

## *A Critical Analysis of Positive Complementarity*

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### **1. What is Positive Complementarity?**

One of the core principles of the prosecutorial strategy of the International Criminal Court (hereinafter, the ICC) is positive complementarity.<sup>1</sup> Complementarity also constitutes one of the three important underlying jurisdictional principles of the ICC Statute, alongside the doctrine that the ICC will only prosecute the most serious crimes of concern to the international community and the principle that the crimes in the Statute remain within the realm of customary international law.<sup>2</sup> From the beginning of his tenure as Chief Prosecutor of the ICC, Luis Moreno Ocampo has made it clear that the absence of trials before the Court would be a major success, thereby optimistically predicting the ability of national criminal justice systems to pursue domestic prosecutions.<sup>3</sup> For Chief Prosecutor Ocampo, ‘the ability to function together’ with prosecutors and judges all over the world is central to boosting the complementarity

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<sup>1</sup> Office of the Prosecutor, Report on Prosecutorial Strategy (14 September 2006) 4. Available at <[http://www.icc-cpi.int/library/organs/otp/OTP\\_Prosecutorial-Strategy-20060914\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf)> (last visited, 11 July 2007).

<sup>2</sup> M. H. Arsanjani, ‘Reflection on the Jurisdiction and Trigger Mechanism of the International Criminal Court’ in H. A. M. von Hebel, J. G. Lammers and J. Schukking, *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (T.M.C. Asser Press, The Hague 1999) 67, fn. 7.

<sup>3</sup> See Statement made by Mr. Luis Moreno Ocampo, Chief Prosecutor, Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (16 June 2003) 2. “As a consequence of complementarity, the number of cases that reach the Court should not be a measure its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success”. Available at <[http://www.icc-cpi.int/library/organs/otp/030616\\_moreno\\_ocampo\\_english\\_final.pdf](http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf)> (last visited, 11 July 2007).

principle.<sup>4</sup> The inherent necessity of interdependency has led Prosecutor Ocampo closer to the notion of positive complementarity. Prosecutor Ocampo has stated that he includes positive complementarity as one of the many key strategic decisions of the Office of the Prosecutor. This was made clear in February 2004 when he commented that: “[Some key strategic decisions include:] A positive approach to complementarity. Rather than competing with national systems for jurisdiction, we will encourage national proceedings wherever possible”.<sup>5</sup>

Positive complementarity implies good networking and a division of labour between domestic courts and the ICC. Thus the principle of positive complementarity implies interdependency between two fora rather than the complete independence of the ICC from domestic courts. It is doubtful whether the idea of positive complementarity can be evaluated as it was originally contemplated by the drafters of the ICC Statute. In this connection, it has been pointed out that: “what is really contemplated seems to be more of an antagonistic relationship between Court and national justice system”.<sup>6</sup>

Positive complementarity as originally conceived is sometimes referred to as ‘passive complementarity’.<sup>7</sup> It assumes the ICC’s role as ‘a backstop to national jurisdictions’.<sup>8</sup> In this sense, passive complementarity is understood as substitutive in nature, viewing the ICC as a substitute for a domestic forum. If we accept this as the

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<sup>4</sup> Ibid., 3.

<sup>5</sup> Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps The Hague, Netherlands (12 February 2004) 1. Available at < [http://www.icc-cpi.int/library/organs/otp/LOM\\_20040212\\_En.pdf](http://www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf)> (last visited, 11 July 2007).

<sup>6</sup> W. A. Schabas, ‘Prosecution at the International Criminal Court: Some Random Thoughts’ (14 April 2003) 2. Available at < <http://www.icc-cpi.int/library/organs/otp/schabas.pdf>> (last visited, 11 July 2007).

<sup>7</sup> W. W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice’ (2006) University of Pennsylvania Law School Paper (144) 1, 4. Available at <<http://lsr.nellco.org/cgi/viewcontent.cgi?article=1148&context=upenn/wps>> (last visited, 11 July 2007), forthcoming in 49(1) Harv.Int’l L.J. (2007).

<sup>8</sup> Ibid.

current conception of the complementarity principle, it seems fair to conclude that the ICC would have been more active under the original antagonistic complementarity scheme.

The meaning of the ‘positive approach to complementarity’ is given by the Office of the Prosecutor in its Report on Prosecutorial Strategy of September 2006. According to this report, the positive approach to complementarity:

[...] encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.<sup>9</sup>

From this perspective, positive complementarity acts to fill the so-called ‘impunity gap’ which normally means a limited prosecution whereby a high-level figure may be prosecuted and lower level perpetrators left untouched.<sup>10</sup> This kind of division of labour can also be seen in the recent practices of completion strategies of the International Criminal Tribunal for the Former Yugoslavia (hereinafter, the ICTY) or the International Criminal Tribunal for Rwanda (hereinafter, the ICTR). The latter practices are often called ‘rule 11 *bis* referrals’ after the relevant provisions of each Tribunals’ Rules of Procedure and Evidence.

To be sure, positive complementarity has several merits. Positive complementarity suggests national and international networks. An interdependent relationship between national and international jurisdictions is supposed to facilitate international cooperation in criminal matters. This cooperation is especially crucial for the ICC. Unlike the ICTY or the ICTR, the ICC often lacks the coercive power of the

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<sup>9</sup> Office of the Prosecutor, Report on Prosecutorial Strategy (14 September 2006) 5.

<sup>10</sup> *See eg.*, L. N. Sadat, ‘Exile, Amnesty and International Law’ (2006) 81 Notre Dame L. Rev. 955, 969.

Security Council of the United Nations acting under Chapter VII of its Charter to facilitate international criminal matters, except where such authorisation is granted by a Security Council resolution. Positive complementarity schemes may also eliminate fears concerning the possible impact the ICC will have on the ability of a state to pursue domestic prosecutions. Since it operates within the scheme of a consensual division of labour between national courts and the ICC, it is unlikely that the Prosecutor will be forced to exercise his *proprio motu* powers thereby reducing State fears of an antagonistic Prosecutor and ensuring the most effective use of the ICC's limited resources. Viewed in this way it is evident that, positive complementarity schemes operate both in the interests of States and the ICC itself. Consequently the Assembly of State Parties has included the issue of positive complementarity in its strategic plan for the ICC.<sup>11</sup> The aim of the strategic plan is to maximise the Court's activities in harmony with the Chief Prosecutor's prosecutorial strategy.<sup>12</sup>

The interdependent nature of the positive complementarity principle of the ICC has intentionally or unintentionally brought about a few so-called 'self-referral' situations. It is not likely to be a coincidence that the first three situations were submitted to the ICC by means of self-referrals under Articles 13(a) and 14 of the ICC Statute.<sup>13</sup> More than a few commentators have suggested that these practices of 'self-referral' were not spontaneous.<sup>14</sup> Obviously these self-referrals by three African countries to the Court would not have been contemplated by the original

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<sup>11</sup> Assembly of State Parties, *Report of the Bureau on the Strategic Planning Process of the International Criminal Court*, 5<sup>th</sup> Session, the Hague, ICC-ASP/5/30 (20 November 2006) 21 and 24. Available at <[http://www.icc-cpi.int/library/asp/ICC-ASP-5-30\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-5-30_English.pdf)> (last visited, 23 July 2007),

<sup>12</sup> *Ibid.*

<sup>13</sup> See M. M. E. Zeidy, 'Critical Thoughts on Article 59(2) of the ICC Statute' (2006) 4(3) JICJ 448, 448.

<sup>14</sup> See *eg.*, for Congo's self-referral, P. Gaeta, 'Is the Practice of 'Self-Referrals' a Sound Start for the ICC?' (2004) 2(4) JICJ 949, 949; for Uganda's self-referral, W. A. Schabas, 'First Prosecution at the International Criminal Court' (2006) 27(1-4) HRLJ 25, 31.

complementarity system, which expected the Chief Prosecutor of the ICC to act vigilantly for unwilling or unable situations.<sup>15</sup> The practice of self-referral can be seen as the product of positive complementarity since both share similar merits, such as the facilitation of national cooperation and the acceleration of certain procedural aspects of proceedings before the ICC (due to uncontested admissibility).<sup>16</sup> Today the practices of self-referrals produce some legal and practical issues of great interest to international criminal justice.

This paper will try to examine rationales behind positive complementarity based on the above mentioned expected effects of the implementation of positive complementarity. Through such an examination, its grand design lies in picturing both the efforts and limitations of the international criminal justice system in its attempts to prosecute those responsible for serious violations of international criminal law. While positive complementarity is intent on serving the needs of a functioning ICC, some aspects of positive complementarity are not necessarily positive. This is especially true for the practice of self-referral when viewed as a corollary of positive complementarity.

## **2. Similarities with Rule 11 *bis* Referrals of the *Ad Hoc* Tribunals**

Positive complementarity presupposes a division of labour between the ICC and domestic courts. Seniority of perpetrators and the incidental gravity of crimes are

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<sup>15</sup> Professor William Schabas has pointed out that the original title of Article 14 of the ICC Statute was ‘Complaint’ instead of ‘Referral of a Situation by a State Party’ and that this alternation did not invoke any comment. Therefore these terms may have been regarded as almost synonyms. Moreover ‘the drafting history of Article 14 of the Rome Statute leaves little doubt that what was contemplated was a ‘complaint’ by a State party against another State’. Ibid 28.

<sup>16</sup> Professor Paola Gaeta points out that ‘when the investigative powers of the Prosecutor are exercised in response to a referral by a State Party, the ICC Statute does not require authorization by the Pre-Trial Chamber to start an investigation’. Gaeta (n 14) 949-950. See Article 15(4) of the ICC Statute, in case of the Prosecutor’s *proprio motu* investigation power is exercised, it is the Pre-Trial Chamber that authorises the initiation of such an investigation.

decisive factors in determining the balance of the division of labour.

As soon as he took the office, Prosecutor Ocampo voiced his policy of focusing on senior level perpetrators by holding that:

the Office of the Chief Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.<sup>17</sup>

The term '[persons] who bear the greatest responsibility' is said to have its roots in the Security Council resolution proposing the establishment of the Special Court for Sierra Leone.<sup>18</sup> In the case of the Special Court for Sierra Leone, however, the seniority of the accused was distinguished from the gravity of the crime and the Court held that the leadership role of an accused rather than the gravity of the crime or its massive scale should determine jurisdiction.<sup>19</sup>

Prosecutor Ocampo's prosecutorial strategy of targeting senior leaders rather than lower level perpetrators was examined by the Pre-Trial Chamber of the ICC in its application of the admissibility test under Article 17 of the ICC Statute and its authorisation of an arrest warrant pursuant to Article 58 of the ICC Statute in the *Lubanga* case (*Situation in the Democratic Republic of Congo*). In rendering its decision the Pre-Trial Chamber I interpreted the gravity threshold, enshrined in Article 17(1)(d) of the ICC Statute, as encompassing a seniority test:

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<sup>17</sup> 'Draft paper on some policy issues before the Office of the Prosecutor, for discussion at the public hearing in The Hague on 17 and 18 June 2003' 6. Available at <[http://www.icc-cpi.int/library/organs/otp/draft\\_policy\\_paper.pdf](http://www.icc-cpi.int/library/organs/otp/draft_policy_paper.pdf)> (last visited, 16 July 2007).

<sup>18</sup> UN Doc. S/RES/1315 (14 August 2000) para. 3. *See* Schabas, 27.

<sup>19</sup> *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana, Case No. SCSL-04-14-PT (3 March 2004) para. 40. *See* Schabas, (2006) 27.

[...] the additional gravity threshold provided for in Article 17(1)(d) of the Statute is intended to ensure that the Court initiates cases only against the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation.<sup>20</sup>

This interpretation involved a reading of the gravity threshold of Article 17(1)(d) in conjunction with ‘the gravity-selection of the crimes included within the material jurisdiction of the Court’.<sup>21</sup> Moreover it is meant to ‘maximize the Court’s deterrent effect’.<sup>22</sup> Prosecutor Ocampo has stressed that if strictly construed the ICC Statute may allow him to prioritize the most serious crimes of concern to the international community and thus underscores the importance and gravity of crimes in defence of targeting senior leaders under Preamble, Articles 5, 17 and 53 of the ICC Statute.<sup>23</sup> Hence there exists a ‘logic that equate[s] the seniority of the perpetrator with the gravity of the crime’<sup>24</sup> behind both the policy of the Prosecutor and the admissibility test adopted by Pre-Trial Judges of the ICC. Curiously, in April 2007 the same Pre-Trial Chamber declined to judicially review the admissibility test, let alone the gravity test under Article 17(1)(d) in the case of Ahmad Harun and Ali Kushayb (*Situation in Darfur*).<sup>25</sup> This relatively cursory review of admissibility may be partially explained by

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<sup>20</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58’, Pre-Trial Chamber I, Case No. ICC-01/04-01/06 (10 February 2006) para. 50.

<sup>21</sup> *Ibid* para. 45.

<sup>22</sup> *Ibid* para. 48.

<sup>23</sup> The Prosecutor noted preamble, Articles 5 and 17 in his ‘Paper on some policy issues before the Office of the Prosecutor’. Schabas, 27.

<sup>24</sup> A. K. A. Greenawalt, ‘Justice Without Politics? Prosecutorial Discretion and the International Criminal Court’ (2007) 39 *NYU Journal of International Law and Politics* 583, 631.

<sup>25</sup> *The Prosecutor v. Ahmad Muhammad Harun (‘Ahmad Harun’) and Ali Muhammad Al Abd-Al-Rahman (‘Ali Kushayb’)*, ‘Decision on the Prosecution Application under Article 58(7) of the Statute’, Pre-Trial Chamber I, Case No. ICC-02/05-01/07 (27 April 2007) para. 18: “Besides, Article 19(1)

the fact that the situation was referred by the Security Council, even though a Security Council referral itself may not pose any legal constraints on the ICC.<sup>26</sup> A State, the subject of a referral by the Security Council, acting under Chapter VII of the United Nations Charter may not contest the admissibility of the referral before the ICC, as long as it is a member of the United Nations.

The emerging prosecutorial policy of division of labour is fast becoming a common characteristic of international criminal prosecutions. The rule 11 *bis* practices of the *ad hoc* international criminal tribunals recognize the importance of the division of labour between international tribunals and national courts to the success of the completion strategies of the ICTY and the ICTR. While the *ratione materiae*, *ratione personae* and *ratione temporis* of the ICTY and the ICTR are limited by the provisions of their respective Statutes, the ICC is permanent in nature and its expected mandate may be described as open-ended. In other words, the Chief Prosecutor of the ICC has been given far wider discretion than his counterparts at the ICTY and the ICTR. With this in mind it seems that the idea of division of labour between domestic courts and the ICC is inevitably promoted by the Office of the Prosecutor. Prosecutor Ocampo explained this division of labour in the following terms:

While states have the first right to prosecute, and we will encourage them to do so, there may be situations where a state and the Office agree that consensual “division of

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of the Statute gives the Chamber discretion to make an initial determination of the admissibility of the case before the issuance of a warrant of arrest or a summons to appear. Such discretion should be exercised only if warranted by the circumstances of the case, bearing in mind the interest of the person concerned”.

<sup>26</sup> L. Arbour and M. Bergsmo, ‘Conspicuous Absence of Jurisdictional Overreach’ in H. A. M. von Hebel, J. G. Lemmers and J. Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (T.M.C. Asser Press, The Hague, 1999) 132: “[...] it is reasonable to expect that admissibility-based litigation will often occur in cases other than those referred to the Court by the Security Council”.

labour” is appropriate (for example where a national system is fractured or where the impartiality or expertise of the Court is needed).<sup>27</sup>

This statement illustrates that positive complementarity requires negotiations for a consensual division of labour. The admissibility of a situation or an individual case becomes more persuasive and less contested in circumstances where the national system agrees to share some of the labours and declares that it will not embark on criminal proceedings: “There is no doubt of admissibility in such scenarios, since Article 17 is clear that cases are admissible in the absence of national proceedings”.<sup>28</sup>

The idea of division of labour may eventually facilitate national cooperation with investigations triggered by the *proprio motu* powers of the Office of the Prosecutor. One can imagine a more rapid investigation and trial process in circumstances where there is a consensual division of labour between national and international systems than in a system of antagonistic complementarity. However, the apprehension of fugitives is not necessarily made easier by a friendly division of labour, since fugitives may be anywhere and frequently the cooperation of neighbouring countries is required. This is especially evident in cases referred to the ICC not by the Security Council, which may issue a binding resolution towards Member States of the United Nations under Chapter VII of the United Nations Charter if necessary, but by a State Party or on account of the *proprio motu* powers of the Office of the Prosecutor. This difficulty may be illustrated by the fact that the ICC currently has only one arrestee, Thomas Lubanga Dyilo in the dock who had already been arrested and detained by Congolese authorities and was

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<sup>27</sup> Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps The Hague, Netherlands (12 February 2004) 1-2.

<sup>28</sup> *Ibid* 2.

transferred to the ICC in March 2006.<sup>29</sup> As of 25 June 2007, the Judges have issued eight arrest warrants following requests by the Office of the Prosecutor,<sup>30</sup> but only one has been detained so far. Difficulties surrounding the division of labour in positive complementarity systems is highlighted by the practice and pitfalls of self-referral addressed in the next chapter.

While the idea of the division of labour reflected in the ICC's prosecutorial strategy is consensual and makes the admissibility of a case uncontested as long as the State in question yields its willingness and/or ability to investigate and prosecute in favour of the ICC, the division of labour in the completion strategies of the ICTY and the ICTR is intrusive and subject to judicial review by the referral bench in order to ensure an appropriate balance in the division of labour. It is clear that the division of labour may not necessarily be consensual since both Tribunals have primacy over national courts regarding concurrent jurisdiction.<sup>31</sup> Despite the limited *ratione materiae* and *ratione temporis* of the ICTY and the ICTR, speedy trials have been difficult to come by due principally to the rigorous pursuit of fair trial procedures involving numerous witness testimonies, translation works, preliminary motions and interlocutory appeals.<sup>32</sup>

The initiative of the *ad hoc* tribunals to focus on only the most senior perpetrators while at the same time strengthening domestic in order to allow them to successfully prosecute less serious offenders was taken not by the Chief Prosecutor but

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<sup>29</sup> Burke-White (n 7) 16.

<sup>30</sup> L. M. Ocampo, "Building a Future on Peace and Justice" Nuremberg (24/25 June 2007), available at <[http://www.icc-cpi.int/library/organs/otp/LMO\\_nuremberg\\_20070625.pdf](http://www.icc-cpi.int/library/organs/otp/LMO_nuremberg_20070625.pdf)> (last visited, 16 July 2007).

<sup>31</sup> See Article 9(2) of the ICTY Statute and article 8(2) of the ICTR Statute.

<sup>32</sup> For the issue of speedy trial before the ICTY and the ICTR, see eg., L. A. Barria & S. D. Roper, 'How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) 9(3) The Journal of International Human Rights 349, 361-362.

by the then President of the ICTY.<sup>33</sup> The Rules of Procedure and Evidence of both the ICTY and the ICTR were amended in order to comply with their respective completion strategies. Following the Security Council's endorsement of targeting senior leaders and transferring minor offenders to national courts,<sup>34</sup> rule 11 *bis* was amended in order to allow for the transfer cases to domestic courts.<sup>35</sup> In terms of criteria for determining the seniority of an accused, rule 11*bis* (C) and rule 28(A) of the Rules of Procedure and Evidence of the ICTY make it clear that it is to be judicially decided whether indictments, *prima facie*, concentrated on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. Although the bench at the ICTR did not adopt a similar amendment of rule 28 for fear of intruding upon the independence of the Prosecutor,<sup>36</sup> the mandate of the ICTR conferred by the Security Council Resolution 1534 (2004) in relation to completion strategies demands that both the ICTY and the ICTR 'concentrate on the most senior leaders suspected of being most responsible for crimes'.<sup>37</sup> Here the ICTR Prosecutor's mandate may be curtailed in accordance with the grand scheme of the completion strategy. Nonetheless, as a consequence of the fact that rule 11 *bis* of the ICTR Rules of

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<sup>33</sup> See D. A. Mundis, 'Judicial Effects of the 'Completion Strategies' on the Ad Hoc International Criminal Tribunals' (2005) 99(1) AJIL 142, 143. Judge Claude Jorda Addresses to the United Nations Security Council, ICTY Press Release JDH/PIS/690-e (23 July 2002) 1.

<sup>34</sup> The seventh preambular paragraph of the Security Council Resolution 1503 says: "*Recalling and reaffirming* in the strongest terms the statement of 23 July 2002 made by the President of the Security Council [...] concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions [...]".

<sup>35</sup> The rule 11*bis* of the ICTR and the ICTY were amended in 2002 and 2004. The amendment of 2004 was made to clarify that cases will not be transferred to jurisdictions that do not observe the minimum guarantees of procedural fairness and international human rights.

<sup>36</sup> Mundis (n 34) 148.

<sup>37</sup> Security Council Resolution 1534 (26 March 2004) para. 5. "*Calls on* each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003)".

Procedure and Evidence contained neither the gravity of the crimes charged nor the level of responsibility of the accused as a prerequisite for the referral of indictments, the judges at the ICTR have never considered the gravity of the crimes charged nor the level of responsibility of the accused upon the Prosecutor's request for the transfer of the case.<sup>38</sup>

It should not be forgotten that the division of labour between national and international criminal fora in accordance with the gravity of crimes charged and seniority of the alleged perpetrator is one of the features of recent international prosecutorial trends. However it must be noted that the arguments do not provide persuasive reasons to treat this policy as a general limitation rather than merely the assignment of priority in context of the ICC.<sup>39</sup> It is shrewdly pointed out that:

If the ICC were truly concerned with eliminating the 'impunity gap,' would the prosecution of additional lower-level persons not captured by the state policy not further encourage national and international efforts by drawing attention to the "impunity gap" that the state's own policy had created?<sup>40</sup>

It may be true in theory that the International Criminal Court should not leave

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<sup>38</sup> For example, *The Prosecutor v. Michel Bagaragaza*, Decision on Prosecutor's Request for Referral of Indictment to the Kingdom of the Netherlands, Case No. ICTR-2005-86-11*bis*, Trial Chamber III, (13 April 2007) para. 8: "Pursuant to Rule 11 *bis*, there are three requirements that must be met before a Chamber can order referral: (i) the referral State must have jurisdiction, and be willing and adequately prepared to accept the case; (ii) the Chamber must be satisfied that the Accused will receive a fair trial in the courts of the referral State; and (iii) the Chamber must be satisfied that the death penalty will not be imposed or carried out". See also *The Prosecutor v. Michel Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, Case No. ICTR-2005-86-11*bis*, Trial Chamber III, (19 May 2006) para. 17. Cf. L. Yarwood and B. Dold, 'Towards the End and Beyond: The "Almost" Referral of Bagaragaza in Light of the Completion Strategy of the International Criminal Tribunal for Rwanda' (2007) 6(1) Chinese Journal of International Law 95, 100.

<sup>39</sup> Greenawalt (n 24) 631.

<sup>40</sup> Greenawalt (n 24) 632-633.

unpunished any most serious crime of concern to the international community as a whole.<sup>41</sup> However resource constraints are constant factors of international criminal prosecutions. This partly explains the reason why positive complementarity entails a consensual division of labour between national courts and the ICC.<sup>42</sup> The international community must acknowledge the inescapable limitation of resources and the absolute necessity of the division of labour among national and international fora. Applying seniority criteria as part of the admissibility test under Article 17 of the ICC Statute does not necessarily mean that the ICC wants lower-level perpetrators to go unpunished. As long as international prosecutorial policies make the gravity of crimes and the seniority of perpetrators the prerequisites for the selection of a case, relative assessment is of importance and is decisive, rather than absolute assessment. Relative assessment necessitates a broader assessment of domestic transitional justice systems.<sup>43</sup> Here political calculation may be inevitable to strike an appropriate division of labour and to address the traditional conundrum of peace versus justice. If a ceasefire agreement suffices to prevent a number of civilian casualties, careful political calculation should not necessarily be excluded as an option in the interests of justice in the sense of the wording of Article 53(2)(c) of the ICC Statute which allows the Prosecutor to conclude that there is not a sufficient basis for a prosecution, though both blanket amnesty (amnesty without accountability) and self-amnesty (amnesty granted to offenders by

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<sup>41</sup> See the fourth pleambular paragraph of the ICC Statute. “*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”.

<sup>42</sup> See Burke-White (n 7) 18: “By effectively harnessing national jurisdictions in the pursuit of accountability, proactive complementarity has the potential to make a considerable contribution toward ending impunity without the need for substantial and unlikely expansion of the Court’s resources and capacity”.

<sup>43</sup> Greenawalt (n 24) 633.

themselves) may be against the spirit of the ICC Statute.<sup>44</sup> Its fourth and fifth preambular paragraphs arguably prevent the Prosecutor from acknowledging blanket amnesties for the most serious crimes of international concern.<sup>45</sup> Even though political calculation may be a predictable by-product of the complementarity system of the ICC, at least ‘political compromise’ should be avoided for the sake of trustworthy international criminal justice.

### **3. Self-referral: The Ultimate Consensual Division of Labour**

When one gets to the core of the consensual division of labour mechanism of positive complementarity, the practices of self-referral before the ICC appear to be the ultimate outcome of positive complementarity. Four situations have been referred to the Prosecutor so far.<sup>46</sup> Out of them, three are referred to the Prosecutor in the form of ‘self-referral’. Namely, three State Parties (Uganda, Democratic Republic of the Congo and Central African Republic) have referred situations occurring on their own territories to the Court in January 2004, April 2004 and January 2005 respectively. The idea of self-referral had been already alluded to in the policy paper of the Office of the Prosecutor in September 2003:<sup>47</sup>

Where the Prosecutor receives a referral from the State in

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<sup>44</sup> See J. Dugard, ‘Possible Conflicts of Jurisdiction with Truth Commissions’ in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I, (Oxford University Press, New York, 2002) 693-704.

<sup>45</sup> According to article 31(1) of Vienna Convention on the Law of Treaties, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” and the context for the purpose of interpretation shall comprise preamble (article 31(2)).

<sup>46</sup> Cf. The Court Today in the ICC website < <http://www.icc-cpi.int/about/ataglance/today.html> > last visited, 17 July 2007).

<sup>47</sup> Schabas (n 14) 29.

which a crime has been committed, the Prosecutor has the advantage of knowing that that State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute. Because the State, of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor can be confident that the national authorities will assist the investigation [...]<sup>48</sup>

This policy paper therefore acknowledges the well-known fact that the self-referrals were not spontaneous in the cases of Uganda and Congo.<sup>49</sup> It may be a natural inference that the Office of the Prosecutor might facilitate the self-referral procedure to advance its positive complementarity scheme and make investigations much easier.

The Pre-Trial I Chamber decided that the practice of self-referral by the Democratic Republic of the Congo appeared consistent with the ultimate purpose of the complementarity regime, so long as the Democratic Republic of the Congo was unable to undertake the investigation and prosecution of the crimes falling within the jurisdiction of the ICC.<sup>50</sup> The equivalent decision for the request for arrest warrants in the situation of Uganda was nothing more than a cursory reference to jurisdiction and admissibility by the Pre-Trial Chamber II.<sup>51</sup> While it is still difficult to generalise that

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<sup>48</sup> 'Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications' (September 2003). Available at <[http://www.icc-cpi.int/library/organs/otp/policy\\_annex\\_final\\_210404.pdf](http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf)> (last visited, 17 July 2007).

<sup>49</sup> Schabas (n 14) 31: "Although the public record does not indicate this clearly, it seems apparent enough that the Prosecutor solicited Uganda's referral in December 2003". For the non-spontaneity of Congo's referral, see Gaeta (n 14) 949; A. Cassese, 'Is the ICC Still Having Teething Problems?' (2006) 4(3) JICJ 434, 436.

<sup>50</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58', Pre-Trial Chamber I, Case No. ICC-01/04-01/06 (10 February 2006) para. 35.

<sup>51</sup> Ex parte, Prosecutor Only, Decision on the Prosecutor's Application for Warrants of Arrest under Article 58, Pre-Trial Chamber II, Case No. ICC-02/04 (8 July 2005) 2.

the practice of self-referral does not infringe the scheme of complementarity envisioned by the drafters of the Rome Statute or necessitate case-by-case examinations, the uncontested nature of admissibility and jurisdiction by carefully agreed self-referrals between the Office of the Prosecutor and a State may make the admissibility test less controversial.

There are several possible reasons and advantages for resorting to self-referral. First of all, the Prosecutor must have a political motive.<sup>52</sup> The Prosecutor's preference for self-referrals was to reassure opponents of the Court fearful of the *proprio motu* powers of the Chief Prosecutor. Thus, although the Prosecutor could have exercised his *proprio motu* power to initiate an investigation, the Prosecutor 'pushed for, and gained,' a self-referral in case of the Democratic Republic of the Congo.<sup>53</sup> The Prosecutor's preference for self-referrals may be 'aimed at reassuring opponents of the Court who fear that he may wield his investigative powers too boldly'.<sup>54</sup> The other strength of the practice of self-referral is obviously the feasibility of the effective cooperation of the referring. The practice of self-referral reveals 'a greater likelihood of cooperation from the national authorities'.<sup>55</sup> As already noted in the words of the Office of the Prosecutor, self-referral has the advantage of indicating to the Prosecutor that the State has the political will to cooperate with the Office of the Prosecutor.<sup>56</sup> Since the ICC is featured as '(independence and) interdependence' by the Assembly of State Parties,<sup>57</sup> States' strong will of cooperation is no doubt crucial.

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<sup>52</sup> P. Gaeta (n 14) 950.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Cassese (n 49) 436.

<sup>56</sup> Gaeta (n 14) 950; Schabas (n 14) 32.

<sup>57</sup> Assembly of State Parties, *Strategic Plan of the International Criminal Court*, 5<sup>th</sup> Session, ICC/ASP/5/6 (4 August 2006) paras. 7-10. Available at <[http://www.icc-cpi.int/library/asp/ICC-ASP-5-6\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-5-6_English.pdf)> (17 July 2007).

While there are considerable advantages to self-referrals as a ‘novel construction’<sup>58</sup> for both the Office of the Prosecutor and the ICC, they may be in danger of trampling on the strong will of the international community to tackle impunity. The practice of self-referral exposes not only a danger, but also needlessness of assurances of State cooperation by means of self-referral. Looking at the very essence of positive complementarity, that is the drive towards State cooperation, there is the counterargument that such cooperation is in any event mandatory for State Parties once they ratify or accede to the Rome Statute thereby questioning the utility of State party referral against itself.<sup>59</sup> Without self-referring themselves, Member States of the ICC are obliged to cooperate with the ICC.

Another problem relates to the State Parties’ responsibilities and duties to prosecute the most serious crimes of international concern. There is a possibility that ‘uncontested admissibility’ might shrink the State Party’s duty to prosecute, which is affirmed in the preamble of the ICC Statute as well as being a part of customary international law.<sup>60</sup> According to the group of experts consulted by the Office of the Prosecutor, burden sharing among national courts and the ICC does not necessarily imply ‘a lack of commitment to the fight against impunity’.<sup>61</sup> For the group of experts, a decision to decline to exercise jurisdiction in favour of prosecution before the ICC is ‘a step taken to enhance the delivery of effective justice, and is thus consistent with both the letter and the spirit of the Rome Statute and other international obligations with

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<sup>58</sup> Schabas (n 14) 29: “Although there had never been even the slightest suggestion, in the drafting history of the *Statute*, that a State might refer a case against itself, some early documents emerging from the Office of the Prosecutor had begun to hint at such a novel construction”.

<sup>59</sup> Schabas (n 14) 32.

<sup>60</sup> Schabas (n 14) 29.

<sup>61</sup> The Office of the Prosecutor of the International Criminal Court, ‘Informal expert paper: The principle of complementarity in practice’ (2003) 19, para. 40. Available at <<http://www.icc-cpi.int/library/organs/otp/complementarity.pdf>> (last visited, 25 July 2007).

respect to core crimes.’<sup>62</sup> Thus the Office of Prosecutor must have strong expert opinion affirming the compatibility of the duty to prosecute<sup>63</sup> and the promotion of self-referral as a corollary of positive complementarity. The group of experts point out that even when there is an acknowledgment of non-exercise of jurisdiction by a territorial State in favour of the ICC, this fact does not affect the primacy of any other State wishing to investigate or prosecute.<sup>64</sup> Even though it is unlikely to happen since the Prosecutor might have a desire to know the will of all the relevant and/or interested States’ before reaching both the arrangement of self-referral and the decision to open an investigation,<sup>65</sup> in theory other State Parties of the ICC still owe the duty to prosecute under the Rome Statute and customary international law and there exists a complementarity principle under which national jurisdictions override the ICC’s. Theoretically, an arrangement of non-exercise of jurisdiction between a self-referring State and the ICC would make the admissibility and jurisdiction tests harder because there may arise the issue of the duty to prosecute of other State Parties of the ICC under traditional jurisdictional bases or even universal jurisdiction.

The problem of apprehension of bias or impartiality is likely to arise in the Prosecutor’s decision to open an investigation into a self-referred situation. It is pointed out that to the extent that the Prosecutor believes his strategy of encouraging self-referral is a productive one, he must surely reassure States that those who refer the case are not threatened, otherwise States will see self-referral as a trap.<sup>66</sup> The first arrest

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<sup>62</sup> Ibid., 19, fn. 24.

<sup>63</sup> There is an issue of duty to investigate as well.

<sup>64</sup> ‘Informal expert paper: The principle of complementarity in practice’ (2003) 20, para 62.

<sup>65</sup> The group of experts suggest that: “It will therefore be prudent to consult with interested States before forming such arrangements”. *ibid.*, para. 63.

<sup>66</sup> Schabas (n 14) 31.

warrants confirmed and issued by the Pre-Trial Chamber of the ICC were against five leaders of the Lord's Resistance Army (LRA), infamous rebels of Uganda. Although this political calculation is very persuasive, the Prosecutor strongly denied any partial investigation:

We notified Uganda that we would interpret the referral as concerning all crimes under the Statute committed in Northern Uganda and that our investigation would be impartial. In a July 2004 report to the Parliament the Government of Uganda confirmed their understanding of this interpretation.<sup>67</sup>

Impartiality, especially impartial investigation, is a key for the Prosecutor to maintain legitimacy.<sup>68</sup> The actual practice of the Office of the Prosecutor, nonetheless, revealed several arrest warrants for members of rebels, rather than national military personnel or civilian leaders of a referring State's organ, in situations referred as self-referrals. Uganda's cases have been all against LRA's leaders so far. In the situation of Congo, Thomas Lubanga Dyilo, who was a leader of the Union of Congolese Patriots, was again a member of an armed militia rather than a member of the national army. These practices may not necessarily represent partiality as long as the Prosecutor ensures an impartial investigation. However, the fact that to date no arrest warrant has been issued for a government agent may give the impression that it is as a deserved reward for a

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<sup>67</sup> 'Statement by Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Statement by the Chief prosecutor on the Uganda Arrest Warrants' (14 October 2005) 2. Available at < [http://www.icc-cpi.int/library/organs/otp/speeches/LMO\\_20051014\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051014_English.pdf)> (last visited, 17 July 2007).

<sup>68</sup> 'Statement by Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Informal Meeting of Legal Advisors of Ministries of Foreign Affairs' New York (24 October 2005) 6. Available at < [http://www.icc-cpi.int/library/organs/otp/speeches/LMO\\_20051024\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051024_English.pdf)> (last visited, 17 July 2007).

self-referral and the government's co-operation with the Office of the Prosecutor.

From the Office of the Prosecutor's perspective, impartiality does not mean that the Office must necessarily prosecute all groups in a given situation.<sup>69</sup> Impartiality is interpreted as an objective criterion applying to all in order to determine whether the high thresholds or the Statute are met and the Prosecutor's policy of focusing on persons most responsible is satisfied.<sup>70</sup> Here impartiality is merely a principle for the application of admissibility and prosecutorial policy. Therefore what really matters for the Prosecutor upon selection of a case must be a relative decision in accordance with prosecutorial policies such as targeting the gravity of crimes and the seniority of perpetrators rather than concrete impartiality in a given situation. It is surely within the discretion of the Prosecutor to interpret impartiality in this way, assuming that it does not contradict the ICC Statute. The Prosecutor at the ICTR arguably has applied this same interpretation of impartiality since no Tutsi is in the dock despite suspected Tutsi involvement in the assassination of the former president which triggered the Rwandan genocide. Even if there is no danger of apprehension of impartiality in the actual practices of the Office of the Prosecutor, it is pointed out that the consensual exercise of the ICC's jurisdiction may show the danger of detracting from the legal obligation of '*quid pro quo*'.<sup>71</sup> Naturally the expectations of *quid pro quo* must rise on the side of the referring State.

While self-restraint in the exercise of Prosecutor's *proprio motu* powers may gain support for the ICC from skeptical countries, self-restraint may also disappoint

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<sup>69</sup> 'Statement by Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Informal Meeting of Legal Advisors of Ministries of Foreign Affairs' New York (24 October 2005) 6.

<sup>70</sup> 'Statement by Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Informal Meeting of Legal Advisors of Ministries of Foreign Affairs' New York (24 October 2005) 6.

<sup>71</sup> C. Kress, 'Self-referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy' (2004) 2(4) JICJ 944, 948.

existing friends of the Court. Too much prosecutorial self-restraint ‘could not only water down the significance of this very power [but] even cast doubts on its legitimacy’.<sup>72</sup>

#### **4. Fragile Positive Aspects of Positive Complementarity**

It remains to be seen whether positive complementarity precipitates positive outcomes. In reality it seems that positive complementarity does not successfully produce positive outcomes. For example, the events subsequent to Uganda’s raised the difficult and traditional question of peace negotiation versus international criminal justice,<sup>73</sup> even though this issue may also arise from situations that are not self-referred. The salient feature of the self-referral system, the apparent possibility of *quid pro quo*, makes the issue more fragile. The self-referral from the government side during the protracted civil war resulted in making Ugandan rebels feel unequally treated by the ICC. The LRA spokesman regards the ICC issue as the sole responsibility of the Ugandan government and accused the Ugandan government of using the ICC indictments ‘as a political tool to try to make political gains where they have failed’.<sup>74</sup> One of the members of LRA is reported to have said that they would remain hidden if a peace negotiation was reached, until such time as the indictments issued by the ICC against several of its leaders were dropped.<sup>75</sup> LRA is also reported to hope that the government will approach the ICC requesting the withdrawal of the arrest warrants.<sup>76</sup> In order to take reclaim the inherent responsibility to prosecute alleged war crimes, the Ugandan government would have to

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<sup>72</sup> Ibid.

<sup>73</sup> M. C. Bassiouni, ‘The ICC – Quo Vadis?’ (2006) 4 JICJ 421, 424.

<sup>74</sup> UN Office for the Coordination of Humanitarian Affairs ‘Uganda: LRA to remain in the bush until the ICC indictments are lifted’ Humanitarian News and Analysis (9 July 2007). Available at <<http://www.irinnews.org/Report.aspx?ReportId=73135>> (last visited, 13 July 2007).

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

amend its penal code to enable alleged war crimes committed during more than two decades of conflict in the north to be prosecuted within the traditional justice system known as *Mato Oput*, practised by the Acholi community in the north where the conflict was at its fiercest.<sup>77</sup>

*Mato Oputo* literally means ‘drinking of the bitter root from a common cup’.<sup>78</sup> The contents of this ritual ceremony are said to differ between clans. However the common feature is said to ‘include the slaughter of two sheep which are cut in half and exchanged by both clans, and the drinking of the bitter herb Oput by both clans to ‘wash away bitterness’.<sup>79</sup> Compared with Rwandan counterpart, *Gacaca*, *Mato Oput* lacks the basic characteristics of a system of criminal justice. Whereas the former is described as ‘a middle path somewhere between the rigours of full-blown criminal prosecution and the moderate truth commission approach employed in many countries’,<sup>80</sup> the latter is no more than a process of reconciliation and forgiveness. *Mato Oput* ceremony is possibly just like granting a pardon or an amnesty with bitterness on the side of perpetrators.

At present there is no customary international norm prohibiting the granting of amnesties.<sup>81</sup> On the one hand there is a strong argument that in case of the violation of international crimes, international law prohibits the granting of amnesties.<sup>82</sup> On the

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<sup>77</sup> Ibid.

<sup>78</sup> M. Ssenyonjo, ‘The International Criminal Court and the Lord’s Resistance Army Leaders: Prosecution or Amnesty?’ (2007) 54(1) NILR 51, fn. 91, 64.

<sup>79</sup> Liu Institute for Global Issues, ‘Restoring Relationships in Acholiland: Traditional Approaches to Justice and Reconciliation’ (September 2005) 30. Available at <[www.ligi.ubc.ca/admin/Information/543/Roco%20Wat%20I%20Acoli-2005.pdf](http://www.ligi.ubc.ca/admin/Information/543/Roco%20Wat%20I%20Acoli-2005.pdf)> (last visited, 13 July 2007).

<sup>80</sup> W. A. Schabas, ‘Genocide Trials and Gacaca Cours’ (2005) 3(4) JICJ 879, 881.

<sup>81</sup> Dugard (n 44) 698; W. A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge 2006) 338.

<sup>82</sup> *The Prosecutor v. Anto Furundžija*, Judgment, Trial Chamber, Case No. IT-95-17/1-T (10 December 1998) para. 155; *The Prosecutor v. Morris Kallon & Brima Bazzy Kamara*, Appeals Chamber, Case No. SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004) para. 66ff.

other hand, as the status of amnesties in international law suggests, a general duty to prosecute international crimes under international law is not supported by State practice.<sup>83</sup> The Appeals Chamber of the Special Court for Sierra Leone in *Kallon* and *Kamara* held that the validity of an amnesty is dependent on whether the crimes within the competence of the Court are crimes susceptible to universal jurisdiction.<sup>84</sup> The Special Court's Judgment in *Kallon* and *Kamara* is short of definitive evidence detailing the incompatibility of amnesties and international crimes in international law even though the direction of international law points towards just such an incompatibility.<sup>85</sup> Therefore the possibility of the utility of amnesty may be open for the ICC until such time as state practice endorses the duty to prosecute enshrined in the Preamble of the ICC or customary international law clearly prohibits it. Seen in this light, the usefulness of the mechanism of amnesty is still on the agenda of the Office of the Prosecutor and nothing in international law may prevent it especially when 'such a mechanism may be the key to ending armed conflict'.<sup>86</sup>

The Ugandan situation reveals another faint expectation of political will to cooperate with the ICC as a consequence of self-referral. It is reported that the Ugandan president rejected a proposal by the Belgian government to arrest Joseph Kony and surrender him to the ICC, thereby showing its unwillingness to comply with the obligation to arrest and surrender, pursuant to a request from the ICC contrary to Article 89 of the ICC Statute.<sup>87</sup>

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<sup>83</sup> Dugard (n 44) 698, Schabas (n 81) 338.

<sup>84</sup> *The Prosecutor v. Morris Kallon & Brima Bazzy Kamara*, Appeals Chamber, Case No. SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004) para. 69.

<sup>85</sup> See as for this prediction, Dugard (n 44) 698.

<sup>86</sup> Schabas (n 81) 338.

<sup>87</sup> Ssenyonjo (n 78) 54.

The other agenda for positive complementarity is to ensure impartial and meaningful justice is not exchanged for exemplary prosecution or any other non-genuine attempt at domestic prosecution. It is reported that the Military Court in the Katanga Province of the Democratic Republic of the Congo ended up acquitting all defendants, both military and civilian, in the Kilwa trial on 28 June 2007. Louis Arbour, the United Nations High Commissioner for Human Rights, expressed her concerns at ‘the court's conclusions that the events in Kilwa were the accidental results of fighting, despite the presence at the trial of substantial eye-witness testimony and material evidence pointing to the commission of serious and deliberate human rights violations’.<sup>88</sup> The Kilwa incident is reported by the United Nations Mission in the Democratic Republic of Congo (MONUC) to have involved summary executions, torture, illegal detention and looting by the *Armées de la République Démocratique du Congo* (FARDC) who were intent on regaining control of Kilwa from rebel groups.<sup>89</sup> Considering the object and purpose of the Rome Statute, this may be a perfect example, given the authority of the High Commissioner for Human Rights, where a domestic system is incapable of conducting a genuine prosecution and a complementarity mechanism is required.

Closing the impunity gap may not be as simple as sharing the burden of prosecuting violations of international criminal law. It might not necessarily be factors derived from gravity or seniority which produce the impunity gap, but may be *mala fide* investigation and prosecution. Such an investigation gap may be prevented by the

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<sup>88</sup> United Nations Press Release, ‘High Commissioner for Human Rights Concerned at Kilwa Military Trial in the Democratic Republic of the Congo’ Geneva (4 July 2007). Available at <<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/9828B052BBC32B08C125730E004019C4?opendocument>> (last visited, 17 July 2007).

<sup>89</sup> Ibid.

learned Judges of the Pre-Trial Chamber which have a power of judicial review over the Court's jurisdiction and admissibility. One should remember that such an unfavourable and unpredicted impunity gap may be nothing more than a counter product of self-referral facilitated by the Office of the Prosecutor.

The problem with impunity in Uganda resides in the fact that pro-government forces are committing atrocities. This is not being addressed by either the country's national justice system or by the International Criminal Court. The priority of the Court should be on perpetrators who are being sheltered by Uganda, and who are protected by its authorities.<sup>90</sup>

## **5. Conclusion: To Overcome Negative Effects of Positive Complementarity**

What lessons have been learned in the four years since the actual establishment of the ICC? Are the negative aspects of positive complementarity surmountable? Positive complementarity is derived from the necessity and inherently interdependent nature of the ICC and national jurisdictions. This notion led the Office of the Prosecutor to negotiate arrangements with national jurisdictions and enabled the Office to achieve some consensual division of labour. Thus the Prosecutor of the ICC has contemplated a move towards the closing of the impunity gap. The trap of positive complementarity policy must be that it somehow makes light of the duty to fulfill the admissibility test. The shift towards a consensual burden to prosecute requires national courts which are at least able and willing to try less serious crimes and lower-level offenders. However, strictly speaking the admissibility test may not be fulfilled for the case in question. In

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<sup>90</sup> Schabas (n 14) 31.

other words, to the extent national courts can function in conjunction with the ICC, national courts are supposed to be able to genuinely carry out the investigation and prosecutions. A common criticism emerging from the Ugandan situation is that the domestic judiciary is perfectly capable of prosecuting all alleged crimes without the assistance of the ICC under a complementarity scheme.<sup>91</sup>

Positive complementarity policies and self-referral practices produce *prima facie* partiality in the investigations and prosecutions pursued at the ICC. On top of that, these practices cast doubt on the genuine will of self-referring States to share the burden of prosecutions with the ICC. The admissibility test under Article 17(1)(a) may be strictly interpreted as opposed to literally so as not to admit any case ‘where a State’s judicial system has not suffered ‘due to a total or substantial collapse or unavailability’’.<sup>92</sup> A literal interpretation may lead to the conclusion that a case is not allowed where the State is unwilling or unable genuinely to carry out the investigation or prosecution of the case in question. A strict interpretation would ‘safeguard against the possible use of the ICC as a political tool or as a less politically and financially costly alternative’.<sup>93</sup> Yet the difficulty lies in the fact that the Prosecutor assumes primary responsibility for ensuring admissibility under the ICC Statute. Under Article 19(1), while jurisdiction shall be satisfied by the Court, the admissibility test is judicially reviewed only ‘on its own motion,’ unless an accused and/or State involved challenges the admissibility of a case under Article 17(2). Still, theoretically the Pre-Trial Chamber may adopt the strict interpretation of admissibility by means of its

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<sup>91</sup> Many authors claim the capability of Ugandan judiciary at the time of self-referral and seem to retain its capability. Schabas (n 14) 31. H. A. Moy, ‘Recent Developments: The International Criminal Court’s Arrest Warrants and Uganda’s Lord’s Resistance Army: Reviewing Amnesty and Complementarity’ (2006) 19 Harv.Hum.Rts.J. 267, 273; Ssenyonjo (n 78) 58.

<sup>92</sup> Ssenyonjo (n 78) 58.

<sup>93</sup> Ssenyonjo (n 78) 58.

*proprio motu* power or even at the arrest warrant stage so as to prevent any possible self-referral in bad faith.<sup>94</sup> Reflecting on the decisions by the Pre-Trial Chambers as to the admissibility test for self-referred situations, it seems unlikely that the Pre-Trial Chambers will interpret admissibility narrowly in the future, especially at the arrest warrant phase. However, it is hoped that the ICC will learn something from past practices and will assess the genuineness of self-referring States carefully when judging ‘uncontested admissibility’.

Another challenge facing the ICC is doubtlessly the issue of amnesties and peace building in countries in a state of protracted conflict. Apparently this problem vexes the President of the ICC. Lately he again reaffirmed that: “the aims of the Rome Statute are to put an end to impunity, to contribute to the prevention of the most serious international crimes and to guarantee lasting respect for and enforcement of international justice’ as set out in the Preamble”.<sup>95</sup> The President’s view of the investigations of the ICC are positive in this regard : “[the ICC] is today being credited with having a shorter term impact in preventing crimes than originally anticipated – and not just a long-term deterrent effect as was once thought”.<sup>96</sup> The situation may be more complicated and delicate for the Office of the Prosecutor whose discretionary powers allow him to suspend an investigation ‘in the interests of justice’ under Article 53(1)(c) of the ICC Statute.<sup>97</sup> Still the recent statement of the Chief Prosecutor shows an unyielding

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<sup>94</sup> For the practices of the Pre-Trial Chamber’s *proprio motu* admissibility review at arrest warrant phase, see M. M. E. Zeidy, ‘Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court’ (2006) 19 LJIL 741-751.

<sup>95</sup> Judge Philippe Kirsch, President of the International Criminal Court: ICC Marks Five Years Since Entry Into Force of Rome Statute, Statement, the Hague (26 June 2007) 1. Available at <[http://www.icc-cpi.int/library/organs/presidency/PK\\_20070627\\_en.pdf](http://www.icc-cpi.int/library/organs/presidency/PK_20070627_en.pdf)> (last visited, 25 July 2007).

<sup>96</sup> Ibid.

<sup>97</sup> The Chief Prosecutor is reported to have said before deciding to request for arrest warrants that: ‘he would be willing to suspend investigations if it became clear that it was not in the best interests of peace to continue’ (9 June 2005). IRIN ‘Uganda: The ICC and the Northern Uganda Conflict’ Available at

attitude:

Peace negotiations can be long and complicated. But I can't be involved in their aspects... The Security Council has noted that lasting peace requires justice and it's my role to help in that. My duty is to end impunity and to contribute to the prevention of future crimes.<sup>98</sup>

The ICC is dealing with situation of ongoing conflict while the *ad hoc* tribunals operate in post-conflict situations. This fact makes the investigations and prosecutions of the ICC more challenging and the issue of amnesty becomes more than a groundless apprehension.

As long as neither the Office of Prosecutor nor the ICC itself become involved in the peace process, such an agreement would not be binding upon the ICC, even if it included blanket and total amnesty.<sup>99</sup> Hence the ICC may be the ultimate adjudicator whether a peace agreement and any form of amnesty are compatible with the Rome Statute.

This paper has not been able to fully provide the way of dealing with some negative sides of positive complementarity. Nevertheless, it is yet to be seen whether these problems threaten to damage the legitimacy of the Office of the ICC. More likely than not, there is no magic bullet or straight answer to provide peace and security for ongoing conflict. In this climate, it may be wise to leave the issue of the delicate balance of peace and security to the Security Council. At the same time, Chief Prosecutor Luis

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<<http://www.irinnews.org/Report.aspx?ReportId=54857>> (last visited, 25 July 2007).

<sup>98</sup> UN News Center, International Criminal Court already changing behaviour, says Prosecutor (7 July 2007). Available at <<http://www.un.org/apps/news/story.asp?NewsID=23120&Cr=criminal&Cr1=court>> (last visited, 25 July 2007).

<sup>99</sup> Ssenyonjo (n 78) 63.

Moreno Ocampo should focus on the fight against impunity unless the Security Council interferes under Article 16 of the ICC Statute.

