not shield perpetrators from justice, the capacity of the judiciary to carry out impartial proceedings, and the efficiency and efficacy of the legal system.

The ICC Statute and RPE do not provide for any mechanism similar to that contained in rule 11 *bis*. However, the flexibility and adaptability of complementarity *stricto sensu* permit the ICC, and the OTP in particular, to defer cases back to states where there has been a relevant change in circumstances so that it supports genuine criminal proceedings, guaranteeing the safety of witnesses and assuring due process.

The question remains of delineating the framework to effectively bolster national judiciaries.

4.2 Obstacles to the Completion Strategy

This subsection will analyse specific obstacles to the implementation of the completion strategy that may guide the elaboration of an effective policy of positive complementarity.

4.2.1 Evidence

One of the problems experienced by the ICTY concerned the use by domestic courts of evidence obtained by the tribunal. Laws concerning the admissibility of evidence vary among legal systems. In this regard, for example, in 2006 the law of Bosnia and Herzegovina had to be amended to conform with the requirements of the Office of the High Representative. The national system started to allow the use in domestic courts of electronic evidence received from the ICTY.[66] This was particularly important because Bosnia did not have a detailed law on the rules of evidence but rather relied on the principle of free evaluation.

4.2.2 Protection of Witnesses and Victims

Issues concerning the obtaining and treatment of evidence are highly relevant in terms of the safety of victims and witnesses.[67] This is all the more significant as witness protection was a factor that the ICTY had to consider when deciding whether to refer cases in order for witnesses to continue to be protected. Bosnia adopted special laws to provide for the protection of witnesses both inside and outside court. However, their practical implementation left much to be desired, particularly at the Entity level: for example, no separate room was made available for testimony to be given by way of voice and image distortion. Further, the so-called Special Investigative Police Agency (SIPA) was established with a specific department responsible for the protection of witnesses testifying before the State Court. Nonetheless, it is important to note that, for

[66] Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings before Courts in Bosnia and Herzegovina.

[67] For example, ICTY, *Prosecutor v Ljubičić*, Fourth OSCE Report annexed to the Fifth OTP Progress Report on the same case, IT-00-41-PT, 19 September 2007. See also Law on Protection of Vulnerable Witnesses and Witnesses under Threat (Bosnia and Herzegovina).

example, in *Radovan Stanković and Gojko Janković* many witnesses were interrogated repeatedly, even after having already testified with regard to the *Foča* rapes before the ICTY and the State Court. Similarly, there was a lack of coordination and harmonisation of protective measures: while some prosecutors and trial panels applied the strictest protective measures, others found that less rigid solutions were sufficient. On the advice of the OSCE mission in Bosnia, having been alerted to the dangers of this approach, a coordinator was appointed to facilitate the resolution of concerns relating to witness protection.[68]

4.2.3 SENTENCES AND THEIR ENFORCEMENT

The process of sentencing and the effective enforcement of penalties are of the utmost importance. It is inevitable that sentences imposed by national courts will be compared with those dictated by international tribunals. It is therefore crucial to establish some coherence between the two spheres of authority. When the State Court in Bosnia sentenced Janković to 34 years' imprisonment at first instance, the defence acting for Milan and Sredoje Lukić (who were at the time awaiting a final decision on their referral to Bosnia) immediately claimed before the Referral Bench that a state 'whose State Court is imposing sentences in referral cases which are nearly as high as the highest sentences ever imposed by this tribunal as in *Prosecutor v Kadislav Krstić*, is clearly not prepared to accept cases under rule 11 *bis*'.[69]

Similarly, the hunger strikes being undertaken by defendants facing trials before the State Court drew public attention to the difference in sentences issued by the State Court and at Entity level. The view of the defence was that the State Court was in breach of human rights because it was imposing prison sentences of 10 to 45 years for war crimes, in accordance with the new criminal code passed in 2003, while at Entity level courts were applying a maximum of 20 years, as determined by the former code (which was in force at the time the crimes were committed).[70] Eventually, the Constitutional Court repealed a challenge to the practice of the State Court and urged Entity courts to apply the new criminal code.[71]

When examining the State Court's review of *Stanković*, which culminated in an increased sentence from 16 to 20 years' imprisonment, the OSCE mission drew attention to the importance

[68] Registry Annual Report, 'Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina', Special Departments for War Crimes and for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina, 2006, 49–50.

[69] *Prosecutor v Lukić and Lukić*, Joint Motion of Defence Counsel for Milan Lukić and Sredoje Lukić for Leave to Submit Supplemental Response to Prosecutor's Request under Rule 11 *bis* and for Evidentiary Hearing, 1 March 2007, as cited in Pipina Katsaris, 'The Domestic Side of the ICTY Completion Strategy: Focus on Bosnia and Herzegovina' (2007) 78 *Revue Internationale de Droit Penal* 183, 193.

[70] ibid.

[71] BiH Constitutional Court, *Abdouladhim Maktouf*, Decision on Admissibility and Merits, Case No 1785/06, 30 March 2007, paras 69, 89, https://www.google.co.il/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDMQFjAA&url=http%3A%2F%2Fwww.codices.coe.int%2FNXT%2Fgateway.dll%2FCODICES%2Ffull%2Feur%2Fbih%2Feng%2Fbih-2007-2-003&ei=k1JLUaRSiOe1BpiHgOgH&usg=AFQjCNGtoYmvANRz51Z_V6ey19PA19WGng&sig2=9xNQSe3Qc9-QiYkpuGGxYA&bvm=bv.44158598,d.Yms&cad=rja.

of judges justifying their decision to increase penalties and limiting their interference in the decisions of trial panels. Otherwise, there is a risk of seeing the national system as subjective, partial and usurping the authority of the local community and its representatives.[72]

Respect for human rights standards does not end with the trial or appeal phase. Having facilities where perpetrators can serve their time in compliance with human rights standards impacts significantly on the legitimacy of the national system. In addition, the security conditions in these facilities and the ability of personnel to respond to emergencies are factors that cannot be neglected.[73] In 2007, Stanković escaped from police custody while he was being transferred to a hospital; after that, the ICTY refused to refer the case of *Milan Lukić* even though it did not directly connect its refusal with the Stanković event.

4.2.4 Legacy and Legitimacy

The completion strategy demonstrated the necessity of guaranteeing transparency of proceedings and setting out effective outreach policies. The State Court was severely criticised for excluding the public from certain high-profile judgments, including the case against Radovan Stanković.[74] Arguably, this decision was based on the need to protect witnesses. Yet the court was condemned for failing to take into account less restrictive measures which would have satisfied the aspirations of the people and responded to suspicions that were developing within public opinion.[75] The court in *Janković* refused to provide journalists with audio records of the trial without substantiating its refusal. The President of the panel was of the view that the decision fell within the realm of judicial discretion and that it would be inappropriate for her to intervene. This notwithstanding, the OSCE mission urged the court to be more consistent, to take into account its legal obligations governing access to information and adopt a coherent policy on transparency of proceedings.[76] Excluding the public from proceedings may have a highly prejudicial impact on the legitimacy of international tribunals and courts. For instance, the public in the areas of Foča and Banja Luka knew very little about the *Stanković* case. Public mistrust only increased after his escape from custody in 2007.[77] Nowadays, the State Court works with a Public Information and Outreach Section, the functions of which are essentially limited to providing basic information on the court's work. Even then the target of this information is also limited (mostly journalists and NGOs), and the provision of information continues to lack coordination.[78]

[72] ICTY, *Prosecutor v Stanković*, Seventh OTP Progress Report annexing the Sixth OSCE Report on the Same Case, IT-96-23/2-PT, 27 June 2007, 3.
[73] ibid, 14 of OSCE Report.
[74] Nidzara Ahmetasevic, 'Justice Report – Interview: Michael Johnson, Registrar of the Court of Bosnia Herzegovina', *Balkan Investigative Reporting Network,* 17 March 2006, http://www.bim.ba/en/3/10/791.
[75] ICTY, *Prosecutor v Stanković*, Third Progress Report annexing the OSCE Second Report on the Case, IT-96-23/2-PT, 7 June 2006.
[76] ICTY, *Prosecutor v Janković*, Sixth OTP Progress Report annexing OSCE Fifth Report in the Case, IT-96-23/2-PT, 14 May 2007, 10.
[77] Katsaris (n 69) 192.
[78] For further information, visit http://www.sudbih.gov.ba.

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4.2.5 RECOMMENDATIONS FOR POSITIVE COMPLEMENTARITY

Against the experience of the completion strategy, the OTP should assist states with:

(i) legal reforms intended to implement core crimes and overcome major obstacles to investigation and prosecution (such as total amnesties and immunities);
(ii) developing effective laws to deal with evidence collected by non-national authorities under different formats;
(iii) ensuring effective mechanisms to protect witnesses while at the same time safeguarding the rights of the accused and the efficiency of the proceedings (this could involve setting up specialised national units, as occurred in Bosnia and Herzegovina);
(iv) harmonising the sentencing procedure and the penalties applied to similar crimes;
(v) building efficient penitentiary systems;
(vi) publicising domestic proceedings that are potentially under the jurisdiction of the ICC, particularly within affected communities, in order to foster public perception that justice is being done and that the ICC is being vigilant (for example, through specific domestic units created for that purpose which are well connected with different sectors of civil society).

The limited resources of the OTP and the negative effects that a too close working relationship between the Prosecutor and the governments involved in cases of mass atrocities may have on the image of the ICC (as happened in Uganda) should not undermine these policies. The OTP could develop partnerships with actors that, although coordinated through the OTP, would directly pursue the cooperation programme. It is important to ensure that those providing assistance are properly qualified. Furthermore, platforms of cooperation should focus on the ICC system and prosecution for core crimes. Other capacity-building operations aimed at developing the national system, while important from a general viewpoint, would not add anything to the capacity of states to prosecute crimes under international law.[79] Returning to the completion strategy, even though rule 11 *bis* allows the Prosecutor to monitor national proceedings, in practice the monitoring task has been carried out by missions of the OSCE who periodically report to the tribunal. The OTP could follow this path by negotiating agreements with specialised agencies, such as the OSCE and the Organization of American States (OAS), that have the resources to bypass developments and compile comprehensive data on legal reforms and the ability of states to genuinely exercise jurisdiction. These institutions (and actors) would work as a focal point for the coordination of synergies between the ICC and domestic authorities. The OTP would be in the position of complementing reports and information provided by the governments concerned with the insight of an independent and specialised body. These institutions could also inform the OTP

[79] With regard to the implementation of the ICC Statute, the Coalition for the ICC identified recurring weaknesses in national laws that derived from models or drafts prepared by international organisations providing technical assistance to states. Among these flaws are inadequate definition of crimes enshrined in the Statute and the politicised trigger-mechanism of national jurisdictions with regard to core crimes. See Meeting on Technical Issues Related to Implementing Legislation (organised by Parliamentarians for Global Action and Amnesty International), *Journal of the ASP*, No 2009/10, 3, 24 November 2009 (on file with the author).

of the opportunity to consult with third states that are willing and able to undertake proceedings with a view to allowing the 'transfer' of proceedings from the ICC to those states. Importantly, there are specific areas where the OTP and the ICC could participate directly in capacity-building, namely through specific agreements that allow practitioners to intern or work in partnership with the court's teams.[80]

Similarly, the Prosecutor should consider deferring back to states cases in respect of which the OTP has already opened proceedings if justified by a change in circumstances and the interests of justice so that the ICC has free resources to deal with cases that states are truly incapable of prosecuting or unwilling to undertake. In this situation, logistical units could be created (similar in substance to the 'residual mechanisms' of the ad hoc tribunals) to assist states with formal and substantive matters concerning these 'deferred' cases (for example, the receipt and treatment of evidence gathered by the ICC and already analysed by the Prosecutor or chambers). These 'satellites' of the court could also follow proceedings at the domestic level, allowing the Prosecutor to consolidate his decision on any future intervention.[81]

It could be argued that these measures would require considerable financial and human resources. This is not necessarily the case. The OTP could, as mentioned earlier, develop agreements with specialised bodies, organisations and institutions. Moreover, this cost should be balanced against the costs that the absence of an effective policy on complementarity may have on state support and the legitimacy of the ICC. The majority of actors are likely to be receptive to an increase in funds aimed at improving domestic systems and avoid the interference of the ICC provided it does not compromise justice.

Finally, the Law Enforcement Network (LEN) is a specific enforcement tool of the investigative side of positive complementarity. The programme was launched by the OTP in 2009, with the aim of creating a network at national prosecutor level to deal with crimes connected with crimes listed in the ICC Statute but not directly submitted to the jurisdiction of the ICC. It is further designed to assist domestic authorities in the investigation of genocide, crimes against humanity and war crimes. Specialised organisations, such as INTERPOL and EUROPOL, are seen as potential participants in the network. The information provided by the various participants should be coordinated by a focal point that is capable of optimising resources and avoiding duplication of procedures. Again, the completion strategy sheds light on the importance of focusing on the treatment of evidence, questioning of witnesses, security and training. It further reveals the importance of engaging with other specialised bodies. Robust agreements with INTERPOL and EUROPOL would, for example, enhance considerably the security and intelligence capacity of many states. A stronger outreach programme would be advisable in order to attract more participants and inform the international community of the efforts of the OTP to respect sovereignty.

[80] Sixteenth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 to the General Assembly and the Security Council, pursuant to Article 34 of the Statute of the International Tribunal, 31 July 2009, UN Doc A/64/205-S/2009/384 para 73.

[81] Similar to the avenues enshrined in r 11 *bis* (D).

These proposals would consolidate positive complementarity and provide solid ground for the Prosecutor to apply this policy first, adjudicating cases only where it failed to be effective. This would not prevent the OTP from collecting evidence or developing procedures necessary to ensure that, were the national system to be unwilling or unable to investigate and prosecute, proceedings before the ICC would not be compromised.[82]

5. CONCLUSION

The ICC necessarily needs to rely on, and defer to, national systems. Its effectiveness depends on assuring states that it does not intend to usurp their authority but rather to intervene only where they are realistically unable or unwilling to undertake genuine proceedings. To this effect, closer cooperation between the ICC, particularly the OTP, and domestic authorities is required. Importantly, this cooperation should not be targeted only to non-situation states. The OTP should evaluate, even after opening an investigation, whether the interests of justice require deferral to the domestic authorities when circumstances have altered so that the ICC is able to free resources to deal with those cases which states are incapable or unwilling to undertake. It is submitted that 'the interests of justice', as referred to in Article 53(1)(c), should also pay tribute to the necessity of making the system of international criminal justice more robust. To this end, optimising the resources of the ICC and strengthening its legitimacy are crucial.

As pointed out by an ICC official, the building of state capacity is not part of the court mandate: 'at most, the ICC has a limited role to play in the catalyzation and facilitation of capacity building'.[83] This vision is restrictive insofar as '[r]adically transformed circumstances for international criminal justice, both in scope and reach, beg the question of what is to be the relation between international to domestic law in the area of criminal justice. The transformed international system demands a guiding principle apt to address the ongoing relationship of the multiple regimes'.[84]

Article 17 lays down the legal principle of complementarity. Yet it needs to be integrated not only through legal concepts but also by means of a sound contextualised policy. This is all the more so because the ICC operates in a highly political context, and will inevitably trigger passion and hate. Positive complementarity is the tool that allows the ICC to interact in global politics in such a manner that enhances the court's legal mandate without dangerously crossing the borders between law and politics. Interaction, negotiation and cooperation at the stage of positive complementarity are much less controversial than within the realm of Article 17. Many of the

[82] ICC Statute (n 1) art 18(6).

[83] Sonia Robla Ucieda, Head of Public Information and Documentation Section, International Criminal Court, 'Engaging African Lawyers with the International Criminal Court', speech given at the seminar 'The Challenges of Complementarity under the Rome Statute System and the Role of Lawyers: Lessons and Prospects', 1 June 2010, http://www.docstoc.com/docs/61449809/The-Challenges-of-Complementarity-under-the-Rome-Statute-System-and-the-Role-of-Lawyers-Lessons-and-Prospects-A-breakfast-seminar-organized-by-ASF-in-collaboration.

[84] Ruti Teitel, 'Law and Politics of Contemporary Transitional Justice' (2005) 38 *Cornell International Law Journal* 837, 852.

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critiques addressed to the OTP relate to the active role of the Prosecutor in 'negotiating' self-referrals and how specific decisions can be misinterpreted in light of this context.[85] The ICC will survive only through the constant renewal of state support. To this effect, it needs to follow a coherent line of action that, while strictly based on the law, is not constrained by excessive legalism. When it is not possible to give precedence to national judiciaries because of unwillingness or inability on the part of the state, the ICC should not hesitate to intervene if the interests of justice so require. The decision to not step in, either because the requirements of the Statute are not fulfilled or because the Prosecutor decides first to explore the potential of positive complementarity, must be rigorously justified. Otherwise, there is a serious risk of scratching the legitimacy of the ICC so deeply that it might threaten the entire system of international criminal justice.

[85] For example, the fact that no members of governmental forces have been indicted by the OTP has been seen as a consequence of the understanding between the Prosecutor and President Museveni that led to the self-referral of the situation in Uganda.

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