Tracing an Idea, Constructing a Norm
Complementarity as a Catalyst

Since the signing of the Rome Statute in 1998, complementarity has grown from a legal rule to an instrument of policy. This policy sees the International Criminal Court (ICC) not only as a forum for prosecution where states fail to undertake criminal investigations and prosecutions themselves, but also as a means to enable or encourage proceedings at the national level. As stated by former prosecutor Moreno-Ocampo in a 2004 speech to the ICC’s Assembly of States Parties, one of his office’s ‘core policies’ would be to pursue a ‘positive approach to cooperation and to the principle of complementarity’. This meant, in his words, ‘encouraging genuine national proceedings where possible, relying on national and international networks, and participating in a system of international cooperation’.78

Such a description of complementarity might now seem commonplace; however, the expansion of its definition, and of its popular understanding, was neither obvious nor ordained. Furthermore, while the vision of ‘positive’ complementarity outlined by Moreno-Ocampo may have been ‘an inherent concept of the [Rome] Statute’, it was also a policy invention. As Carsten Stahn notes, ‘In court policy, complementarity was slowly discovered as a virtue, … as an instrument to foster legitimacy and enhance the efficiency of justice’.79 This discovery was chiefly driven by non-state actors – international and national NGOs, human rights advocates, academics and donors – many of whom had initially sought a stronger role for the court vis-à-vis national courts (primacy, rather than complementarity); had themselves served in previous leadership positions with other criminal

tribunals and, in certain cases, came to occupy important leadership positions in the early years of the ICC itself. These ‘norm entrepreneurs’ have persuasively advanced the conception of complementarity as a catalyst, while typically framing it as a series of obligations upon states to legislate, prosecute and adjudicate international crimes at the national level.

This chapter traces complementarity’s transformational evolution – its meaning and purpose as a catalyst – and queries how it came to dominate so much of the ICC’s early discursive space. It first offers a brief overview of the Rome Statute’s drafting history, emphasizing how the predominant understanding of complementarity amongst states at the time was as a principle of constraint. Unlike the *ad hoc* tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY), the drafters of the Statute chose not to grant the ICC primacy over national jurisdictions. This issue was deeply contested in the negotiations over the court and reflected a delicate process that sought to balance supranational jurisdiction with an enduring concern for state sovereignty. Furthermore, in line with this process, a deliberate choice was made to permit states substantial leeway in their prosecution of international crimes, including, for instance, their ability to prosecute Rome Statute crimes as ‘ordinary’ crimes.

Despite these careful negotiations, the second section of the chapter examines the evolution of complementarity from a technical rule of admissibility crafted by states towards a more catalytic vision driven by private actors. In so doing, it traces complementarity’s growth as a policy concept, which was embraced early on by the Office of the Prosecutor (OTP) as a way of encouraging national accountability for grave crimes. The intellectual history of complementarity is also considered, including the experiences of the ICTR and ICTY, whose completion strategies vis-à-vis the states of the former Yugoslavia and Rwanda played an important role in academic writing on the concept of positive complementarity and, in turn, influenced early ICC practice. Finally, the role of non-state actors in advancing the normative content of this concept is examined. Through this discourse analysis, the chapter demonstrates how the carefully negotiated compromises that informed the Rome Statute’s drafting have been progressively constructed and reshaped through the principle of complementarity.

The final section attempts to better understand the means by which complementarity’s polysemy (its meaning both as a rule of admissibility and as a catalyst) evolved with such apparent speed. Indeed, rather than complementarity’s ‘slow discovery’ as a virtue, the pace of this discovery – given the degree to which it might alter the perceived obligations of states, and the extent to which states at least initially ratified that perception – is
more notable for its swiftness. One reason for this swiftness, I suggest, is that the framing of complementarity as a catalyst benefited from the unprecedented and influential role that non-state actors played in the establishment of the ICC itself. Consistent with constructivist approaches to international relations, the success of private actors in this transformation underscores how a new complementarity norm was ‘discovered and learned’ through an interactional process, one in which ‘actors generate shared knowledge and shared understandings that become the background for subsequent interactions’. I also suggest that constructivist literature on transnational ‘communities of practice’, a concept developed by Etienne Wenger and advanced by the political scientist Emanuel Adler, offers a helpful lens through which to understand how this new complementarity norm – as an expectation of ‘what ought to be done’ – proliferated. In highlighting this dynamic interplay between practice and discourse, complementarity emerges as an evolving, adaptive principle rather than a static legal concept.

1 Complementarity as Constraint

While negotiations around the ICC’s establishment inaugurated a wave of interest in complementarity, the principle itself is not new. As Mohamed El Zeidy notes, ‘the conditions or the parameters of [complementarity’s] operation developed over a lengthy period of time until the adoption of the 1998 Rome Statute’. The principle was the subject of much debate around the creation and operation of a United Nations (UN) War Crimes
Commission during World War II, where the role of the commission vis-à-vis allied states played an ‘antecedent role’ to the Rome Statute.\textsuperscript{84} Still, most academic commentary on the subject did not emerge until the early 1990s, spurred on by the end of the Cold War and, relatedly, the International Law Commission’s (ILC) efforts to study the question of international criminal jurisdiction.

\textit{The International Law Commission: 1990–1994}

Trinidad and Tobago first requested that the UN General Assembly consider the question of establishing an international criminal court in 1989.\textsuperscript{85} In its initial report responding to that request, the commission presaged much of the debate that would follow by emphasizing that the main questions to resolve in establishing such a court were whether it was intended to ‘replace, compete with or complement national jurisdictions’.\textsuperscript{86} The general assembly subsequently requested that the commission prepare a formal draft Statute for an international court as a matter of priority. It did so, culminating in the ILC’s 1994 Draft ICC Statute, which proposed jurisdiction over genocide, aggression, war crimes and crimes against humanity.

Of note in that 1994 draft was Article 42, which drew upon the principle of \textit{ne bis in idem} (the principle that a person should not be prosecuted more than once for the same criminal conduct) as embodied in the ICTY and ICTR Statutes.\textsuperscript{87} As proposed, a person could be retried under the proposed court’s jurisdiction if the offence for which he or

\textsuperscript{84} Mark S. Ellis, \textit{Sovereignty and Justice: Balancing the Principle of Complementarity between International and Domestic War Crimes Tribunals} (Newcastle upon Tyne: Cambridge Scholars Publishing, 2014), 19. Operating from 1943 to 1948, part of the UN War Crimes Commission’s task was to assist national governments in the prosecution of Axis personnel, prefiguring much of the modern discourse around complementarity and the role of the ICC.

\textsuperscript{85} Notably, this initial request focused on a court with far narrower subject matter jurisdiction: drug trafficking. After the prime minister drafted a motion (with the assistance of former Nuremberg prosecutor Benjamin Ferencz and law scholar M. Cherif Bassiouni) proposing that the International Law Commission study the idea, the general assembly adopted it in 1989. Crucially, the language of that motion was to consider a court with jurisdiction to try crimes including, but not limited to, illicit drug trafficking. See, e.g., Benjamin N. Schiff, \textit{Building the International Criminal Court} (Cambridge: Cambridge University Press, 2008), 37–38.

\textsuperscript{86} El Zeidy, ‘The Genesis of Complementarity’, III.

she had been tried by another court was ‘characterized as an ordinary crime’, or if the proceedings ‘were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted’.  

Support for this provision was far from unanimous, with substantially differing views as to the ICC’s relationship with national jurisdictions. As Kleffner notes:

Some members of the ILC envisaged the court as supplementing rather than superseding national jurisdiction, while others envisaged it as an option for prosecution in case the state concerned was unwilling to do so. A third group of members suggested providing the court with limited inherent jurisdiction for a core of the most serious crimes, thus presumably envisaging exclusive jurisdiction of the International Criminal Court for these crimes.

Although no final decision was taken on a specific model at the time, the draft Statute presented by the ILC endorsed the proposed court being ‘complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective’. The ILC further proposed, in Article 35, a regime according to which jurisdiction would be allocated based on a determination of the admissibility of a case.

In the commentary to this paragraph, the commission explained to the General Assembly that the international court was ‘intended to operate in cases when there is no prospect of [the suspect] being duly tried in national courts’. Thus, ‘the emphasis is … on the court as a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts’. With respect to a situation where a person had already been tried by another

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89 Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 73.
91 Ibid., Article 35 (‘Issues of Admissibility’). The Rome Statute retains this provision: admissibility assessments are case-specific.
92 ILC Draft Statute, 27 (commentary 1).
93 Ibid.
(domestic) court, the 1994 draft retained the provision that subsequent trial by the ICC would not be barred where the initial trial had been for an ordinary crime, or in the case of sham, i.e., non-genuine, proceedings.94 The ILC report thus reflected the ‘classical’ conception of complementarity as a limiting jurisdictional principle. In Stahn’s words, it was a ‘concept to regulate potential conflicts as between the (primary) jurisdiction of national courts and the residual jurisdiction of the ICC’.95


Whereas complementarity appeared only in passing in the ILC’s earlier draft, it featured prominently in the discussions of the Ad Hoc Committee that was set up by the General Assembly to discuss the ILC’s report, in advance of the assembly’s 1995 session.96 The topic appeared under three general headings in the committee’s 1995 report: the ‘significance’ of the principle, its jurisdictional implications and the role of national jurisdictions.97 As the report noted, many state delegations ‘stressed that the principle of complementarity should create a strong presumption in favour of national jurisdictions’.98 In so doing, a number of advantages were highlighted, including that ‘evidence and witnesses would be readily available’, ‘language problems would be minimized’ and the ‘applicable law would be more certain and developed’.99 Furthermore, states had a ‘vital interest in remaining responsible and accountable for prosecuting violations of their laws – which also served the interest of the international community’.100 An additional point of debate was whether the principle should be reflected in the preamble of the Statute or its operative part.101

94 See ILC Draft Statute, Article 42(2).
96 Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions, 76.
98 Ibid., para. 31.
99 Ibid., paras. 31, 129.
100 Ibid., para. 31.
101 Ibid., paras. 35–37.
Other delegations expressed support for national courts retaining current jurisdiction with the proposed ICC, but insisted that ‘the latter should also have primacy of jurisdiction’. A particular point of contention remained the principle of *ne bis in idem*, as it was seen by some delegations as ‘incompatible with what they considered to be the intention of the ILC not to establish a hierarchy between the ICC and national courts or to allow the ICC to pass judgment on the operation of national courts’. To that end, the suggestion was made to delete the distinction between ordinary crimes and international crimes that had survived previous drafts. In particular, ‘It was stressed that the standards set by the Commission were not intended to establish a hierarchy between the international criminal court and national courts, or to allow the international criminal court to pass judgement on the operation of national courts in general’.

A Preparatory Committee (‘PREPCOM’), whose task it was to further develop the draft Statute replaced the Ad Hoc Committee in 1996, with the idea that a plenipotentiary conference would follow. Over the course of the next three years, ‘the original 43-page 1994 ILC draft Statute expanded into a draft Statute of 173 pages replete with bracketed options, alternative phrasing, and footnotes for consideration at the Rome Conference’. John Holmes, the head of the Canadian delegation that was asked to coordinate informal consultations on what became Article 35, produced a draft that, for the first time, introduced the terms ‘unwilling’, ‘unable’ and ‘genuine’ into the text of the proposed Statute, along with a set of conditions for determining where those conditions would render a case admissible.

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102 Ibid., paras. 32, 218.
104 Ad Hoc Committee Report, para. 43.
105 Schiff, *Building the International Criminal Court*, 70. See also Immi Tallgren, ‘Completing the “International Criminal Order”: The Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court’, *Nordic Journal of International Law* 67 (1998), 107–137. Tallgren offers a compelling account of the PREPCOM negotiations through the analogy of ‘Master’ and ‘Butler’, the latter ‘see[ing] complementarity as a means of restricting the role of the ICC and its scope of jurisdiction’ (i.e., constraint) and the former ‘represent[ing] the process of internationalization’, 124.
According to Holmes, inability was not controversial in principle: relevant agreed upon factors were the ‘total or partial collapse’ of a state’s national judicial system, the state being unable to secure the accused, or being ‘otherwise unable to carry out its proceeding’. Unwillingness, however, proved more contentious, ‘as some delegations had concerns with regard to state sovereignty and constitutional guarantees in domestic systems against double jeopardy’. To assuage concerns about the subjectivity inherent in such a test, the word ‘genuinely’ was inserted, as it was thought to carry a more objective connotation. Debates around the ne bis in idem principle also persisted, leading to the deletion of the ordinary crimes exception that had survived previous drafts. The Statute instead refers to the ‘same conduct’ of an accused, ‘to make clear that a national prosecution of a crime – international or ordinary – did not prohibit ICC retrial for charges based on different conduct’.

The Rome Statute: Article 17 and the Substance of the Principle

The term ‘complementarity’ itself does not appear in the Rome Statute. The Statute only notes, in its tenth preambular recital and in Article 1, that the ICC ‘shall be complementary to national criminal jurisdictions’. Article 17 sets out the substantive criteria for determining the admissibility of a case, but it does not use the term ‘complementarity’ as such. The article instead states that ‘a case is inadmissible where … [it] is

107 Ibid., 45–49.
109 In addition to concern that sham proceedings might be used to shield an accused, two other forms of unwillingness were agreed upon: undue delay inconsistent with an intent to bring the person to justice and lack of independence or impartiality.
110 Holmes, ‘The Principle of Complementarity’, 57–58. Stigen also confirms that the ‘ordinary crime’ criterion, initially endorsed by the [ILC], ‘was proposed but rejected [in the negotiations] as it met too much resistance’. Stigen, The Relationship between the International Criminal Court and National Jurisdictions, 335.
111 Kevin Jon Heller, ‘A Sentence-Based Theory of Complementarity’, Harvard International Law Journal 53(1) (2012), 224. For a similar conclusion, see Nouwen, Complementarity in the Line of Fire, 50; Rod Rastan, ‘What Is “Substantially the Same Conduct”? Unpacking the ICC’s “First Limb” Complementarity Jurisprudence’, Journal of International Criminal Justice 15(1) (2017), 1–29. Article 93(10), discussed in the following chapter, further supports this interpretation, as it refers to the court providing assistance to a state party ‘conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the court or which constitutes a serious crimes under the national law of the requesting State’.
112 Rome Statute Preamble, tenth recital. Article 1 of the Statute also states that the ICC ‘shall be complementary to national criminal jurisdictions’.
being investigated or prosecuted by a state which has jurisdiction over it, unless the state is _unwilling or unable_ genuinely to carry out the investigation or prosecution_. A case will also be inadmissible when ‘the state has decided not to prosecute, unless the decision resulted from the _unwillingness or inability_ of the state to genuinely prosecute’, or when the person ‘has already been tried for conduct which is the subject of the complaint, and a trial by the court is not permitted under Article 20, paragraph 3’. The Statute thus sets forth a two-step test, ‘the first explicit question of which is whether a state is investigating or prosecuting the case or has done so’. Where there are no such proceedings evident at the national level – which under ICC case law requires, as the following chapter discusses, similar charges of conduct – the case is admissible. The more difficult assessment to be made is the second step: whether a state, even where proceedings are underway, is ‘unwilling or unable genuinely to carry out the investigation or prosecution’. This prong of the test has generated significantly more controversy, as it invites the ICC to scrutinize the quality and standard of national proceedings. It involves a more subjective assessment of the standards by which such proceedings should be judged.

As discussed further below, several interpretive controversies have also arisen with respect to the test itself. For instance, Darryl Robinson (the drafter of the text that became Article 17) notes that rather than the two-step test that the text sets forth, a ‘slogan version’ of complementarity has instead come to exercise a ‘powerful grip on popular imagination’. In this ‘slogan’ version, complementarity is effectively reduced to a ‘one-step test’ that omits the predicate question of whether a state is investigating or prosecuting – the proceedings requirement – by focusing instead on the ‘unwilling/unable’ prong as the entirety of the test. This ‘hermeneutic...

113 Rome Statute, Article 17 (‘Issues of Admissibility’).
114 To determine whether a state is ‘unwilling’ to prosecute after an investigation, the court will look to see whether the proceedings shielded the person concerned, whether the proceedings were unjustifiably delayed ‘inconsistent with an intent to bring the person concerned to justice’ or whether the proceedings were not conducted impartially or independently and ‘in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice’. Ibid., Arts 17(2)(a–c).
115 Darryl Robinson, ‘The Mysterious Mysteriousness of Complementarity’, Criminal Law Forum 21(1) (2010), 68. As the following chapter examines further, the court has only rarely entered into questions of ability or willingness, finding instead an absence of domestic proceedings in almost all of its admissibility decisions to date.
116 Ibid., 67–102.
117 Ibid., 68.
118 Ibid., 69.
“blind spot”, as Robinson puts it, has since become ubiquitous in popular descriptions of the ICC, which routinely state that it is a court of ‘last resort’, or that it only intervenes where a state ‘is unable or unwilling’. Supportive of Robinson’s analysis, the text of Article 17 makes clear that complementarity is a case-based assessment. The question is not whether a ‘situation’ in general is or has been the subject of domestic investigations or prosecutions, despite the frequent shorthand of inability or unwillingness. To that end, commentators and court documents alike have noted that ‘complementarity does not require an assessment of [a] state’s overall justice system … merely that it is capable of conducting genuine proceedings in the particular case’. While the condition of that system

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119 The so-called ‘slogan’ version of complementarity has raised the ire of other commentators as well. See, e.g., Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes* (International Center for Transitional Justice, 2016), 43 (‘The slogan version [of complementarity] does not understand the importance of the two-step process. Only if you understand how the test works will you understand the right questions to ask about complementarity’). On the occasion of International Justice Day, the ICTJ released the cited handbook alongside an invitation to test viewers on ‘how well [they] understand the ins and outs’ of complementarity. See ICTJ, ‘Quiz: How Much Do You Know About Complementarity?’ (13 July 2016), at www.ictj.org/news/complementarity-quiz.

120 As defined by Pre-Trial Chamber I, cases ‘comprise specific incidents during which one or more crimes within the jurisdiction of the court seem to have been committed by one or more identified suspects [and] entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear’. Situations, by contrast, are ‘generally defined in terms of temporal, territorial and in some cases personal parameters’. *Situation in the Democratic Republic of Congo*, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101, PTC I (17 January 2006), para. 65. See also The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to Article 19(2)(b) of the Statute’, ICC-01/09-02/11 OA, Appeals Chamber, 30 August 2011, paras. 38–39 (‘Kenyatta Admissibility Appeals Judgment’) and The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Judgment on the appeal of the Republic on Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber (30 August 2011), paras. 39–40 (‘Ruto et al. Admissibility Appeals Judgment’) (stating that the specificity of the term ‘case’ will depend on the stage at which admissibility is challenged). For further on the distinction, see Rod Rastan, ‘Situation and Case: Defining the Parameters’, in *The International Criminal Court and Complementarity*, 421–459.

121 Nouwen, *Complementarity in the Line of Fire*, 74, 106.
can undoubtedly influence the ability to investigate or prosecute a particular case, it is not a determinative basis for admissibility. As explained later, however, arguments have since emerged to the effect that a national system should be considered ‘available’ only when it ‘incorporates the entire spectrum of substantive and procedural safeguards enshrined in the Statute and by which the ICC is to abide’.122

Complementarity also combines optional and mandatory features. Article 17 provides that the ‘court shall determine that a case is inadmissible’ in response to a challenge lodged by a state or individual.123 States, however, may also ‘refer’ cases to the ICC, as both Uganda and the Democratic Republic of Congo (DRC) (and other states subsequently) have done.124 El Zeidy has termed this ‘optional complementarity’ and notes that it is the ‘reversed scheme of ‘mandatory complementarity’, in that it is not due to the court’s determination that a state was inactive, unwilling or unable, but rather that the ‘state itself voluntarily decided to renounce the exercise of its jurisdiction in favour of the [ICC]’.125

This practice has also generated a significant literature amongst commentators who contend that such so-called ‘self-referrals’ are unsupported by the Statute and the intention of the drafters.126 Robinson again persuasively contests this view, noting that Article 14 expressly provides for state party referrals and that they were a ‘recurring and explicit topic of deliberation throughout the negotiations, from the first to the final discussion’.127 Not unlike the one-step ‘slogan version’ of complementarity, he notes that, ‘a reconstructed history appears to have eclipsed the actual drafting history’.128 Indeed, despite the

123 Three states have raised such challenges to date: Kenya, Libya and the Ivory Coast.
124 See Rome Statute, Article 14 (‘Referral of a situation by a State Party’).
frequency with which the ICC is referred to as a court of ‘last resort’, states may, and have, voluntarily referred situations on their territory to the court’s attention.

Articles 18 and 19, in turn, set out the procedural framework for complementarity. The former sets out a notification requirement of one month for the OTP when a situation has been referred, or where the office initiates an investigation. States may also pre-empt an OTP investigation by invoking Article 18. Doing so obligates the requesting state to initiate an investigation, but compels the prosecutor to ‘defer’ to the domestic jurisdiction.129 (Notably, however, this procedure has been rarely, if ever, invoked.130) Where the OTP has decided to prosecute, Article 19 grants the right to challenge admissibility to an accused, as well as to a state which has jurisdiction over a case. Such challenges may be brought only once – and, for states, ‘at the earliest opportunity’ – and ‘prior to or at the commencement of the trial’.131

Taken together, the Rome Statute’s complementarity criteria establish a ‘horizontal relationship between national and international courts: they constitute jurisdictional alternatives to one another with right of way normally given to national courts’.132 This ‘horizontal paradigm’ in turn, appeared to affirm a preference for domestic prosecution. Added to this were the decisions on the part of the drafters to explicitly depart from the primacy that characterized the ad hoc tribunals for Rwanda and the former Yugoslavia, to not include the absence of domestic due process rights as a condition for admissibility, and, relatedly, to reject the distinction between international and ordinary crimes as a basis for the ne bis in idem provision.

129 It should be noted that while this procedure applies to situations that are referred to the OTP or where the prosecutor has opened an investigation proprio motu, it does not apply in situations referred by the Security Council.

130 Carsten Stahn, ‘Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?’ in Carsten Stahn (ed.), The Law and Practice of the International Criminal Court (Oxford: Oxford University Press, 2015), 240 (describing deferral has having ‘largely remained a dead letter’). Articles 89 and 94 also provide for consultation between a state and the court in cases where an ICC request conflicts with domestic investigation of prosecution (or conviction), but this regime has also been little used to date. Article 17 is thus the dominant juridical avenue through which the court’s complementarity case law has been developed to date.

131 Rome Statute, Article 19(4)–(5). Article 19(4) foresees the possibility of an additional challenge (‘In exceptional circumstances, the court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.’).

Unsurprisingly, those who had sought a stronger role for the court as it was being developed viewed some of these compromises with dismay. Federica Gioia argues, for instance, that ‘despite the ambitious objectives set forth in the preamble of the Statute, the ICC still pays too great a tribute to state sovereignty’, while Frédéric Mégret notes that human rights NGOs, in particular, found the Statute’s ‘compromises’ to ‘have been fundamentally unrepresentative of the state of international law, or at least at variance with the better objectives of international criminal justice’. In the end, many in the NGO community came to embrace complementarity, but largely as a strategic concession: by supporting it as a mechanism that could curtail the ICC, political support could be marshalled for other critical proposals (for instance, the granting of powers to the prosecutor to initiate investigations propria motu, i.e., on her own accord). Ultimately though, the Statute was a ‘bargained document’, one in which the complementarity principle emerged less as a catalytic instrument than as protector of a classical principle of international law: sovereignty.


135 Even if opinion was more divided earlier in the earlier period of negotiations, by the time of the PREPCOM in 1997 many of the principal NGOs engaged in negotiations were largely supportive of complementarity. See, e.g., Human Rights Watch, ‘Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court’ (June 1998) (noting that ‘codification and application of the Statute’s complementarity principle … is key to the functioning of the [ICC]’ and that ‘one by-product of an effective and independent court should be to encourage national authorities themselves to investigate the crimes within the jurisdiction of the court, and the consequent strengthening of national judicial systems’), 69. Michael Struett also notes that, while debate on the meaning of complementarity became ‘more complex and sophisticated’ during the course of PREPCOM negotiations, NGOs ‘hammered away at the importance of designing the complementarity jurisdiction in such a way that it would not permit states to shield accused persons for political reasons’, 98. See Michael Struett, The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency (Palgrave Macmillan, 2008).

136 Schiff, Building the International Criminal Court, 79, 85. See also Markus Benzing, ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity’, Max Planck Yearbook of United Nations Law 7 (2003), 591–632, 595 (‘The most apparent underlying interest that the complementarity regime of the court [was] designed to protect and serve is the sovereignty both of state parties and third states’) (emphasis in original).
2 From Constraint to Catalyst:
The Evolution of Complementarity

The drafting history recounted above affirms that the Rome Statute was the result of extensive negotiation and compromise. The decision to vest the ICC with jurisdiction secondary to that of domestic courts was critical: states insisted upon it, even if many advocates had, at least initially, hoped that the new institution would possess the same jurisdictional primacy enjoyed by the ICTY and ICTR. So understood, complementarity was thought to primarily be an instrument of limitation, a ‘technical term of art for a priority rule set out in Article 17 of the Rome Statute’.137

Early ICC Policy: The Office of the Prosecutor

Notwithstanding these earlier compromises, a ‘thicker’ notion of the complementarity principle grew swiftly in the wake of the ICC coming formally into existence in the summer of 2002. While the court did not start functioning until late the following year – after prosecutor Moreno-Ocampo had been elected and other key staff appointed – a ‘start-up team’ within the OTP suggested that an expert consultation process on complementarity be convened early on, to consider the ‘potential legal, policy and management challenges which are likely to confront the OTP as a consequence of the complementarity regime of the Statute’.138 Comprised of experts drawn from a range of state, academic and NGO backgrounds – many of whom were part of the same epistemic community that had been engaged in early debates around the ICC and complementarity – the ‘informal expert paper’ that emerged from this process reflects the early seeds of a broader approach to complementarity. In its words, ‘The principle of complementarity can magnify the effectiveness of the ICC beyond what it could achieve through its own prosecutions, as it prompts a network of over 90 states parties and other states to carry out consistent and rigorous national proceedings’.139

137 Nouwen, Complementarity in the Line of Fire, 14.
139 Ibid., 4.
As a matter of ‘respect for the primary jurisdiction of states’ and of the limits on the number of prosecutions the ICC could ‘feasibly conduct’, the paper took as its premise that the complementarity regime ‘serves as a mechanism to encourage and facilitate the compliance of states with their primary responsibility to investigate and prosecute core crimes’. The report argued that two principles should guide this approach: (1) partnership, which may include ‘possibly provid[ing] advice and certain forms of assistance to facilitate national efforts’, as well as situations where the OTP and a state ‘agree that a consensual division of labour is in the best interest of justice’; and (2) vigilance, which ‘marks the converse principle … that where there is an indicia that a national process is not genuine, the prosecutor must be poised to take follow-up steps, leading if necessary to an exercise of jurisdiction’.141

The distinction between partnership and vigilance indexed an emergent distinction between complementarity as a contentious, coercive principle and as the framework for a more consensual, managerial relationship between the court and national jurisdictions. For the latter, the paper envisioned a range of direct assistance and advice functions, including ‘exchang[ing] information and evidence to facilitate a national investigation or prosecution’, providing technical advice (the OTP would, it was presumed, ‘build up a unique and unparalleled in-house expertise’)142 and training. As to its ‘vigilance function’, the paper noted that ‘certain background contextual information … may be gathered in order to inform an admissibility assessment under either the ‘unwillingness’ or ‘inability’ branches of the Statute. Such contextual information might include a state’s legislative framework (offences, jurisdiction, procedures, defences); ‘specific jurisdictional regimes (military tribunals); and the ‘legal regime of due process standards’.143 Factors affecting the inability test could include a ‘lack of judicial infrastructure’, as well as a ‘lack of substantive or procedural penal legislation rendering [the criminal justice] system “unavailable”’.144

In this indexing, the expert paper articulated a number of possible indicia that have assumed a more determinative character over time in the course of their uptake in scholarship and a range of advocacy

140 Ibid., 3.
141 Ibid., 4.
142 Ibid., 5–6.
143 Ibid., 13–14; 28–31.
144 Ibid., 15. At the same time, the paper noted that ‘The standard for showing inability should be a stringent one, as the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards’. Ibid.
materials developed by NGOs. Furthermore, it painted an early picture of both the coercive and cooperative dimensions of complementarity and of the OTP’s wide-ranging and discretionary role in its application. To that end, the office’s first policy paper, also published in 2003, emphasized that a ‘major part of [its] external relations and outreach strategy … [would] be to encourage and facilitate states to carry out their primary responsibility of investigating and prosecuting crimes’.145 The paper further developed the idea of a division-of-labour relationship between the court and national jurisdictions, noting that it ‘will encourage national prosecutions, where possible for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice’.146 Such an approach suggested a two-tiered arrangement between the ICC and states, with those ‘most responsible’ being prosecuted in The Hague. Architecturally, the OTP reflected the prioritization of this policy as well. The establishment of a separate division responsible for jurisdiction and complementarity issues (the Jurisdiction, Complementarity and Cooperation Division, JCCD) underscored the importance attached to this aspect of the office’s work.147

**Emergent Theories: Complementarity as Cooperation and Coercion**

From the outset, then, complementarity’s potential was understood as more than a tool for regulating jurisdiction, but also, as ‘a forum for managerial interaction between the court and states’.148 This ‘systemic dimension’ of complementarity, Stahn argues, ‘institutes a legal system under which the court and domestic jurisdictions are meant to complement and reinforce each other in their mutual efforts to institutionalize accountability for mass crimes’.149 Scholars have offered different descriptions to explain this imagined relationship. The ICC as ‘backstopping’ national courts has been a more passive iteration, while the court as a ‘reinforcement’ mechanism has been another.150

145 ‘Paper on some policy issues before the Office of the Prosecutor’, 5.
146 Ibid., 3.
147 The JCCD’s function is discussed further in Chapter 4. Notably, the establishment of the division was not without controversy, as some critics saw it as unduly politicizing the OTP’s role. See, e.g., Schiff, _Building the International Criminal Court_, 113–115.
149 Ibid., 91.
By contrast, a catalytic relationship is more active in its design. Burke-White, for instance, has argued that ‘international and domestic institutions are engaged in complex interactions whereby the international level, and particularly the ICC’s complementarity regime, may catalyse changes at the national level’. Likewise, referencing complementarity’s dynamic component, Stahn has written that ‘complementarity serves as a catalyst for compliance by virtue of the construction of Articles 17 and 19 of the Rome Statute’. And, as previously noted, Kleffner argues that complementarity should be a ‘catalyst for compliance’, insofar as it is ‘understood as aiming to induce and facilitate the compliance of states with their obligation “to exercise [their] criminal jurisdiction over those responsible for international crimes”, which underlies the Rome Statute’.

Cooperation: Technical Assistance, Burden Sharing and Capacity-Building

Kleffner’s reference to inducement and facilitation again suggests two different models for the court’s role as a catalyst for compliance: one coercive, the other cooperative. In the latter, the ICC’s relationship with domestic jurisdiction is compliance-driven, but fundamentally beneficent. The court and national jurisdictions complement each other not only in a ‘negative’ dynamic, wherein the ICC’s competences are engaged by the absence (or non-genuineness) of state action, but ‘also


153 Kleffner, ‘Complementarity as a Catalyst for Compliance’, 80.

154 Stigen echoes this two-sided approach, noting that ‘The complementarity principle seeks to enhance national jurisdictions partly by stimulating and partly by applying pressure’, 17. See also Rod Rastan, ‘Complementarity: Contest or Collaboration’, in Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010). Rastan contends that ‘limiting complementarity to a contest paradigm will prevent the realization of the statutory goal to put an end to impunity and thereby contribute to the prevention of crimes’, 84.
in a positive fashion, i.e., through mutual assistance and interaction’.

This policy of ‘positive’ complementarity received early endorsement from the OTP. As Stahn argues, however, ‘positive’ complementarity is not only a policy invention; it is also an ‘inherent concept of the Statute’, reflected, for instance, in its cooperation regime. Thus, ‘positive’ complementarity is ‘focused on problem-solving, i.e., the ability of the court to strengthen domestic jurisdictions and to organize a division of labour based on “comparative advantages”’.157

Even if it was ‘hardly … contemplated by all the [Rome Statute] negotiators’, numerous commentators and jurists have endorsed this approach to complementarity.158 Former ICC judge Mauro Politi, for instance, notes that there is ‘no doubt’ that one important goal of complementarity ‘is to establish a division of labour between national jurisdictions and the ICC, under which the court should essentially concentrate on those who have major responsibility for the crimes involved’.159 Cherif Bassiouni likewise identified that an ‘important ancillary function of the ICC is to prod national jurisdictions to assume their international legal obligations’, which may extend to the court providing technical assistance and capacity-building support to national criminal justice systems.160 Cooperation also animates complementarity’s affinity with a ‘managerial model of compliance’, or a ‘global compliance system for the enforcement of international criminal law’,161 wherein the ICC and states participate in a ‘cooperative venture to ensure accountability of perpetrators’.162 Gioia

155 Stahn, ‘Taking Complementarity Seriously’, 260. As discussed further in the following chapter, this dimension of complementarity also finds statutory support in Article 93(10) of the Statute.

156 Ibid., 236. Nouwen similarly contends that the Statute’s cooperation regime is what effectuates a policy of assisting domestic jurisdictions; in her view, ‘such a policy of assisting domestic jurisdictions is not inherent in complementarity’. Complementarity in the Line of Fire, 97–98.

157 Ibid., 260–261.

158 Stigen, 476.


162 Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions, 311.
likewise writes that ‘A “friendly” version of complementarity relies on the assumption that the ICC is not meant to act as a censor of national jurisdictions, but rather to allow for the most efficient sharing of competencies between the national and international level’.163

Burke-White’s scholarship is amongst the most well-known and influential articulation of the ICC’s relationship to national jurisdictions, casting it explicitly in catalytic terms. A 2005 article on the influence of the ICC in the DRC posited that the court was not merely an institution acting against domestic states, but rather part of a ‘multi-level global governance model’, one that also ‘participates in the domestic process, altering political as well as legal outcomes’.164 As part of such a multi-level system, his elaboration of a ‘Rome system of justice’ is rooted in a ‘virtuous circle in which the court stimulates the exercise of domestic jurisdiction through the threat of international intervention’.165 This invocation of the ICC as the apex of an organic judicial chain (the ‘virtuous circle’), while also recognizing its coercive properties (the ‘threat of international intervention’), comes together in the idea of ‘proactive complementarity’, in which the ICC ‘can and should encourage, and perhaps even assist, national governments to prosecute international crimes’.166

Burke-White’s writing – part of a growth of scholarly interest on the impact of the ICTY’s proceedings on domestic jurisdictions more generally – also drew heavily on the introduction of a completion strategy for the tribunal to support the notion of shared responsibility between national and international courts.167 Characterizing the completion strategy as a catalytic force for domestic accountability in states like Bosnia and Serbia, he argued that such an approach could be instructive for the ICC’s complementarity regime. In his words, ‘The structural changes in the ICTY’s jurisdiction and mandate undertaken as part of the completion strategy essentially shifted the governance structure from one of absolute international primacy toward a new relationship with incentives similar to those of complementarity’.168 These changes occurred in the

163 Federica Gioia, ‘Complementarity and “Reverse Cooperation”’, in The International Criminal Court and Complementarity, 817.
164 Burke-White, ‘Complementarity in Practice’, 559.
165 Burke-White, ‘Proactive Complementarity’, 57.
166 Ibid., 56.
168 Ibid., 320.
same period as the ICC’s operations began to take shape, contributing to the developing concept of ‘positive’ complementarity.\textsuperscript{169}

Under the completion strategy the ICTY’s Rules of Procedure and Evidence were amended, such that the tribunal could effectively incentivize domestic institutions by referring cases back to national jurisdictions, monitoring proceedings and ultimately taking cases back to the international forum if certain targets of due process were not met.\textsuperscript{170} UN Security Council Resolution 1503, issued in August 2003, endorsed the tribunal’s strategy and called upon the international community to ‘assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY’.\textsuperscript{171} Coordinating mechanisms initially set out in the 1996 Rome Agreement, which governed the relationship between the ICTY and local courts, were likewise strengthened under the so-called ‘rules of the road’, with the tribunal, after years of delay, fulfilling its obligation to review locally initiated cases before an arrest warrant could be issued by domestic authorities.\textsuperscript{172}

\textsuperscript{169} For a trenchant critique of Rule\textsubscript{11bis} analogies to the ICC, see Padraig McAuliffe, ‘Bad Analogy: Why the Divergent Institutional Imperatives of the Ad Hoc Tribunals and the ICC Make the Lessons of Rule \textsubscript{11bis} Inapplicable to the ICC’s Complementarity Regime’, \textit{International Organizations Law Review} 11 (2014), 345–427.

\textsuperscript{170} There is an abundant literature on the so-called Rule \textsubscript{11bis} ‘referrals’ and their impact on domestic jurisdictions in former Yugoslavia. For further discussion, see Fausto Pocar, ‘Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY’, \textit{Journal of International Criminal Justice} 6 (2008), 655–665; David Tolbert and Aleksandar Kontic, ‘The International Criminal Tribunal for the Former Yugoslavia and the Transfer of Cases and Materials to National Judicial Authorities: Lessons in Complementarity’ and Fidelma Donlon, ‘Positive Complementarity in Practice: ICTY Rule\textsubscript{11bis} and the Use of the Tribunal’s Evidence in the Srebrenica Trials before the Bosnian War Crimes Chamber’, both in \textit{The International Criminal Court and Complementarity}, 888–954. For a more sober assessment of the ICTY’s engagement with domestic institutions, see Yaël Ronen, ‘The Impact of the ICTY on Atrocity-Related Prosecutions in the Courts of Bosnia and Herzegovina’, \textit{Penn State Journal of Law & International Affairs} 3(1) (2014), 113–160.


This approach found early endorsement in OTP policy. ‘Positive’ complementarity was described as a deliberate way to promote national proceedings through the provision of information to states, advice and the development of legal tools to empower domestic criminal jurisdictions.\textsuperscript{173} The metaphor of catalyst was also embraced by those affiliated with the office. In the words of Juan Mendez, the OTP’s then special advisor on crime prevention, ‘Under its policy of positive complementarity, the OTP can act as a catalyst for national action’.\textsuperscript{174}

The division-of-labour approach to cooperation as a means towards this end was also closely linked to the OTP’s policy of ‘invited’ referrals under Article 14. The 2006 report of the office stated, for instance, that, over the course of the first three years (2003–2006), it had adopted a formal policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the court.\textsuperscript{175} As described in detail in Chapter 6, such a division of labour was the explicit basis for seeking the DRC government’s referral, where it was made clear that the OTP’s role was to prosecute senior leaders and those ‘most responsible’, while domestic authorities would handle other responsible actors. More recent statements by Prosecutor Bensouda suggest a similar approach to other situations. After the OTP did not contest the Libyan state’s admissibility challenges, for instance, Bensouda told the UN Security Council that ‘Joint complementary efforts of both the government of Libya and the ICC, strongly and actively supported by the international community, are … crucial for ending impunity in the country’.\textsuperscript{176} She further added that her office would ‘prioritise its investigations and prosecution of those who are outside the territory of Libya and who are thus largely inaccessible to the Libyan authorities’, while the government would focus on those suspects within Libyan territory.


\textsuperscript{176} To that end, the OTP and the Libyan government ‘concluded a burden-sharing memorandum of understanding, the purpose of which is to facilitate our collaborative efforts to ensure that individuals allegedly responsible for committing crimes in Libya as of 15 February 2011 are brought to justice either at the ICC or in Libya itself’. See ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011)’ (remarks delivered in New York, 14 November 2013).
Coercion: Complementarity as Duty and Threat

Coercion, in which the threat of ICC intervention is meant to function as a leveraging device on national jurisdictions, has arguably been the more predominant iteration of complementarity, rooted as it is in a compliance-oriented model of state interaction with the Court. Stigen, for instance, has posited that the court’s catalytic effect is fundamentally one of ICC avoidance. In his words, ‘An ICC finding that the territorial state or the suspect’s home state is unwilling or unable to proceed genuinely may well be perceived as a considerable stigma that states will seek to avoid’. In order to avoid such stigma, states would be compelled to act. Similarly, in his early work, Bruce Broomhall suggested that the ICC would ‘spur’ on national prosecutions in order to avoid ‘adverse attention, the diplomatic entanglements, the duty to cooperate and other consequences of ICC activity’.

Kleffner’s work on complementarity also explored the principle’s coercive potential, ‘as a mechanism through which states parties are induced to and facilitated in complying with [the] obligation [to investigate and prosecute ICC crimes]’. In his view,

[T]he novelty of complementarity lies in the fact that, for the first time in the history of international criminal law, states parties have agreed ex ante that this failure [to investigate and prosecute] will entail a concrete legal consequence: states forfeiting the claim to exercise jurisdiction, including over their own nationals and officials.

Kleffner’s conception of the court’s role is similarly compliance-oriented. In his words, the ICC ‘can generate a pull-effect towards complying with the obligation to investigate and prosecute’. One reason for this anticipated effect is, he contends, the court’s ‘high degree of legitimacy’, and its potential as a vehicle to ‘bestow legitimacy on national

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177 At the same time, Stigen correctly notes that the auto-referrals of Uganda and the DRC to the ICC suggest that, at least in some cases, ‘being labelled as unable is something that some states can live well with’, 475.


179 Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions, 309.

180 Ibid., 319–320.

181 Ibid., 311; see also Patricia Soares, ‘Positive Complementarity and the Law Enforcement Network: Drawing Lessons from the Ad Hoc Tribunals’ Completion Strategy’, Israel Law Review 46(3) (2013), 320–322 (characterizing ‘positive complementarity’ as ‘a “binding policy” or a “quasi legal” imposition insofar as it gives effect to core principles of the ICC Statute’).
proceedings’, which further ‘generates a pull towards compliance’. Additionally, in his view, the ‘procedural setting of complementarity contains elements of an interaction between the court and national criminal jurisdictions, which may serve to induce states to carry out investigations and prosecutions’. A final reason is the threat of sanction, which ‘finds support in the largely antagonist premise on which the regime of complementarity is based’.

As with ‘positive’ complementarity, the experience of the tribunals in Rwanda and the former Yugoslavia also played an influential role in elaborating the catalytic potential of ‘jurisdictional forfeiture’. The ICTR, like the ICTY, amended its Rules of Procedure and Evidence in 2004 under pressure from the UN Security Council, in order to allow the referral of cases from the tribunal to ‘competent national jurisdictions, as appropriate, including Rwanda’. Notably, the requirement of a fair trial was explicitly included amongst the conditions that had to be satisfied for such referrals, which contributed in turn to the 2007 passage of a national law in Rwanda that sought to implement the ICTR’s due process standards (including abolition of the death penalty).

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182 Ibid., 313. Kleffner sees the ICC as carrying both procedural and substantive legitimacy, insofar as it ‘is based on the specific consent of states to the Rome Statute’, while also safeguarding the sovereignty of states, ‘in as much as it reaffirms rather than encroaches upon their primary role in the investigation and prosecution of core crimes’, 311, 314. Further, complementarity ‘benefits from a large degree of determinacy’ and ‘leaves no doubt’ that ‘the sole role of the ICC is to supply the deficiencies of national criminal jurisdictions’, 315.

183 Kleffner, ‘Complementarity as a Catalyst for Compliance’, 82.

184 Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions, 320.

185 UNSC Resolution 1503, preambular para. 8; Rule 11bis of the ICTR’s rules was so amended in April 2004. As with the ICTY, there is a similarly abundant literature on the ICTR’s referral process and its impact at the national and local level in Rwanda. For a fuller treatment see L. J. van den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law (Leiden: Martinus Nijhoff, 2005); Jesse Melman, ‘The Possibility of Transfer(?) A Comprehensive Approach to the International Criminal Tribunal for Rwanda’s Rule 11bis to Permit Transfer to Rwandan Domestic Courts’, Fordham Law Review 79(3) (2011), 1271–1332.

the tribunal denied the first five requests for transfer to Rwanda, using the antagonist premise on which the primacy regime was based to strengthen, ostensibly, fair trial guarantees at the domestic level.187

Under this threat-based approach, complementarity’s catalytic potential rests on several presumptions. One presumption is that states would necessarily want to avoid the ICC, or that the political costs of pursuing domestic prosecutions will necessarily prevail over the desire to keep the court at bay. The cooperative dimensions of complementarity might also stifle its coercive potential, insofar as a state could seek the ICC’s assistance (as was initially the case in Uganda and the DRC), or may seek to ‘offload’ complex cases to another judicial forum. Robinson makes a similar point when he acknowledges that ‘an over-strong regime might resist ICC intervention as a threat to government, [while] an under-strong government might welcome impartial and effective intervention as a reinforcement of governance’.188 Here again, then, the ICC may not be a court of ‘last resort’ as it is so often described, but rather a forum conveniens for a government who might turn to the court to bolster its own authority.

The ICC’s coercive capacities have been taken up as part of the OTP’s approach to complementarity. In his first address to the Assembly of States Parties (ASP), the ICC prosecutor noted that ‘due to the dissuasive effect that the mere existence of the court generates, the possibility of presenting a case at the International Criminal Court could convince some states with serious conflicts to take the appropriate action’.189 Furthermore, one sees in the office’s approach to certain situation countries a more adversarial approach towards domestic jurisdictions. In Uganda, for instance, later attempts by the government to negotiate with the Lord’s Resistance Army clashed with the ICC’s outstanding arrest warrants. Similarly, in Kenya, the prosecutor adopted a threat-based approach to complementarity in an attempt to force the government to establish a domestic tribunal to prosecute its post-election violence. These histories are examined more fully in later chapters.

Complementarity’s power to advance domestic accountability relies upon a duty-based reading of the Rome Statute. These duties have commonly been understood to encompass not only the prosecution of serious crimes through national criminal fora, but also the domestic implementation of the Rome Statute’s substantive and procedural provisions. Most commentators root these duties in a purposive reading of the Statute, particularly its preambular language, which recalls ‘that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes’. As Padraig McAuliffe has noted, ‘the open-ended and aspirational language of the preamble’, in particular, supports a ‘teleological impulse to apply expansive modes of interpretation to admissibility provisions in the interest of maximizing the impact of its main institution, the ICC’. Much of the literature cited above exemplifies this teleological impulse.

In fact, as its drafting history illustrates, there is no provision on states parties’ prosecutorial duties in the operative part of the Statute. While states may be obliged to investigate or prosecute crimes based on other rules of international law, the Statute itself obliges states only to cooperate with the court (as part IX of the treaty enumerates), to ensure that its

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190 Para. 6, Rome Statute. See, e.g., Gioia, ‘State Sovereignty, Jurisdiction, and “Modern” International Law’, 1113. Gioia states that only investigations and prosecutions that ‘abide by the highest standards of fair trial’ can be regarded as ‘proper implementation of the obligations at stake [in the Rome Statute]’, and that ‘failure to comply with such standards should be construed as tantamount to failing to perform the obligation and result in the court legitimately stepping in’.

191 Padraig McAuliffe, ‘From Watchdog to Workhorse: Explaining the Emergence of the ICC’s Burden-sharing Policy as an Example of Creeping Cosmopolitanism’, Chinese Journal of International Law 13 (2014), 294. See also Darryl Robinson, ‘The Identity Crisis of International Law’, Leiden Journal of International Law 21 (2008), 944–946 (noting that, through ‘victim-focused teleological reasoning aggravated by utopian aspirations’, ICL seeks to ‘end’ crime rather than merely manage it); Nouwen, Complementarity in the Line of Fire, 241 (‘Many members of the international-criminal-justice movement interpreted the Statute on the basis more of their functional biases than of the international rules of interpretation as codified in the Vienna Convention on the Law of Treaties. The biases of international experts stem from their background in international fora and favour the international: an international court, international crimes and international standards’).

domestic law facilitates cooperation with the ICC and that offences against the ‘administration of justice’ be criminalized domestically.\textsuperscript{193} Furthermore, as a matter of treaty interpretation, the preambular recital was deliberately not made part of the Statute’s operative text; rather, it merely ‘recalls’ a suggested pre-existing duty, not one arising from the treaty itself.\textsuperscript{194} As Nouwen notes, the recital itself ‘merely reflects an aspiration, just like many of the other preambular considerations’.\textsuperscript{195}

With respect to implementation, there is also no positive obligation on member states to implement the Rome Statute’s substantive (or procedural) provisions.\textsuperscript{196} Alain Pellet (himself a member of the ILC that authored the 1994 draft Statute) states, ‘neither the signatory states nor even the states parties have any clear obligations to bring their domestic legislation into harmony with the basic provisions of the Rome Statute\textsuperscript{3}.\textsuperscript{197} Indeed, as noted during the drafting of Article 20(3) on \textit{ne bis in idem},

\textsuperscript{193} Such rules may arise under relevant human rights treaties that impose a duty to criminalize and investigate, see, e.g., UN Convention Against Torture (Articles 4, 5 and 7) and the International Convention for the Protection of All Persons from Enforced Disappearance (Arts. 4, 6, 9 and 11). Regional human rights treaties may also impose such obligations: the Inter-American Court on Human Rights has held that ‘[t]he state has a legal duty … to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation’. \textit{Velásquez Rodríguez v. Honduras} (29 July 1988), para. 174; the European Court of Human Rights has affirmed a similar line of jurisprudence, see, e.g., \textit{Al-Skeini and others v. U.K.}, Grand Chamber Judgment (7 July 2011), para. 167. See also Diane Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, \textit{Yale Law Review} 100 (1991), 2539–2615. Arguably, customary international law may also impose a duty to investigate and prosecute. See, e.g., International Law Commission, \textit{Second Report on the Obligation to Extradite or Prosecute}, para. 26, UN Doc. A/CN.4/585 (11 June 2007); but see Kieran McEvoy and Louise Mallinder, ‘Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy’, \textit{Journal of Law and Society} 39(3) (2012), 419 (‘[I]n relation to international crimes regulated by international customary law, it appears that the best that can be argued at present is that the duty to prosecute is \textit{permissive}, rather than mandatory, which leaves more discretion for states to explore alternative approaches to truth and accountability’).


\textsuperscript{195} Nouwen, \textit{Complementarity in the Line of Fire}, 39.

\textsuperscript{196} Article 88, Rome Statute.

states explicitly rejected a proposal that would have made a case admissible before the ICC where the national proceeding failed to consider the international character or grave nature of a crime. Instead, the Statute refers to the ‘same conduct’ of an accused, ‘to make clear that a national prosecution of a crime – international or ordinary – did not prohibit ICC retrial for charges based on different conduct’.198

In a related vein, the difference between ‘ordinary’ and international crimes has also been advanced as a basis for domestic implementation. In the context of the ICC, Kleffner has again been one of the strongest proponents of this position. He argues that:

Implementation can only be considered satisfactory if it comprehensively and effectively covers the entire range of conduct criminalized by the Rome Statute, without adversely affecting pre-existing obligations under international law that go beyond the Rome Statute, and while taking into account the need to fill gaps in the legislation that may lead to impunity, such as those resulting from the absence of universal jurisdiction.199

Key ICC actors also endorsed this view early on. Silvana Arbia, the court’s former registrar, writes:

Without [implementing legislation], states could be left in the position of prosecuting only for some of the constitutive acts of the crimes, such as murder and rape. This could undermine the basis of national prosecutions and may invite the ICC’s Judges to take jurisdiction where this might not be needed.200

Arbia’s qualification that the ICC might ‘take jurisdiction’ grants that such an outcome is not mandatory, but the language of both she and Kleffner is threat based: failure to conform with the Rome Statute risks forfeiture at the national level.

Influential non-state actors have advanced similarly expansive interpretations. Of particular relevance are individuals whose organizations often act as a bridge between academic or policy communities and advocacy-oriented organizations engaged in accountability work. For instance, Mark Ellis, who serves as executive director of the International Bar Association

198 Heller, ‘A Sentence-Based Theory of Complementarity’, 224. That said, as Robinson notes, it may be ‘prudent to ensure that [a state’s] criminal laws are at least as broad as the subject matter jurisdiction of the ICC’. It is not, however, required. See Darryl Robinson, ‘Three Theories of Complementarity: Charge, Sentence, or Process?’, Harvard International Law Journal, 53 (April 2012), 169, fn. 25.

199 Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions, 112.

(described as ‘the world’s leading organisation of international legal practitioners, bar associations and law societies’), is unequivocal that state failure to ‘effectively incorporate the Rome Statute into its domestic body of criminal and procedural law’ would trigger a finding of ‘inability’ under the Rome Statute. In his view,

[A] state party must incorporate the Rome Statute’s substantive criminal law provisions into its domestic body of law. This is the complementarity part of the test. It requires states parties to take steps such as criminalizing all offences contained in the Statute, ensuring that the principle of command responsibility is incorporated into domestic legislation, removing any statute of limitations for Rome Statute offences, and perhaps most importantly, denying immunity to heads of state.

Similarly, David Donat Cattin, secretary-general of Parliamentarians for Global Action (PGA) (a ‘non-profit, non-partisan international network’ of legislators whose ‘vision is to contribute to the creation of a rules-based international order for a more equitable, safe and democratic world’), argues that the principle of complementarity ‘implies that states shall fully implement the Rome Statute in their domestic legal orders in order to comply with their primary responsibility to realize the object and purpose of the treaty (and [Rome Statute] system), which is to put an end to impunity and deter future crime. The PGA, in turn, describes complementarity as follows:

Complementarity means that states have the primary obligation to investigate and prosecute those responsible for international crimes, but also that the court will only intervene when states do not have the genuine will or the capacities to do so. … To this effect, the first and minimal

202 Ellis, Sovereignty and Justice, 123.
203 Ibid., 125. Curiously, later in his text, Ellis nevertheless appears to endorse the Libyan government’s admissibility challenge on the grounds that it is ‘irrelevant’ if the acts are charged as ‘ordinary crimes’ pursuant to the Libyan criminal code. In so doing, he avers that his ‘position is supported by a number of jurists who have argued that the prosecution of international crimes using ordinary domestic law would satisfy a state’s obligations under the Rome Statute’, 211.
condition enabling states to abide to this obligation of accountability for genocide, crimes against humanity, war crimes and crime of aggression is the existence of legislation that incorporates in their national law the crimes and general principles of law contained in the Rome Statute.206

As Chapter 5 illustrates, the PGA was amongst those international NGOs who played a crucial role in the implementation of the Statute in Uganda and Kenya, as well as the DRC.

Other views of complementarity encompass even more ambitious policy goals, including that domestic criminal justice systems satisfy ‘international standards’.207 Linking these goals to the juridical foundation of complementarity, Ellis contends that ‘inability’ as set forth in Article 17(3) should encompass states that ‘lack the type of judicial systems that is required under the international standard of legal fairness, or have failed to incorporate implementing legislation necessary to cooperate with the court, or have failed to ensure fair trial proceedings’.208 To that end, he has proposed the establishment of an international advisory group that could, at the request of the ICC or a state party, provide an ‘objective, impartial and non-political evaluation regarding a state’s ability to carry out judicial proceedings with international standards’.209 In his view, questions this group should ask in making its assessments would include the following:

Does the domestic court have extensive backlogs resulting in long pre-trial detention? Does the state have a sufficient number of trained defence lawyers and an effective legal aid program for indigent defendants? Are there sufficient guarantees against outside pressure on the judiciary?

207 As with investigations and prosecutions, it is clear that the absence of due process and/or the failure to meet such standards is not grounds for admissibility under Article 17. For a convincing articulation of this view, see Kevin Jon Heller, ‘The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process’, Criminal Law Forum 17 (2006), 255–280.
208 Ellis, Sovereignty and Justice, 113. Elsewhere, Ellis has also argued that ‘If [s]tates desire to retain control over prosecuting nationals charged with crimes under the ICC Statute, they must ensure that their own judicial systems meet international standards. At a minimum, states will have to adhere to standards of due process found in international human rights instruments, particularly as they relate to the rights of defendants’. See Mark S. Ellis, ‘The International Criminal Court and Its Implication for Domestic Law and National Capacity Building’, Florida Journal of International Law 15 (2002), 241.
209 Mark S. Ellis, ‘International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions’, Hague Journal on the Rule of Law 1 (2009), 84. In the same article, Ellis also calls for the creation of an international technical assistance office, whose purpose would be to ‘provide technical and unbiased assistance to domestic war crimes courts’, 82.
Does the state impose the death penalty? Can the court provide witnesses and victims with medical, psychological and material support during and after trial through a witness and victim support office? Can the court provide these same witnesses and victim security protection prior to, during and after the trial? Is there ongoing political strife and repression in the country? Does the state have detention facilities that meet international standards? 210

While such ambitious criteria could be asked of any country’s criminal justice system, here the language of complementarity animates them.

‘Positive’ complementarity is also summoned by many human rights and rule-of-law actors in their efforts to engage criminal justice sector reform more broadly. For instance, at a 2011 workshop on witness protection held in Uganda, a paper prepared by the UN’s Office of the High Commissioner for Human Rights drew explicitly on the ICC, noting that the court has ‘emphasized the importance of witness protection in recent decisions, demonstrating that [it] is a key concern’. To that end, and ‘in line with the doctrine of positive complementarity, the application of witness protection standards by the court will serve a great role in demonstrating adequate capacity, competence and credibility’ of Ugandan courts. 211 Similarly, a report of the Institute for Security Studies argues that Uganda ‘must now consider the requirements of ICC complementarity’. 212 In its words, ‘the creation of a witness protection programme is a critical element of ICC complementarity considerations’, as it ‘may well be a future driver of African protection mechanisms’. 213 A July 2018 paper from the International Bar Association likewise insists that under Article 17, the assessment of national proceedings should, ‘de minimis, cover … [an] evaluation of compliance with principles of due process recognised by international law’. 214

210 Ibid., 85.
211 This quoted material was included in OHCHR’s concept note for the victim and witness protection workshop, held in August 2011 (on-file).
213 Ibid. Other commentators have gone further, suggesting that the failure to provide ‘gender sensitive’ witness protection could also be a form of inability that might invite the ICC’s involvement. See Louise Chappell, Rosemary Grey and Emily Waller, ‘The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court’s Preliminary Examinations in Guinea and Colombia’, International Journal of Transitional Justice 7(3) (2013), 455–475.
214 International Bar Association, ‘Analysis of overcrowded and under-examined areas, following a mapping of organisations’ work on ameliorating domestic capacity to try serious international crimes’ (July 2018), 5.
The ‘requirements’ of complementarity, as rendered in these and other documents, underscores the centrality of compliance to the ICC’s catalytic framing. Materials that domestic NGOs circulate in countries like Kenya, Uganda and the DRC further reinforce this discourse. The Ugandan Coalition for the ICC, for instance, urges Uganda’s ‘compliance with the Rome Statute’,\textsuperscript{215} while a study on the DRC prepared by Protection International (an international NGO dedicated to the protection of human rights defenders) notes that the passage of domestic implementing legislation would ‘enable the DRC to comply with its obligation … to integrate the Rome Statute in its internal legislation’.\textsuperscript{216} A convening of government officials throughout southern Africa (supported by the University of Pretoria’s Centre for Human Rights, International Criminal Legal Services and the Konrad Adenauer Foundation) even notes in its workshop report that the ‘[p]erception that [Rome Statute] crimes can be prosecuted as ordinary crimes’\textsuperscript{217} – itself a correct statement of the law – is an ‘obstacle’ for promoting greater domestication of the Statute.

Framing complementarity as a duty for states, and the bridge that this builds to compliance, offers a way to route broader governance objectives through the authority of the ICC. Indeed, Ellis’s suggested questions are themselves reflected in the views of the Ugandan government, which opined at a United Nations conference in 2011 that ‘Complementarity is … envisioned and approached more broadly in Uganda, encompassing the adoption of relevant institutional, legal and judicial measures to strengthen the rule of law institutions and the administration of justice more generally’.\textsuperscript{218} Rather than a constraint on the court, then, complementarity became a means of extending the ICC’s authority.

\textsuperscript{215} Uganda Coalition for the International Criminal Court (UCICC), ‘Strategic Plan 2011–2013’, 6. The plan adds that ‘Uganda being the host ought to be a good example in implementing the [Kampala] Declaration that was passed’.

\textsuperscript{216} Isabelle Fery, ‘Executive Summary of a Study on the Protection of Victims and Witnesses in D. R. Congo’ (Brussels: Protection International, July 2012), 11.


4 Constructivism and the Social Production of a (New) Norm

In her seminal analysis of complementarity’s ‘catalytic effect’ in Uganda and Sudan, Nouwen focuses on the efforts of norm entrepreneurs, whom she defines as ‘activists, often foreigners working in cooperation with local actors, who promote the adoption of international norms (or what in their view should be international norms) at the domestic level’.

Driven by what she describes as a ‘pro-ICC ideology’, Nouwen argues that these activists have in turn sought to build a network of actors – ICC officials, diplomats, rule-of-law and development experts – who increasingly understand complementarity not as a rule of admissibility, but as a normative ordering principle. Nouwen characterizes these actors not merely as entrepreneurs, however, but also as ‘hijackers’, whom she accuses of ‘misrepresentation’ and ‘distortion’ when invoking complementarity in the literal sense – to endorse, for instance, a certain standards and benchmarks for domestic proceedings that ‘are laudable from a human rights perspective, but do not fit complementarity’.

As noted, the transformation that Nouwen describes represents a significant evolution from the negotiated compromises that informed the Rome Statute’s drafting. Rooted in the language of compliance, this evolution is noteworthy both for the relative speed with which it has evolved (given the greater burden it arguably imposes on states parties) and the degree to which it has come to dominate the public discourse about complementarity. But how should the uptake and proliferation of this new norm be understood?

Rather than focusing on norm ‘distortion’ or ‘misrepresentation’ by a select group of international elites, I suggest that constructivism – with its emphasis on the norm-shaping and socializing role of international law – offers a better window through which to understand not only complementarity’s evolving meaning, but also the popular traction that particular interpretations of it came to command.


220 Nouwen defines this ideology as based on three interrelated beliefs: (1) that international courts ‘mete out better justice than domestic systems’; (2) that international crimes must be prosecuted as such; and (3) because, ‘at a minimum, once the ICC is involved the fledgling court must be seen to succeed’. She further suggests that this ideology has been ‘at times more powerful than complementarity’, to the detriment of its catalysing effect. See *Complementarity in the Line of Fire*, 13.

221 Ibid., 192, 241. For a similar critique, see McAuliffe, ‘From Watchdog to Workhorse’.

noted, these interpretations range from the view that self-referrals were never contemplated by the Rome Statute’s drafters, to the popular ‘shorthand’ version of complementarity (i.e., that the ICC will act only ‘when a state is unable or unwilling’), to the view that complementarity imposes an obligation on states to prosecute and legislate Rome Statute crimes domestically. The power of these interpretations is consistent with the evolution of complementarity itself, wherein a principle that was once meant to affirm a limitation on the ICC’s power was instead reinterpreted in ways that sought to magnify its influence. These reinterpretations have, in turn, circulated to a broader epistemic community that generates and maintains new collective understandings of the principle.

**Norm Entrepreneurs**

A rich literature on network analysis and norm diffusion helpfully illustrates the means by which the broader understanding of complementarity – one that imposes certain duties upon states – has acquired such currency. By focusing on the role that non-state actors have played as agents of this new discourse, the significance of the transnational network of ICC supporters, rather than the court as an institution in itself, comes more clearly into focus. Aaron Boesenecker and Leslie Vinjamuri note that ‘International human rights NGOs are quintessential [norm] facilitators; they both participate in global networks and discussions on justice and accountability and work locally in conflict and post-conflict situations to diffuse norms through a power of socialization’.223 Many of these organizations, ranging from Human Rights Watch to Avocats sans Frontieres, Amnesty International to the International Center for Transitional Justice, also maintain national offices in key ICC situation countries (including the three studied herein), creating a nodal network between those sites where international criminal law is produced – The Hague, Brussels, Geneva, New York – and enacted.

The motivations of these influential ‘trans-sovereign entrepreneurs’ – the epistemic community they inhabit – are informed not only by NGOs, but through a wider network of private actors, ranging from journalists

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and media professionals, to donor organizations, professional and civic associations and legal experts. Indeed, the views advanced by an array of scholars like Burke-White, Kleffner and Stahn (to name a few) have sought to expand the earlier consensus around complementarity and explore more deeply the policy dimensions of this new ordering principle. In part, these efforts offered new readings of the Rome Statute through systematic and teleological interpretations, but their purpose in doing so was the same as those working within the ICC: to magnify the court’s influence.

These ‘teleological impulses’ matched well with the community of NGOs and advocates engaged in developing the ‘cascading’ international accountability norm that scholars like Sikkink have described. As she and Martha Finnemore note, norm entrepreneurs bring actors to embrace new norms and, in so doing, displace existing standards or understandings by establishing a different ‘logic of appropriateness’ as a basis for decision making. In their words, ‘Ideational commitment is the main motivation when entrepreneurs promote norms or ideas because they believe in the ideals and values embodied in the norms’. In so doing, actors construct new ‘cognitive frames’, which, when successful, ‘resonate with broader public understandings and are adopted as new ways of talking about and understanding issues’.


Here, the desire to diffuse and entrench more deeply an ideational commitment to international accountability dovetailed with the need to construct complementarity as a normative ordering principle, rather than a narrow admissibility test. Thus, while many of the entrepreneurs advancing this new, more ambitious norm may have initially wished more for the ICC vis-à-vis national jurisdictions – that it, too, might be a court of primacy – this shortcoming was progressively reinvented in the post-Rome period. Complementarity as a ‘catalyst’ marked the arrival of a new cognitive frame.

**Transnational Advocacy Networks and ‘Communities of Practice’**

Emanuel Adler’s scholarship on transnational ‘communities of practice’, building on the work of Etienne Wenger, is also instructive in understanding complementarity’s evolution, as it points to the dense array of ICC-engaged actors who helped advance the complementarity-as-catalyst framework. Adler’s work is illuminating insofar as it examines the social construction of shared norms and ideas, as well as how a group of actors ‘develops a common body of knowledge and common practices by engaging in their field in relation with each other’. Building on Adler, Brunnée and Toope have advanced a concept of ‘interactional international law’, one in which ‘shared understandings’ are ‘created through communities of practice that shape the mutual engagement of various actors in international society’. This dynamic of socialization is practice based: ‘For such a community to exist, participants must be engaged in interactions of a certain density and specificity’.

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227 Wenger’s theory of communities of practice was rooted in his observation that people develop knowledge socially, i.e., through others who are engaged in similar activities and motivated by shared concerns. Wenger defined the term as ‘groups of people informally bound together by shared expertise and passion for a joint enterprise’. See Etienne Wenger and William M. Snyder, ‘Communities of Practice: The Organizational Frontier’, *Harvard Business Review* (2000); Etienne Wenger, *Communities of Practice: Learning, Meaning, and Identity* (Cambridge University Press, 1998).


229 Brunnée and Toope, *Legitimacy and Legality in International Law*, 86.

230 Ibid., 70.
Extrapolating this insight to the transnational, Adler suggests that ‘we can take the international system as a collection of communities of practice’ – diplomats, human rights advocates, legal experts, progressive donors – who may share ‘a sense of joint enterprise that is constantly being renegotiated’, as well as shared practices, which ‘are sustained by a repertoire of communal resources, such as routines, words, tools, ways of doing things, stories, symbols, and discourse’. In a similar vein, Margaret Keck and Sikkink point to the role of ‘transnational advocacy networks’, which can be understood as one component of Adler’s communities of practice. They define such a network as ‘those actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services’. Pertinent to complementarity, they note that such networks are ‘most prevalent in issue areas characterized by high value content and informational uncertainty’. Thus, even where information may be technically inaccurate (as with the depiction of complementarity as imposing a set of prosecutorial duties), or represent a departure from previously settled understandings, it is through participation in these relationships that such information is not only transmitted, but also where meaning itself develops. These relationships and repertoires underscore, in Adler’s view, ‘the role of knowledge communities, communities of discourse, and, more generally, “communities of the like-minded” in the structuration and dynamic evolution of social reality’.

The density, frequency and specificity of interaction amongst entrepreneurs and network members resonate particularly strongly in the context of international criminal law, which remains a specialized field (if one that enjoys significant influence), and in the context of a singular judicial institution like the ICC, popularly seen as the institutional apex of

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233 Adler, Communitarian International Relations, 4.
the international justice ‘movement’. ICC staff not only share a sense of joint enterprise (to combat impunity), but so do the transnational communities of human rights NGOs, advocates and academics that played a pivotal role in the court’s establishment. As Gerry Simpson notes of the Rome Statute’s negotiations, ‘Never before had non-state actors played such a prominent role in bringing a treaty into existence. NGOs such as Amnesty International, No Peace Without Justice and Human Rights Watch were highly influential – providing expertise and advice, drafting and circulating proposals and cajoling delegates’.234

Marlies Glasius’s monograph on the establishment of the ICC captures well the development of these network ties and the sense of community amongst them. Describing the ‘organization of national and international conferences, expert meetings, public debates, seminars, symposia, and workshops’ that were organized in the years leading up to the Rome conference, she writes that the conferences were ‘characterized by an intermingling of officials with the NGO and the activist communities, and by high-level legal debates, rather than political confrontations’.235 International, regional and national meetings alike ‘often boasted one or more international guests drawn from the ranks of the NGO coalition, the Yugoslavia and Rwanda tribunals, or from the academic community’.236

This intermingling of communities, focused on the normative and institutional growth of the ICC has endured post-Rome, concomitant

235 Glasius, The International Criminal Court: A Global Civil Society Achievement, 39. More recent iterations of such intermingling includes the series of ‘Greentree retreats’ supported over the course of 2010–2012 by the ICTJ, UNDP and various donor governments; these retreats were designed to ‘bring together high-level actors from three different sectors: international justice, rule of law assistance, and development’. See Synthesis Report on ‘Supporting Complementarity at the National Level: From Theory to Practice’ (Greentree III, 25–26 October 2012), as well as International Law Association’s ‘Committee on Complementarity in International Law’, which was created in November 2013. Its mandate is to ‘consider the question of how the concept of complementarity, particularly positive complementarity, should be interpreted and applied both in the context of admissibility proceedings of the International Criminal Court and in the domestic jurisdictions of states parties (and beyond)’. See ILA Johannesburg Conference 2016, Complementarity in International Law Discussion Report; ILA Sydney 2018, Complementarity in International Criminal Law.
236 Glasius, The International Criminal Court, 39.
with the expansion in complementarity’s definition and meaning. Examples abound of personnel from state delegations and NGOs who were involved in setting up the ICC having since swapped roles – former delegates leaving political service to join civil society and vice versa. Likewise, a number of ICC staff and judges in the court’s early years were drawn from the same pool of people who had been involved in drafting the Statute, either as part of state delegations or as NGO representatives. Edited volumes about the court regularly include contributions from ICC officials and human rights advocates alike, while academic institutions house a number of legal training projects that seek to enhance the impact of the ‘Rome Statute System’. Key organizations like the Coalition for the International Criminal Court (CICC), which serves as a global coalition of local and international NGOs, is another critical node in this thickly webbed network. Likewise, many former staff members of the ad hoc tribunals were themselves part of the initial vanguard within the ICC (later moving to academia themselves). To an unusual degree, then, ‘network ties and communal identity exist within and across organizational boundaries’ in the field of international criminal law. In Elena Baylis’ words, ‘in the ICL tribunal context, [networks] are acting as the framework for a transnational community that conceives of itself as building the field of ICL’.

The dominant framing of complementarity as a catalyst for compliance/rule-following amongst these transnational communities is also significant in illuminating the vertical engagement between international actors and civil society organizations at the national or local levels. Returning


240 Baylis, ‘Function and Dysfunction in Post-Conflict Judicial Networks and Communities’, 633.

241 Ibid., 649. See also David S. Koller, ‘The Faith of the International Criminal Lawyer’, NYU Journal of International Law and Politics 40 (2008), 1060 (‘The ultimate value of international criminal law may rest … in its role in identity construction, in particular in constructing a cosmopolitan community embracing all of humankind.’).
to Adler, ‘learning means redefining reality by means of “contextual” community knowledge, from which [practitioners] borrow in order to get their bearings’.242 This borrowing is again part of a process, wherein the transmission of information has helped redefine the meaning of complementarity away from a technical rule of admissibility to a normative ordering principle, one that emphasizes fidelity and conformity with the Rome Statute. The pursuit of this framework was predominantly forged through practice, including, notably, a growth in ‘capacity-building’ projects amongst ICC member states, northern NGOs and advocates in ICC situation countries. A number of such projects were highlighted at the ICC Review Conference in 2010: from Avocats sans Frontières’ ‘Integrated Project on Fighting Impunity and the Reconstruction of the Legal System in the DRC’ to ‘Danish Support to the War Crimes Court and the Judiciary in Uganda’, these efforts have collectively furthered the cognitive framing of complementarity as a catalyst for accountability.243

The actors engaged in this transnational learning community thus advanced a vision for complementarity – as catalyst, rather than constraint – that appears different than it did at the time of the Rome Statute’s drafting. But this was not merely the result of innate ‘pro-ICC ideology’; rather, the coercive and cooperative dimensions of complementarity were discovered, learned and transmitted over a period of time to a broader community and network of actors. As Brunnée and Toope explain, ‘through interaction and communication, actors generate shared knowledge and shared understandings that become the background for subsequent interaction’.244 These shared understandings, in turn, become structures that shape ‘how actors perceive themselves and the world’,

242 Adler, Communitarian International Relations, 20. Writing in another context, the legal scholar Annelise Riles’s description of a discourse community is equally apt. As she notes, “language” is quoted and reprinted from one conference document to the next and as states begin to conform their practices, or at least their discourse, to the norms expressed therein, some of what is agreed upon at global conferences gradually will become rules of “customary international law”. Annelise Riles, The Network Inside Out (University of Michigan Press, 2001), 8.

243 For descriptions of these (and other) projects, see ‘Focal points’ compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes’, RC/ST/CM/INF.2, 30 May 2010 (see examples D and I).

244 Brunnée and Toope, Legitimacy and Legality in International Law, 13; see also Lisbeth Zimmerman, Global Norms with a Local Face: Rule-of-Law Promotion and Norm Translation (Cambridge: Cambridge University Press, 2017) (underlining ‘the desirability of an international and deliberative approach to norms that stresses mutual processes of construction as a condition for the legitimacy of global norms in local contexts’), 6.
as well as how they form interests and set priorities.\textsuperscript{245} This process of interest formation and priority setting constructed an expanded understanding of the ICC’s purpose and of the complementarity principle, one that increasingly came to dominate its public persona.

As an evolving norm, then, complementarity was not so much ‘hijacked’, as it was built over time. Constructivism’s attention to interactional processes and knowledge generation is critical to understanding the evolution and plural understandings that animate the discourse around complementarity. It also points to the contingent nature of norm generation, as well as the ‘constantly shifting ground on which precarious paths to validity, power, or legitimacy must be constructed’\textsuperscript{246} Indeed, while the history described in this chapter explains complementarity’s evolution towards a magnification of the ICC’s influence, more recent discourse from some member states has begun to contest this interpretation and pushback on the degree of influence that NGOs have previously enjoyed in the expansion of the concept. The ICC’s recent performance challenges have, for instance, heightened the insistence of some states that the court should focus on its ‘core mandate’ and leave ‘positive complementarity’ to other actors.

Other states (several of which have been the subject of early preliminary examinations) have also now found it politically convenient to question what mandate the court has to engage in ‘positive complementarity’ or what the legal basis for such a policy would be. One NGO report notes, for instance, that while the term ‘positive complementarity’ appears in the OTP’s 2013 policy paper (and still in its latest strategy), those within the office now ‘prefer to avoid using the term’, as it ‘could be interpreted to indicate that the OTP applies this as a “policy” in every situation or that it has earmarked funds to support such activities’.\textsuperscript{247} To that end, the OTP’s 2019–2021 strategy now states:

\begin{quote}
Although capacity building or technical assistance are important elements that can speed up the office’s completion strategy in a given situation, the office recalls that this is a role for development agencies and other actors; the office’s role is more limited to encouraging engagement by such partners, to make its standards, lesson learned and best practices available for use, and to contributing participants, where possible and
\end{quote}

\textsuperscript{245} Ibid., 65.
\textsuperscript{246} Frédéric Mégret, ‘The Anxieties of International Criminal Justice’, \textit{Leiden Journal of International Law} 29(1) (March 2016), 221.
within its means, to the expert-level meetings, trainings and seminars organised by others. In the office’s assessment, which it invites states to provide continuous feedback on, all these activities flow from the Statute and draw from the mutually-reinforcing cooperating framework it establishes. 248

This pushback may be temporary, or it may signal a larger retrenchment from the scope and ambition that animated complementarity’s early evolution. It is a reminder, however, that just as a new complementarity norm was constructed, it can also be whittled back.

5 Conclusion

Over the past decade, complementarity has become the normative site and an adaptive strategy for realizing a broad array of goals, wherein the ICC is meant to not only complement national forums, but to actively encourage domestic proceedings as well. As mediated by a dense, interconnected web of actors – NGOs, ICC officials, human rights advocates, academics, donors and receptive state officials – complementarity has thus become increasingly polysemous, imbued with multiple meanings (admissibility rule, as well as catalyst) and dimensions (cooperative, as well as coercive).

Furthermore, in the travel towards a more ‘positive’, policy-based vision for complementarity, new interpretive meanings have arisen. One such interpretation holds that states have not only the right to investigate and prosecute international crimes, but also, under the Rome Statute, the duty to do so in a manner consistent with fair trial standards. As with the ‘slogan’ version of complementarity, the dominance of this popular understanding of the principle is another example of how international obligations – here, complementarity as compliance – are created and learned, and how ‘shared understandings can be successfully promoted by non-state actors, be they groups or influential individuals’. 249

Rather than a concession to sovereignty, then, complementarity-as-compliance might now be considered a condition of sovereignty, i.e., a test that states must satisfy in order to successfully challenge the ICC’s control over a case. The following chapter examines the juridical nature of these challenges in greater detail and the tensions that arise in negotiating these plural understandings in the work of the court itself.

248 OTP Strategic Plan 2019–2021, para. 51.
249 Brunnee and Toope, Legitimacy and Legality in International Law, 61.