

From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism

Padraig McAuliffe*

Abstract

Though it was initially presumed that the primary role of the International Criminal Court (ICC) would be a residual one of monitoring and ensuring the fulfilment by the State of its obligations under the Rome Statute, it has over time moved towards a more activist “burden-sharing” role. Here, the Office of the Prosecutor initiates prosecutions of the leaders who bear the most responsibility for the most egregious crimes and encourages national prosecutions for the lower-ranking perpetrators. Since at least 2006, the Prosecutor has committed to a formal policy of inviting and welcoming voluntary referrals as a first step in triggering the jurisdiction of the Court. The judges on the Court have approved these referrals, while the broader academic and activist communities welcomed this more vertical relationship with national jurisdictions and, significantly, have provided the intellectual justifications for it. Burden-sharing, a concept unmentioned at the Rome Conference establishing the ICC, is presented as an unproblematic, natural and organic emanation from the Statute. This article argues that this development was not in fact inevitable or mandated by the Rome Statute. It was chosen, and in justifying this choice, familiar modes of cosmopolitan-constitutionalist treaty interpretation fundamentally premised on the field's virtue and indispensability have operated to enable a Court established as a residual watchdog to become a workhorse in individual situations by assuming the preponderance of responsibility for combating impunity.

* Senior Lecturer, School of Law and Social Justice, University of Liverpool, e-mail: p.g.mcauliffe@liverpool.ac.uk. This paper was completed on 27 February 2014. The websites cited were current as of this date unless otherwise noted.

The sense of cosmopolitan identity has grown gradually through individuals advocating for a cosmopolitan approach within whatever cracks and fissures have appeared in the Statist system of international law. One of the reasons for the hope placed in international criminal law is its possibility to exploit these cracks and fissures. International courts and tribunals present a particularly unique opportunity for change as they are answerable to their underlying legal texts and enjoy substantial autonomy from States. Once organizations or individuals have a foot in the door, they may seek to push the field in a direction which may not necessarily contribute to the immediate mandate of the relevant institutions as envisioned by their creators, but which will build towards establishing the cosmopolitan community.¹

I. Introduction: The Emergence of Burden-Sharing

1. As the International Criminal Court enters its twelfth year of operation, it has become apparent that the Court has three different functions—as a criminal court proper trying individual cases when they are deemed admissible, as a “world security court” when the UN Security Council refers a situation under Article 13(b), and as a “watchdog court” monitoring national proceedings when a case is deemed not admissible under Article 17 by reason of the State’s purported willingness or ability to prosecute.² The first two functions operate in a vertical framework as the Court enjoys priority over the national jurisdiction,³ incorporating notions of superior supra-nationality as an international body⁴ and implying a relationship of authority by intervening in the

- 1 David Koller, *The Faith of the International Criminal Lawyer*, 40 NYU JILP (2008), 1019, 1061–2.
- 2 Florian Jessberger and Julia Geneuss, *The Many Faces of the International Criminal Court*, 10 JICJ (2012), 1081, 1083.
- 3 Assuming that Security Council referral supersedes the State’s rights to use its national criminal justice system as the forum of first resort, as argued in George Fletcher and Jens Ohlin, *The ICC: Two Courts in One*, 4 JICJ (2006), 428, 431–433 and Michael A. Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 Santa Clara JIL (2010), 115, 131.
- 4 The ICC has direct effect characteristic of supra-nationality within the territory of a State party or one referred to the Prosecutor by the Security Council in a number of areas such as the Prosecutor’s wide-ranging investigative powers in Article 57(3)(d), her power to directly summon a person where there exists reasonable grounds to believe he committed the crime alleged in Article 58(7) and her authority to issue binding arrest warrants within the legal system in art. 58(1). See Sasha Rolf Lüder, *The Legal Nature of the International Criminal Court and the Emergence of Supra-national Elements in International Criminal Justice*, 84 Int’l R Red Cross (2002), 79, 90.

domain of domestic affairs.⁵ By contrast, the “watchdog” aspect of the ICC operates on a more horizontal framework, rooted in State consent and deferential to the State’s primacy of action regarding criminal prosecutions. Complementarity is a functional principle allocating priority among several bodies able to exercise jurisdiction, granting it to a subsidiary body when the main body fails to exercise its primary jurisdiction.⁶ In the Rome Statute, the State justice system was clearly that main body, while the Court was endowed with what is at best a “stuttered verticality” insofar as the Court enjoys the capacity to determine whether national proceedings are genuine and to assert admissibility where they are not under Articles 18 and 19.⁷

2. One of the most interesting questions that has emerged is whether there is a hierarchy between these three functions.⁸ In the earliest days of the Court it seemed that there was, with the watchdog function at the apex. This appeared to be the understanding of the first ICC Prosecutor when he famously emphasized at his swearing-in that the success of the Court would be determined not by the number of international prosecutions undertaken, but rather by the number of international prosecutions avoided because of increased functioning of domestic legal systems eager to avoid a finding of admissibility.⁹ An early Office of the Prosecutor policy paper on complementarity echoed this, acknowledging that it would “take action only where there is a clear case of failure to take national action.”¹⁰ Domestic trials would only be displaced in exceptional circumstances.¹¹ This is in strong contrast to the criminal court proper and world security functions where the Court enjoys unfettered freedom to exercise solitary control over proceedings and a relationship to individual victims and criminals largely unmediated by State structures after a final confirmation of admissibility.

3. Over time, it appears the watchdog function has slipped in the hierarchy as the Court rejects a monitoring role in favour of assuming the prosecutorial and judicial initiative in a manner characteristic of a more vertical relationship. The old orthodoxy that

- 5 Frédéric Mégret, In Search of the “Vertical”: Towards an Institutional Theory of International Criminal Justice’s Core, in: Carsten Stahn and Larissa van der Herik (eds.), *Future Perspectives on International Criminal Justice* (2010), 178, 192 and 180–181.
- 6 Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, 88 *Int’l R. Rev. Cross* (2006), 375, 380.
- 7 Frédéric Mégret, above n.5, 192.
- 8 Florian Jessberger and Julia Geneuss, above n.2, 1094.
- 9 Luis Moreno-Ocampo, *Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the ICC*, 16 June 2003.
- 10 Office of the Prosecutor, *Paper on Some Policy Issues before the Office of the Prosecutor* (2003), 5 (http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf (accessed: 24 November 2013)).
- 11 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Session, Supp. No. 22, AN Doc. A/50/22 (1995), para.47.

the Court would operate in a merely residual manner as a “last resort”¹² or as a “safety net”¹³ may now represent the minority view. The best example of this is the Office of the Prosecutor’s (OTP’s) commitment to what it calls “burden-sharing”, by which the OTP now states that it “will initiate prosecutions of the leaders who bear the most responsibility for the crimes. On the other hand, 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 by some other means.”¹⁴ Since at least 2006, the Prosecutor has committed to a formal “policy of inviting and welcoming voluntary referrals as a first step in triggering the jurisdiction of the Court”.¹⁵ While the old orthodoxy assumed a somewhat jealous relationship between the Court and national justice systems zealously guarding their prerogatives,¹⁶ burden-sharing based on voluntary relinquishment of jurisdiction by the State through territorial State self-referrals looks most likely to become the dominant paradigm as it moves forward. The ICC Prosecutor’s lack of independent enforcement power makes such a relationship highly attractive as it diminishes the risk of failure to collect evidence or witnesses, or to foster State co-operation.

4. That something has changed is best illustrated by an examination of the stated positions of two ICC judges, one from before the point where burden-sharing was mainstreamed and one from after. In January 2004, the first President of the Court, Philippe Kirsch, endorsed a horizontalist, subsidiary role of the ICC, arguing that “[i]t is only in extreme cases that the international community should intervene. Normally there should be no reason to intervene. [...] The business of the Court is not to second-guess domestic proceedings. The ICC is not after prosecution.”¹⁷ Nevertheless, over time, a new orthodoxy has emerged where the Court should assume the burden of major prosecutions from the State even where it appears able and willing to undertake at

12 Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity*, 7 *Max Planck YUNL* (2003), 591, 599.

13 M. Cherif Bassiouni, *The ICC—Quo Vadis?*, 4 *JICJ* (2006), 421, 422.

14 Office of the Prosecutor, above n.10, 3.

15 Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003–June 2006)*, 7 (http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf (accessed 24 November 2013)).

16 Hitomi Takemura, *A Critical Analysis of Positive Complementarity*, in: Stefano Manacorda and Adán Nieto Martín (eds.), *Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters in International Military Matters* (2009), 601, 602.

17 From Council on Foreign Relations Briefing, *Accountability Versus: The International Criminal Court*, Federal News Service, 16 January 2004 (<http://www.cfr.org/courts-and-tribunals/accountability-vs-impunity-role-international-criminal-court/p6696> (accessed 24 November 2013)).

least some prosecutions, a position best illustrated by Judge Kirsh's colleague on the bench, Judge Mauro Politi, six years later:

What is then the ultimate purpose of complementarity? There is no doubt that one important goal 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.¹⁸

Far from working constructively to achieve the goal of improved domestic fulfilment of the State's legal obligations as was initially presumed to be the Court's main role, greater attention has been given to how to make the Court a more relevant and efficient actor in the international legal order.

5. A general preference for pro-active burden-sharing or a division of labour between State and the ICC is not mentioned anywhere in the Rome Statute, was not considered in the negotiations leading up to it (though Robinson convincingly argues that a more reactive policy of accepting territorial State self-referrals was),¹⁹ and was ignored as a possibility in the first generation of commentary on the new Court in the years before it began to try its first cases. However, circumstances provided a significant spur to its emergence when States like Uganda, DR Congo, Central African Republic and Mali surprised observers by announcing a willingness to request the Prosecutor to investigate situations occurring on their own territory for the purpose of determining whether one or more specific persons should be charged with the commission of crimes under Article 14(1) of the Rome Statute. These requests are known as self-referrals. In these states of domestic inaction, the Rome Statute left little by way of specific guidance. The classical watchdog role envisaged in cases where the State was purporting to undertake proceedings and in which the ICC OTP and Pre-Trial Chambers would monitor the proceedings to ensure the State was willing and able to do so genuinely was inappropriate because there was nothing to monitor. Instead, the Court would react to the inaction by becoming active itself without the need to inquire as to the nature of the State's inability or unwillingness. However, from this reactive contingency, a more systematic preference for self-referrals emerged. A pro-active, burden-sharing "workhorse" role was enunciated whereby the Court actively and enthusiastically would take the initiative to secure the State's voluntary relinquishment of jurisdiction, though assistance would be lent to the domestic justice system to conduct its own prosecutions, ensuring this burden would be shared.

6. This expansion of the ICC's role has been treated as entirely natural and beneficial. It is presented not as a reactive exception to the State's duty to prosecute, but rather as

18 Mauro Politi, *Reflections on Complementarity at the Rome Conference and Beyond*, in: Carsten Stahn and Mohamed El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (2011), 142, 145.

19 Darryl Robinson, *The Controversy Over Territorial State Referrals and Reflections on ICL Discourse*, 9 *JICJ* (2011), 355, 359–364.

something that is consistent with this duty and at the same time preferable to it. A necessary reaction to the exigencies of self-referrals has become a policy where the Prosecutor feels entitled to negotiate with all of the considerable pressure her Office can bring to bear with States over the division of prosecutorial labour long before there is any intimation that the State is unwilling or unable to prosecute. In so doing, the gradual emergence of the burden-sharing role is a good example of the tendency of international legal instruments, and in particular those with a human rights and/or international criminal law nexus, to exhibit an apparently unconscious cosmopolitan “creep”. Effectively, a policy based on self-referrals which both supporters and detractors of the concept imagined being extremely rare or unlikely²⁰ (and which some scholars could credibly argue was in fact impermissible under the Statute)²¹ has become a cornerstone of prosecutorial policy. The much-trumpeted ideal of “positive” complementarity has changed from a principle where the Court lends support to States to undertake the most serious prosecutions where their judicial systems are weak to a managerial principle dividing labour between the Court and domestic institutions on the basis of this weakness. This article argues that the view of burden-sharing as inherently beneficial or as an organic emanation from the statute should not be as readily assumed as it is. International criminal legal discourse “transmits and continually reconstructs” a shared understanding of its history, goals and texts.²² Burden-sharing is a product of this reconstruction, but the process is not value-neutral—the sources of discursive assumptions are worth uncovering. This article argues that a dynamic cosmopolitanism underlies the embrace of burden-sharing.

7. In international law, three schools of interpretation are typically applied, namely (1) the textual approach; (2) the intent-based approach; and (3) the object and purpose approach.²³ As Wessel argues, interpretation of the Rome Statute’s provisions would always be oriented on a spectrum between conservative-statist and progressive-cosmopolitan.²⁴ The greater the emphasis on the former, the less likely “creational checks” like complementarity or deference to sovereign prosecutorial initiative embedded in the Statute as a function of the voluntaristic, sovereignty-conscious practice of States

20 Ibid., 379–380.

21 Mahnoush Arsanjani and W.M. Reisman, *The Law-in-Action of the International Criminal Court*, 99 *American JIL* (2005), 385 and William Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 *JICJ* (2008), 731.

22 Darryl Robinson, above n.19, 357.

23 Leena Glover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 *EJIL* (2010), 543, 547.

24 Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 *Columbia JTL* (2006), 377, 380–381.

Parties would be interpreted strictly.²⁵ Textual and intent-based approaches (bearing in mind the sovereignty-conscious nature of the Rome Statute negotiations) would tend in a conservative-Statist direction, but an object and purpose approach offers greater potential for the individual preferences of scholars, activists, actors and judges within or surrounding the Court to tilt interpretation in a progressive-cosmopolitan direction.

8. This article argues that the emergence of burden-sharing as a policy preference, permissible under the Rome Statute but certainly not mandated, manifests the shared objective of global human rights civil society, the like-minded group of States at the Rome Conference and the professionals involved in international criminal law for the establishment of a stronger, more cosmopolitan and supra-national Court than that which emerged in 1998's negotiations. It illustrates the tendency of scholars, activists, judges and lawyers in international criminal law to infer verticality or supra-nationality from the pure idea of international criminal justice on the basis of good-faith but partial interpretations of texts agreed earlier by sovereignty-conscious States who would prefer a more horizontal relationship.²⁶ The expectation of some observers that the Rome Statute would be construed less as a normal treaty capable of interpretation through standard textual hermeneutics (obviating the need for inquiry into its objects and purposes) than as a living, international-constitutional instrument of the global order interpreted on a discretionary, teleological basis appears to have been realized.²⁷ Burden-sharing may represent a textbook example of the general tendency in international criminal legal discourse to treat explicit textual restrictions or fundamental principles like legality, culpability or, in this case, systematic preference for State primacy in terms of prosecution as mere "artifacts of legal positivism" or as "inconvenient obstacles" obstructing the pursuit of international criminal justice.²⁸

9. It should be noted at the outset that this article is not intended as a critique of self-referrals.²⁹ It does not in any way deny the legality of self-referrals under the Rome Statute. Though some argue self-referrals were never contemplated in the Statute,³⁰ referral of situations by the territorial State was clearly permitted by Article 14(1). Though

25 Ibid., 401, citing Bruno Simma and Andreas Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 *American JIL* (1999), 302, 310.

26 Frédéric Mégrét, above n.5, 198.

27 Jared Wessel, above n. 24, 407–408.

28 Brad Roth, *Coming to Terms With Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice*, 8 *Santa Clara JIL* (2010), 231, 252 and 287.

29 Though it draws on some extant criticisms to show the comportment of burden-sharing with the spirit of the Statute is partial.

30 William W. Burke-White and Scott Kaplan, *Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation*, 7 *JICJ* (2009), 257, 259.

some critics initially argued that where national courts are willing and able to prosecute any relinquishing of jurisdiction was impermissible,³¹ this article accepts that the creational checks of Article 17 are not applicable where for any reason a case is not being investigated by the State.³² However, the article draws a distinction between the acceptance by the Court of individual self-referrals from States as a reactive (and, it was initially assumed, reluctant) measure to combat impunity, on the one hand, and burden-sharing as a proactive, systematic and enthusiastic policy of dividing labour between the Court and States by soliciting self-referrals. Those who advocate self-referrals and burden-sharing appear to conflate the two. While the former is a necessary component of the latter, the latter was not a necessary product of the former. It is possible to imagine a Court which accepts self-referrals reluctantly but which does not actively seek referrals from States. Indeed, to the limited extent such a possibility was considered at the Rome conference where the ICC Statute was negotiated, this more circumspect vision of the Court is probably what was envisaged.

10. In exploring how cosmopolitanism trumped circumspection, the article begins in Section 2 by examining cosmopolitanism, its faith in international institutions like the ICC and its desire to transcend the domain of sovereign control. Section 3 then analyses the balance in the Rome Statute between Statist-conservative concessions to sovereignty incorporated in the complementarity regime and progressive-cosmopolitan provisions less deferential to the State's prerogatives. Section 4 summarizes what burden-sharing is and how it tilts this balance in a more vertical direction, and examines how it contradicts some elements of the Rome Statute while giving effect to others. Section 5 examines how cosmopolitan interpretative techniques have been applied to the ICC's admissibility regime to present the practice as an unproblematic, natural realization of the Preambular aspirations of the Statute for a managerial system of jurisdictional allocation. However, in so doing, it selectively ignores other key principles of the Statute which suggest more conservative-statist constructions of the text.

II. The Cosmopolitan Faith in International Criminal Tribunals

11. Cosmopolitanism is an ideology that posits that all humans belong to a single, universal community based on a shared morality.³³ It is based on three fundamental precepts: (a) individualism, whereby individual human beings are the ultimate units of concern, as opposed to tribes, ethnicities, nations etc.; (b) universality, whereby all

31 See e.g. *ibid.*

32 Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 *Criminal L. Forum* (2010), 67.

33 Onora O'Neill, *Bounded and Cosmopolitan Justice*, 26 *R. Int'l Studies* (2000), 45.

human beings enjoy equal moral status; and (c) generality, whereby these human beings are subjects of concern for all and not merely their fellow nationals or co-religionists.³⁴ There are two strands to cosmopolitan thought, namely moral cosmopolitanism and legal cosmopolitanism.³⁵ From the first of these flows the belief that all humans, and not merely compatriots or fellow-citizens, come under the same moral standards, consequently rendering the boundaries between nations, States, cultures or societies morally irrelevant. Legal cosmopolitanism is premised on the need to construct a global political order incorporating institutional schemes that will preserve and protect the rights of all human beings everywhere in the world. As a result, schemes for cosmopolitan law are distinctly different from both domestic law which establishes the rights and duties that exist between citizens and government, and international law which establishes the conditions for co-existence between States. Schemes for cosmopolitan law aspire instead to regulate the conditions which should exist between all human beings in all States irrespective of national origin or State citizenship.³⁶ This cosmopolitan conception of the world in which humans are the subjects of law conflicts with the traditional, State-centric Grotian tradition of the international community in which States are the exclusive (or almost exclusive) actors on the international scene and the individuals within them are mere objects, enjoying no rights or liabilities under international law except insofar as they possess them as a derivative of the State under the principles governing nationality.³⁷ Though international law is viewed by most liberals as inherently civilizing (indeed, some argue cosmopolitan desires underlie the whole project of international law),³⁸ for many cosmopolitans its horizontal nature makes it “a second best, a temporary solution that allows us to live with the status quo until the consequences of [...] utopia have been fully worked out.”³⁹ By contrast, a Kantian model of international community assumes that individuals should be the focus of international relations as subjects of international dealings in their own right, with their rights reflected in a core of universal values (peace, respect for human rights, self-determination) that all members of the international community must respect. These common interests transcend any individual State and unite the

34 Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 *Ethics* (1992), 48, 48–49.

35 Patrick Hayden, *Cosmopolitanism and the Need for Transnational Criminal Justice: The Case of the International Criminal Court*, 104 *Theoria* (2004), 69, 70.

36 Garrett Wallace Brown, *State Sovereignty, Federation and Kantian Cosmopolitanism*, 11 *European J. Int'l Relations* (2005), 495, 502.

37 Claire Cutler, *Critical Reflections on the Westphalian Assumption of International Law and Organization: A Crisis of Legitimacy*, 27 *R. Int'l Studies* (2001), 133, 141.

38 Both notions are explored in Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of Modern International Law, 1870–1960* (2001).

39 Martti Koskenniemi, *Legal Cosmopolitanism: Tom Franck's Messianic World*, 35 *NYU JILP* (2003), 471, 484.

whole of mankind.⁴⁰ One obvious consequence of such an international community would be the right or duty of that community to monitor the internal affairs of its members and interfere to protect certain basic rights.⁴¹ Another consequence, and one of particular relevance to this article, is there needs to be a match between the substantive law of the global community and institutions that represent that community, both at the executive enforcement level and at the judicial level.⁴²

12. Cosmopolitan literature evaluates law from the perspective of the requirements of mankind *tout court* and typically places the egoistic values of the nation in contradistinction to those of universal humanity, generally preferring the latter.⁴³ Consequently, many cosmopolitans attempt to disrupt the relationship between the individual and the State and relegate the latter from its status as the primary actor in the international system.⁴⁴ Thomas Pogge, one of the most influential contemporary theorists of cosmopolitanism, argues that State sovereignty should be diffused across different institutions both above and below the level of the State to break the monopoly of authority it enjoys over its citizens.⁴⁵ On this basis, the State enjoys merely derivative significance as one instrument to advance moral universalism.⁴⁶ Others go further, arguing the sovereign State is a “mistake, an illegitimate offspring” to be overcome on the path to a depoliticized world of universal human rights,⁴⁷ the “traditional enemy” of human rights,⁴⁸ and an “enduring obstacle” to the furtherance of international criminal law.⁴⁹ As Cassese puts it, “either one supports the rule of law, or one supports state sovereignty.

40 Antonio Cassese, A Big Step Forward for International Justice, *Crimes of War* magazine (December 2003) (<http://www.didierbigo.com/students/readings/IPS2011/13/cassese2003.pdf> (accessed: 24 November 2013)).

41 Daniele Archibugi, Immanuel Kant, *Cosmopolitan Law and Peace*, 1 *European J. Int'l Relations* (1995), 429, 430.

42 Paul Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 *Chicago JIL* (2000), 1, 13.

43 Martti Koskeniemi, Book Review: *Humanity's Law*, Ruti G. Teitel (Oxford: Oxford University Press, 2011), 26 *Ethics & Int'l Affairs* (2012), 395.

44 Amy Eckert, *The Cosmopolitan Test: Universal Morality and the Challenge of the Darfur Genocide*, in: Steven Roach (ed.), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (2009), 205, 216.

45 Thomas Pogge, above n.34, 57–69.

46 David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (1995), 233–235.

47 Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights*, *Et Cetera*, 68 *Fordham LR* (1999), 1, 2.

48 Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (2006), 624.

49 Steven Roach, *Politicizing the ICC: The Convergence of Ethics, Politics and Law* (2006), 19.

The two are not [...] compatible.”⁵⁰ Broomhall may not in fact exaggerate when he argues most scholarship in the field of international criminal law implicitly or explicitly presents the reduction of sovereignty in the name of enforcing international human rights norms as desirable.⁵¹ Though the *raison d'être* of much international human rights and international criminal law was to spur States to develop institutions that would secure the rule of law, rectify human rights abuses and punish those responsible for injustice, values of State sovereignty are lost in this zero-sum game juxtaposition of sovereignty and universal norms—action by the State appears more like a dilution of an international tribunal than a necessary and beneficial complement to it.

13. This antipathy to sovereignty is heightened in the context of international criminal tribunals given the redemptive faith scholars, activists and practitioners have in the superiority of these bodies over their domestic equivalents on the basis of their reliability, independence and largely unquestioned benevolence.⁵² As Koller argues, international criminal law has developed to a significant extent because of the individual and collective identities of those influencing the course of international law.⁵³ Many of those who develop, theorize and practice international law (and international criminal law in particular) are driven by a normative ideal that development of the law may progressively catalyse the establishment of a cosmopolitan community which would accord all individuals equal moral status, regardless of any national borders.⁵⁴ Along these lines, the diversion of cases to the ICC has emerged as a preferred option for its tendency to maximize at least five identifiable goals of international criminal justice:

- Firstly, when active international criminal courts can fulfil three basic functions of any and all international tribunals—stabilizing normative expectations (restating the law, enforcing it, punishing deviations), law-making (establishing abstract and categorical statements as authoritative reference points for later practice, for example by outlining theories of joint criminal enterprise or rape as a crime against humanity) and the legitimization of authority (controlling domestic authority against yardsticks of international law).⁵⁵ Jessberger and Geneuss, for example, argue that the ICC has both the capacity and the mandate to find the law, consolidate it and advance it, just as the *ad hoc* tribunals did.⁵⁶

50 Quoted in Bruce Broomhall, *International Justice & the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), 56.

51 *Ibid.*, 58.

52 Frédéric Mégrét, above n.5, 214–215.

53 David Koller, above n.1, 1021 and 1023.

54 *Ibid.*, 1050.

55 Armin von Bogdandy and Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 *Leiden JIL* (2013), 49, 50 and 54–59.

56 Florian Jessberger and Julia Geneuss, above n.2, 1083.

- Secondly, it is argued that global crime automatically calls for global justice on the basis that international tribunals are both more effective and more legitimate, and hence more conducive to a true normative universalism.⁵⁷ The best expression of this global vision is found in the admittedly exceptional circumstances of the seminal *Tadić* jurisdictional decision, when the ICTY Appeals Chamber held that an international criminal tribunal created by the Security Council “must be endowed with primacy over national courts” because human nature will create “a perennial danger” of international crimes being characterized as ordinary crimes or trials being designed to shield the accused.⁵⁸
- Thirdly, in its role as a security court it assumes a global role in the world’s network of international politics to reduce atrocities and end conflict which no domestic court could perform.⁵⁹
- Fourthly, international prosecution has a wider symbolic effect, acting as “a loud-speaker echoing the values of the international community”⁶⁰ and shaping “a new normative foundation for the society of states.”⁶¹
- Finally, international law represents the legalistic desire to seal law off from politics (of the domestic variety, at least) through the mechanical, zealous application of an authoritative international criminal apparatus as the path to a more peaceful world.⁶²

14. Concurrence of jurisdiction between the State and international tribunals inevitably produces tensions. One obvious tension lies in the reality that the more an international legal apparatus defers to the sovereign discretion of the State on matters of law, opportunities to realize these five goals will be limited, if not foreclosed. The key question leading into the Rome Conference of the International Criminal Court was whether the body negotiated would inaugurate a revolutionary, cosmopolitan conception of world society which transcended Statehood or whether deference to the State’s assertion of its sovereign duty to prosecute and adjudicate would water down the Court’s jurisdiction. It is to the balance between these two perspectives that attention must turn.

57 Mireille Delmas-Marty, *Global Crime Calls for Global Justice*, 10 *European J. Crime, Crim. L. and Crim. Justice* (2002), 286, 286.

58 *Prosecutor v Tadic*, Case No. IT-94-AR72, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), para.59.

59 Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 *JICJ* (2006), 434, 441.

60 Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 *EJIL* (2002), 561, 592.

61 Jason Ralph, *Between Cosmopolitan and American Democracy: Understanding US Opposition to the International Criminal Court*, 17 *Int’l Relations* (2003), 195, 197.

62 John Czarnetzky and Ronald Rychlak, *An Empire of Law? Legalism and the International Criminal Court*, 79 *Notre Dame LR* (2003), 55, 61–62.

III. The Balance of the Rome Statute

15. The self-conception of cosmopolitan civil society, typically composed of scholars, activists and non-governmental organizations, is that of a culture which has liberated itself from national politics and the claims of popular sovereignty.⁶³ In the negotiations for the Rome Statute a number of these actors present made progressive-cosmopolitan calls for the ICC to serve as the sole venue for prosecuting crimes on the basis that universal jurisdiction rendered certain “hard-core” crimes outside the exclusive authority of States,⁶⁴ while others argued it should enjoy primary jurisdiction with national courts merely exercising residual jurisdiction.⁶⁵ The diplomats, non-governmental organizations (NGOs) and scholars, who drove the ICC negotiations, were generally unconcerned with ensuring national courts would fulfil their duties under international law and discussed the idea of the Court “long before they even had given the slightest attention to the issue of relations with national jurisdictions”.⁶⁶ Delegates were implored not to let “outmoded notions of state sovereignty [...] derail the forward movement” seeking to achieve international peace and order.⁶⁷ However, States would not agree to a Court that went so far.

16. In addition to Preambular statements that “effective prosecution must be ensured by taking measures at the national level”, “the duty of every State to exercise its criminal jurisdiction over those responsible for international” and the Court “shall be complementary to national criminal jurisdictions crimes”, Article 17 appeared to cement a systematic preference in the Rome Statute for domestic prosecution. Under this provision, for a case to be admissible before the ICC, the Court must be satisfied that domestic authorities have not pursued or are not pursuing the case. If they have pursued it or are pursuing it, the Court must satisfy itself that these efforts are/were the product of genuine willingness and ability to investigate or prosecute.⁶⁸ In terms of unwillingness, the Court examines whether:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;

63 Paul Kahn, above n.42, 6.

64 M. Cherif Bassiouni (ed.), *Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute from 1994–1998* (1999), 62.

65 Sharon Williams, Article 17: Issues of Admissibility, in: Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (1999), 383, 385–386.

66 Frédéric Mégret, Why Would States Want to Join the ICC? A Theoretical Exploration Based on the Legal Nature of Complementarity, in: Jann Kleffner and Gerben Kor (eds.), *Complementary Views on Complementarity* (2006), 1, 39.

67 Benjamin Ferencz, Address to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, 16 June 1998.

68 Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), Article 17(1).

- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.⁶⁹

In terms of ability, the Court may inquire as to whether the State is able to undertake proceedings based on a consideration of “whether due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”.⁷⁰ On a basic textual interpretation of the Article, only when the national proceedings are non-existent or not genuine can the OTP proceed with an investigation. As such, Article 17 reinforces State sovereignty⁷¹ and affirms that States may represent the most effective way of repressing international crimes.⁷² Outside of Security Council referrals, it appeared the ICC would serve not as the primary actor in international criminal law, but merely as a vigilant watchdog.

17. The failure to instantiate a form of universal jurisdiction based on ICC primacy without the mediation of the State disappointed those with more cosmopolitan visions of international law. The exacting admissibility hurdles were initially decried as an unseemly sacrifice of justice to sovereignty⁷³ and a less than desirable common denominator.⁷⁴ NGOs, finding the Court’s admissibility requirements “at variance with the better objectives of international criminal justice”, greeted the complementarity regime with dismay.⁷⁵ International law, of course, is frequently presented in this way, embodying a division between its substantive law, which reflects the ideals of a global community, and its institutions, which reflect the reality of State privilege,

69 *Ibid.*, art. 17(2).

70 *Ibid.* art. 17(3).

71 Bruce Broomhall, above n.50, 2.

72 Philippe Sands, *After Pinochet: The Role of National Courts*, in: Philippe Sands (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice* (2003), 68, 76–77.

73 Federica Gioia, *State Sovereignty, Jurisdiction, and “Modern” International Law: The Principle of Complementarity in the International Criminal Court*, 19 *Leiden JIL* (2006), 1095, 1096.

74 Phani Dascalopoulou-Livada, *The Principle of Complementarity and Security Council Referrals*, in: Mauro Politi and Federica Gioia (eds.), *The International Criminal Court and National Jurisdictions* (2008), 57.

75 Frédéric Mégrét, *Too Much of a Good Thing? Implementation and the Uses of Complementarity*, in: Carsten Stahn and Mohamed El Zeidy (eds.), above n.18, 361, 374.

producing an unifying balance between norms and power.⁷⁶ Though there is an element of truth in the argument that for many of the States the emphasis on the responsibility of national authorities was self-protective and cynical, it must be acknowledged that for most States complementarity arose out of a genuine belief that emphasis on national responsibility was the only way the putative Rome Statute system could be legitimate and sustainable.⁷⁷ From the earliest stages in the negotiation process, States rejected international primacy on the basis that they “had a vital interest in remaining responsible and accountable for prosecuting violations of their laws”.⁷⁸ As noted in the sixth Preambular paragraph, the “duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” precedes the Rome Statute, deriving from the *aut dedere aut judicare* requirement States accepted in legal instruments such as the Genocide Convention or the Geneva Conventions or from the requirements of international customary law. This duty is realized through genuinely undertaking investigations, followed by a prosecution, trial or extradition where evidence demands. State delegations in Rome argued that a permanent ICC with unlimited authority to deny States the exercise of these sovereign powers would offend the basic principle of non-intervention, a principle that above all else expresses the democratic thought that sovereignty resides in the community.⁷⁹ Though European countries and civil society wished to replicate the strongly vertical model of the *ad hoc* tribunals, most States preferred a horizontal regime, explicitly emphasizing the need to normalize international criminal justice after the unprecedented primacy enjoyed by the International Criminal Court for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY).⁸⁰

18. Nevertheless, State sovereignty did not emerge undiminished from Rome. The sovereign right to prosecute was no longer absolute but conditional on its proper exercise, legitimizing but constraining the authority the State enjoys over its subjects. Indeed, even where the duty is exercised properly by the State, the ICC will still be in a position to judge its satisfactoriness. One sees in this harmonization of national criminal justice systems with international criminal law vis-à-vis the treatment of mass atrocity a reining-in of sovereign chauvinism—as Ralph puts it, “the secondary norms of non-intervention and sovereign/diplomatic immunity are replaced by State

76 Paul Kahn, above n.42, 10.

77 Rod Rastan, *Complementarity: Contest or Collaboration*, in: Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (2010), 83, 132 and Frédéric Mégret, above n.66, 23.

78 Ad Hoc Committee on the Establishment of an International Criminal Court, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22 of 6 September 1995, 31.

79 Rod Rastan, above n.77, 107.

80 Frédéric Mégret, above n.5, 214.

responsibilities to protect and prosecute.”⁸¹ It is for this reason that the response among cosmopolitans to the ICC gradually became more supportive after the initial disappointment at the failure to achieve primacy.⁸² For some, the sheer fact of a permanent international institution applying international criminal law directly to the individual in the course of proceedings in The Hague made the ICC an inherently revolutionary project.⁸³ Others, as we will see, saw even greater potential for the Court to become a more active agent.

19. Overall, the primary characteristic of the admissibility regime is balance. If this innovation constituted a Kantian revolution, its deference to classical, Grotian international law contained within it a counter-revolution.⁸⁴ The ICC addresses systematic impunity resulting from the statist framework, but to the extent it articulates a cosmopolitan vision of justice it does so within that framework. It caters for State authority but responds to the traditional Westphalian failure to protect individuals from atrocity, balancing legitimacy with efficacy, supra-national authority with domestic constitutional orders. This balancing exercise clearly paid off—the compromises based on complementarity (and territoriality and nationality) attracted surprisingly early and numerous accessions from the Global South to reach the 60 ratifications necessary for the Statute to enter into force, a possibility disregarded by the mostly-European group of like-minded States who insisted on universal jurisdiction and a smaller twenty-State threshold.⁸⁵

20. One issue that went unaddressed at Rome but which had an obvious pertinence after 1 July 2002 was whether and how the Court would change from the inert ideal in the Statute to a living, breathing Court. While any erosion of the admissibility arrangements that were agreed would cause a crisis of confidence in the ICC in the period before it came into effect,⁸⁶ this was less of a concern in subsequent years as institutional concerns of an autonomous Court replaced the need to attract ratifications and the Rome conference imperative of cosmopolitan concessions to sovereignty grew remote. Though international courts are typically presented as the agents of States Parties, once established, any oversight or sanctioning by States tends to have relatively little power to restrain their creation once it stands on its own two feet.⁸⁷ The annual

81 Jason Ralph, *Anarchy is What Criminal Lawyers and Other Actors Make of It: International Criminal Justice as an Institution of International and World Society* in: Steven Roach (ed.), above n.44, 133, 135.

82 Antonio Franceschet, *Four Cosmopolitan Projects: The International Criminal Court in Context*, in: Steven Roach (ed.), above n.44, 179, 201.

83 Florian Jessberger and Julia Geneuss, above n.2, 1085.

84 Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002), 8.

85 William A. Schabas, *The Banality of International Justice*, 11 *JICJ* (2013), 545, 548.

86 Michael A. Newton, above n.3, 122–123.

87 Allison Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 *Vanderbilt LR* (2006), 1, 57.

Assembly of States Parties is well suited to considering regulatory matters within the framework of the Statute, but is a cumbersome mechanism for exercising oversight in relation to politically contentious, context-specific policies like burden-sharing. As Casey points out, all of the ICC functions will be carried out by its own personnel, divided by bureaucratic authority but not necessarily by interest.⁸⁸ Because ICC judges and agents of the Office of the Prosecutor come from a specialized community and meta-judicial culture of human rights and academia which import their own preformed preferences (often progressive-cosmopolitan),⁸⁹ there is a justifiable expectation that actors on the bench or OTP sympathetic to the progressive development of international criminal/humanitarian law might engage in policy-making to improve the status and functionality of the Court.⁹⁰ International courts generally manifest a normative bias favouring international legal completeness and dynamism,⁹¹ a tendency magnified in international criminal tribunals by its dominant culture of progressive development.⁹²

21. This professional inclination towards expansion may be exacerbated by the exigencies of the ICC. As Batros notes, international tribunals have internal interests in being active and prominent which are distinct from the external interests of other entities such as States—once the Court became established, these interests would naturally come to the fore.⁹³ One need not have been unduly cynical to expect that the Prosecutor’s rhetorical suggestion that his own idleness would represent success might diminish in the cold light of day given the ICC’s consistent need to

88 Michael A. Newton, above n.3, 144, citing argument made in Lee A. Casey, *The Case Against Supporting the International Criminal Court*, in *Washington University School of Law International Debate Series No. 1* (2002).

89 As Snyder and Vinjamuri observe, “[l]egalists who stress these justifications for war crimes tribunals have permeated human rights-based nongovernmental organizations (NGOs), international organizations, and universities. More than any other professional class, lawyers have moved freely among these institutions and taken leadership roles in the international tribunals whose creation they have advanced.” (Leslie Vinjamuri and Jack Snyder, *Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice*, 7 *Annual R Political Science* (2004), 345, 358).

90 Jared Wessel, above n.24, 419–421 and 447. Updating Wessel’s figures from 2006 (at 449–450), from an examination of the web-pages of the seventeen judges serving on the ICC’s three chambers as of April 2014, it would appear that twelve of the judges have experience in academia, eleven have worked in human rights NGOs or been appointed to human rights or humanitarian bodies, eight have done both and only two have done neither.

91 Richard H. Steinberg, *Judicial Law-Making at the WTO: Discursive, Constitutional, and Political Constraints*, 98 *American JIL* (2004), 247, 258.

92 David Koller, above n.1, 1050.

93 Ben Batros, *The Evolution of the ICC Jurisprudence on Admissibility*, in: Carsten Stahn and Mohamed El Zeidy (eds.), above n.18, 558, 595.

justify its budget and avoid the type of inactivity that would “kill” the Court.⁹⁴ As Schabas notes:

The suggestion that the Court might measure its success by a paucity of cases was not a very compelling message for States Parties, who were investing large sums of money in the institution and who expected to see trials and convictions.⁹⁵

He convincingly argues that the convoluted self-referral by the DRC of Thomas Lubanga (already being prosecuted by the Congolese for crimes of greater gravity than recruitment of child soldiers for which he was ultimately indicted) was the product of impatience where “we had to get an indictment quickly”, setting a pattern for future conduct.⁹⁶ Since then, the ICC has been struggling to assert its credibility, above all because of its lack of judicial productivity in securing only one conviction in its first ten years. Furthermore, the rejection of four out of 14 cases brought by the Prosecutor to the Confirmation Hearing Stage, the acquittal of Matthieu Ngudjolo and the controversial withdrawal of charges against Kenya’s former civil service head Francis Muthaura have threatened the Court’s credibility.⁹⁷ Admissions that we are in the “post-romantic” phase of the ICC⁹⁸ or that the “honeymoon” is over are both commonplace and accurate.⁹⁹ Constant activity appears to have been adopted as a response to this status anxiety and the inter-related risk of irrelevance. While there are principled justifications for actively seeking more cases, a mindset of “looking for business” has made Court–State interactions quite different from those envisaged in Rome.¹⁰⁰

22. While on a plain reading of Article 17, the admission of a case to the Court appears a “drastic”¹⁰¹ response to State failure, some scholars made early predictions

94 This concern was best expressed at a Round Table in June 2004, when ICC judge Theodor Meron noted that without a critical mass of cases, State Parties would question whether the Court was worth sustaining and Mauro Politi acknowledged that it was difficult to convince ambassadors to support the Court when it only had one trial (Round Table: The ICC Relationship With National Jurisdictions: What Future?, in: Mauro Politi and Federica Gioia (eds.), above n.74, 133, 135 and 156).

95 William A. Schabas, *The Rise and Fall of Complementarity*, in: Carsten Stahn and Mohamed El Zeidy (eds.), above n.18, 150, 156.

96 William A. Schabas, “Complementarity in Practice”: Some Uncomplimentary Thoughts, 19 *Crim. L. Forum* (2008), 5, 32–33.

97 William A. Schabas, above n. 85, 546–547.

98 Payam Akhavan, *The Rise and Fall, and Rise, of International Criminal Justice*, 11 *JICJ* (2013), 527, 527.

99 David Luban, *After the Honeymoon: Reflections on the Current State of International Criminal Justice*, 11 *JICJ* (2013), 505, 505.

100 Paul Seils, *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor*, in: Carsten Stahn and Mohamed El Zeidy (eds.), above n.18, 989, 989.

101 Frédéric Mégret and Marika Giles Samson, *Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials*, 13 *JICJ* (2011), 571, 578.

that Article 17's requirements "may chafe an ICC prosecutor that sees them as an overly restrictive manifestation of arcane sovereignty principles".¹⁰² These predictions have been vindicated by the emergence burden-sharing based not merely on tolerance for self-referrals but on active pursuit of them. Considering the general perception after Rome that a largely conservative body had been agreed upon and the fact that the concept of a division of labour based on State referrals finds no support in the *travaux préparatoires* or academic commentary before 2003, burden-sharing clearly represents an imaginative augmentation to that which was agreed in Rome. After all, the admissibility regime was formulated on the presumption that the ICC was not inherently superior,¹⁰³ forming a hierarchy of jurisdiction where the body in The Hague constituted merely a permanent reserve court.¹⁰⁴ As Section 4 goes on to argue, burden-sharing has a reactive, practical root as a necessary emanation from the policy decision to accept self-referrals. However, because some of these reactive and practical justifications have proven unsatisfactory and are indistinguishable in practical terms from "looking for business", burden-sharing also enjoys more principled rationalization flowing from a cosmopolitanism-influenced, constitutional reading of the Statute. Before moving on to this, it is necessary to examine these principles. Even if we assume burden-sharing fits within the letter of the Rome Statute, many aspects of it jar with its spirit to the extent that the presentation of the policy as a natural by-product of the Court's admissibility arrangements is more complex than simplistic presentations of the Rome Statute's teleology would suggest.

IV. Burden-Sharing: Legally Permissible, Philosophically Questionable?

23. The hitherto unimagined (or at least unelaborated) concept of burden-sharing was outlined in a 2003 Informal Expert Paper entitled "The Principle of Complementarity in Practice", which envisaged situations where the appropriate course of action may appear to be for a State to voluntarily accept admissibility before the ICC of certain cases under a consensual division of labour.¹⁰⁵ As noted in the introduction, following such voluntary acceptance, the Office of the Prosecutor will initiate prosecutions of the leaders who bear the most responsibility for the crimes (those in *de jure* or *de facto*

102 Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 *Military LR* (2001), 20, 68.

103 *Ibid.*, 64.

104 Ruth Mackenzie, Cesare P. Romano and Philippe Sands, *Complementarity in the Rome Statute and National Jurisdictions* (2008), 4.

105 ICC Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice* (2003), 19 (www.icc-cpi.int/iccdocs/doc/doc654724.PDF, accessed: 24 November 2013).

hierarchical control and other causally significant actors who commit exceptionally egregious crimes notwithstanding their low placement in the hierarchy of atrocity) and will encourage national prosecutions, where possible, for the lower-ranking perpetrators.¹⁰⁶ This policy, it is argued, would “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 respect to core crimes”.¹⁰⁷ The presumption is that from the stage where the prosecutor becomes aware of a situation, he can engage in dialogue with the State over the parties and incidents it intends to prosecute, if any.¹⁰⁸ Once a division of labour is agreed, a further presumption is that national justice processes broadly understood will be supported (albeit in an undefined way) in their prosecutions of other perpetrators as part of a phased withdrawal to leave a sustainable impact, crucially distinguishing burden-sharing from self-referrals *simpliciter*.¹⁰⁹

24. Examples of these types of agreement abound, and dominate the Court’s active case-load. The OTP agreed on a division of labour with Uganda whereby the former would prosecute those who bore the greatest responsibility,¹¹⁰ and repeated this with the Democratic Republic of the Congo.¹¹¹ Though the current Kenyan cases before the Court proceed through the Prosecutor’s *proprio motu* authority, the Agreed Minutes formalized at the meeting of the Prosecutor and the representatives of Kenya’s Government in 2009 stated that if a special tribunal or other judicial mechanism could not be agreed between in parliament, the Government of Kenya would refer the situation there to Prosecutor in accordance with Article 14 with an implication that the latter would then divide prosecutorial responsibility.¹¹² Central African Republic and Mali have also made self-referrals, while investigations in Côte d’Ivoire consented to initially by Laurent Gbagbo and later requested by Alassane Ouattara represent a

106 Office of the Prosecutor, above n.10, 3.

107 Informal Expert Paper, above n.105, 19.

108 Carsten Stahn, *Complementarity: A Tale of Two Notions*, 19 *Criminal Law Forum* (2008), 87, 106–107.

109 First Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno-Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005), 29 June 2005, 10 (http://www.icc-cpi.int/NR/rdonlyres/CC6D24F9-473F-4A4F-896B-01A2B5A8A59A/0/ICC_Darfur_UNSC_Report_290605_EN.pdf (accessed 24 November 2013)).

110 Luis Moreno Ocampo, *Building a Future on Peace and Justice: Address at the International Conference in Nuremberg*, Nuremberg (24 June 2007).

111 Remarks by ICC Prosecutor Luis Moreno-Ocampo, 27th meeting of the Committee of Legal Advisors on Public International Law, Strasbourg (18 March 2004).

112 Agreed Minutes of the Meeting between Prosecutor Moreno-Ocampo and the delegation of the Kenyan Government, The Hague 3 July 2009, 2 (<http://www.icc-cpi.int/NR/rdonlyres/1CEB4FAD-DFA7-4DC5-B22D-E828322D9764/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele.pdf> (accessed 24 November 2013)).

highly convoluted self-referral via Article 12(3), notwithstanding its technical status as a *proprio motu* investigation. At all times, the Prosecutor made clear his willingness to encourage (though crucially, not ensure) domestic prosecutions. Where a State does nothing to prosecute a case (an implied self-referral) or announces it will not (an express self-referral), an agreement with the State to voluntarily renounce jurisdiction in these contexts would undoubtedly be quicker than the convoluted admissibility proceedings seen in Articles 17–19. Some argue that referral of a situation by the territorial State would fulfil its Preambular duty to “exercise criminal jurisdiction” to the extent that it is consistent with the customary obligation of *aut dedere aut judicare*, and is therefore satisfied by surrender of a suspect to criminal proceedings that result in prosecution.¹¹³

25. As a pragmatic response to a situation where a State freely admits it cannot or will not prosecute a situation or case, acceptance by the ICC of self-referrals would be unobjectionable and, it might be added, unavoidable. The wisdom of the uncontested admissibility situations originally envisaged in the Informal Expert Paper, namely where the State justice system is too incapacitated to undertake any trial (e.g. Central African Republic) or where “[g]roups bitterly divided by conflict may oppose prosecutions at each other’s hands and yet agree to a prosecution by a Court regarded as neutral and impartial” (e.g. a highly precarious military stalemate or power-sharing peace agreement) is inarguable.¹¹⁴ However, advocates of self-referrals have not stopped at this reactive justification for the policy, and go on to proactively outline a number of obvious advantages to a broader policy of burden-sharing. The general thrust of the argument is that the Rome Statute formalizes the idea that impunity must be fought at both the international and the domestic levels, and as a result there should be no objection to a policy where they mutually reinforce each other. Burden-sharing offers obvious opportunities for co-ordinated investigations and evidence gathering between the State and The Hague, and may foster an environment of co-operation that might mutually enhance arrest, detention, transfer/extradition and enforcement of sentences. The Appeals Chamber since *Katanga* has deemed self-referrals permissible under Statute, consistent with its goal of limiting impunity and accepts there may be “merit” in assumption by the ICC of some of the State’s duty to prosecute.¹¹⁵ Because the division of labour is negotiated and consensual, it allows for individuals and crimes to be considered on a case-by-case basis and effectively grants the State a choice of jurisdiction.¹¹⁶ As Gioia puts it:

113 Informal Expert Paper, above n.105, 19.

114 Office of the Prosecutor, above n.10, 5.

115 Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07 OA 8, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, para.85.

116 Ben Batros, above n. 93, 601.

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.¹¹⁷

Advocates of burden-sharing contend that referral of the most sensitive cases to the ICC could avert the danger of domestic victor’s justice, freeing the State up for a comprehensive accountability policy for less contentious indictees.¹¹⁸ If a domestic court lacks expertise, infrastructure or security, the State may agree the ICC is a superior forum.¹¹⁹ One can assume the standard of trial available in The Hague will be as good as, if not better than, that in any State recently or presently subject to war or repression.¹²⁰ From the ICC’s point of view, the obvious resource and capacity constraints of a Court that can only try a handful of cases at any given time (and which does so with inordinate slowness) makes a defined pathway to domestic assumption of responsibility attractive.¹²¹ A guaranteed role for the ICC increases judicial coverage, while commitment to encouraging prosecutions at the domestic level avoids territorial State inertia that might occur if a case was found admissible in The Hague.¹²² The self-referrals which underpin burden-sharing can be commended for being more reassuring to the State concerned (and the Court’s critics) than the bold wielding of the Prosecutor’s *proprio motu* powers, and hence more likely to attract the co-operation of the State.¹²³

26. When presented simply as a mechanism for “collaboration and synergies across multiple fora”,¹²⁴ the case for burden sharing at first glance appears incontestable, an inevitable product of the Rome Statute, and hence consistent with its spirit as well as its letter. However, on closer inspection many of the more assertive arguments in favour of pro-active burden-sharing are weaker than superficial analysis based on the weakness of the State and the comparative strength of the Court would suggest. Self-referral raises far more complex questions than the uncomplicated, synergistic, co-operative models envisaged. Space precludes a detailed examination of self-referrals, but they have

117 Federica Gioia, Complementarity and “Reverse Cooperation”, in: Carsten Stahn and Mohamed El Zeidy (eds.), above n.18, 807, 817

118 Ruth Mackenzie et al., above n.104, 321.

119 Darryl Robinson, above n.32, 97.

120 This idea of “comparative advantage” is examined in the next section.

121 William W. Burke-White, Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice, 49 *Harvard ILJ* (2008), 53, 102.

122 Jan Kleffner, Complementarity as a Catalyst for Compliance, in: Jan Kleffner and Gerben Kor (eds.), above n. 66, 79, 91–92.

123 Paola Gaeta, Is the Practice of Self-Referrals a Sound Start for the ICC? 2 *JICJ* (2004), 949, 950.

124 Rod Rastan, above n.77, 132.

proven the Court's most problematic issue, generating a number of principled objections, which can briefly be summarized:

- (a) A justifiable suspicion exists that self-referral by the territorial State gives it too much control over the process, allowing it to discredit its internal enemies while securing its own impunity as the ICC will be too reluctant to alienate its least ongoing prosecutions be jeopardized through lack of co-operation.¹²⁵ The fact that only Lord's Resistance Army members have been indicted and no arrest warrants have been issued for Ugandan government agents, for example, has raised suspicions of a quid pro quo agreement with Kampala, though the Prosecutor denies it.¹²⁶ Referrals by Democratic Republic of the Congo's Joseph Kabila and Central African Republic's (subsequently deposed) Francois Bozizé of situations within their territories were rewarded with situation investigations and indictments that targeted their enemies or political rivals and not their governments, notwithstanding clear evidence of serious crimes by national armed forces.¹²⁷ Because the ICC lacks enforcement power, it is dependent on national assistance for access to crime scenes, execution of arrest warrants and protection for witnesses. This requires a co-operative relationship, making investigations that would jeopardize relations with the Congolese, Malian or Central African Republic leaderships unattractive to the Prosecutor. This can call into question the impartiality an international court was assumed to exemplify.
- (b) Neither of the Ugandan nor Congolese self-referrals were fully voluntary—in both cases the first ICC Prosecutor requested a self-referral by letting the State know that if one was not made, he would employ his *proprio motu* powers to investigate after authorization by the Pre-Trial Chamber.¹²⁸ This in turn undermines one of the main justifications for burden-sharing, namely its consensual nature, particularly when one notes how self-servingly the Court has applied the same conduct test employed by Chambers under

125 Mark Drumbl, *Policy Through Complementarity: The Atrocity Trial as Justice*, in: Carsten Stahn and Mohamed El Zeidy (eds.), above n.18, 197, 214. In *Prosecutor v Bemba Gombo*, Case No. ICC-01/05-01/08-704-red3-tENG Application Challenging the Admissibility of the Case pursuant to Articles 17 and 19(2)(a) of the Rome Statute (25 February 2010), the Defence argued the ICC put itself “at risk of manipulation by transient governments” who might “exploit the ICC to eliminate their old enemies” (para.68).

126 Kenneth Rodman and Petie Booth, *Manipulated Commitments: The International Criminal Court in Uganda*, 35 HRQ (2013), 271, 284.

127 *Ibid.*, 296–297.

128 Paola Gaeta, above n.123, 949–950 and Christopher Hall, *Positive Complementarity in Action*, in: Carsten Stahn and Mohamed El Zeidy (eds.), above n.18, 1014, 1018.

Article 17 to determine whether a State is proceeding with the same case.¹²⁹ Though contrasts are drawn between the “threat-based”, “competitive” and “passive” nature of classical complementarity contained in the text of Article 17 and the “gentle”, “constructive” and “positive” nature of burden-sharing,¹³⁰ the preference for consensus over competition is somewhat self-serving if the competition is engineered by the Prosecutor. The distinction between “passive” complementarity entailed in waiting for the State’s unwillingness or inability to become manifest and “positive” engagement with it to allocate burdens is significantly over-stated—inspection of the Preamble and relevant articles suggests that the Statute never intended to separate national and international jurisdiction fully, and instead envisaged a process of formalized interaction. Though the Rome Statute prioritized the State’s duty to prosecute, it never envisaged ICC passivity or competitiveness. As the Court put it in the *Kony* admissibility case:

Considered as a whole, the corpus of these provisions delineates a system whereby the determination of admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario.¹³¹

The basic framework of admissibility envisages an active court operating as a catalyst for States who might otherwise be reluctant to allow their judicial institutions to investigate, prosecute and try cases, even in the absence of any scheme of burden-sharing.¹³²

- (c) The most common criticism of self-referrals, however, is that they create a “pernicious incentive” to do nothing in terms of post-conflict justice other than to externalize the responsibility.¹³³ Though the judiciaries in Uganda and DR Congo appeared fully capable of trying the cases they referred to The Hague, the Office of the Prosecutor pressed aggressively for self-referrals.¹³⁴ The policy has been criticized for running contrary to the ethos of the Rome

129 Sarah Nouwen, *Fine-tuning Complementarity*, in: Bartram S. Brown (ed.), *Research Handbook of International Criminal Law* (2011), 206, 212–214.

130 Rod Rastan, above n.77, Carsten Stahn, above n.108, 89 and 102.

131 *Prosecutor v. Kony and others*, Case No.ICC-02/04-01/05-377, Decision on the Admissibility of the Case Under Article 19(1) of the Statute (10 March 2009), para.52.

132 Jann Kleffner, above n.122, 82, Christopher Hall, above n.128, 1017.

133 Mark Drumbl, above n.125, 200.

134 William A. Schabas, above n.21, 743 and Nidal Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (2011), 149–161 and 170.

Statute which prioritized the State duty to prosecute and for contradicting the Prosecutor's stated policy to encourage national prosecutions.¹³⁵ While the initial presumption was that the modalities of the complementarity regime would stimulate States to develop an ability to exercise jurisdiction, it instead encourages "laziness" on the part of the State's judicial apparatus.¹³⁶ As Burke-White argues, the Court appears to have renounced its most powerful tool, namely the ability to "incentivize, nudge or cajole" reluctant national governments to undertake domestic prosecutions.¹³⁷

- (d) Finally, advocates of burden-sharing miss one obvious point—if the State feels unable or unwilling to try a case of a major criminal or is found to be so, how then can it be prepared to try someone only slightly further down the criminal hierarchy? Even if a division is drawn between complex "big fish" and less complex "small fish" cases (though given the ICC's stated ambition to try only handful of cases, the division would be probably be one between senior leaders and upper middle-management ones), the State cannot be presumed to be equipped to cope with the latter, which will still involve immense technical difficulties and may prove equally sensitive politically. As Glasius argues:

There is a logical inconsistency at the heart of the positive complementarity doctrine: complementarity teaches that the ICC is only supposed to take up situations where States are "unable" or "unwilling" to investigate or prosecute—but positive complementarity in situation countries demands that the same States suddenly recover their ability and willingness with regard to all the perpetrators the ICC does not have capacity to try.¹³⁸

Though advocates of a division of labour argue burden-sharing and its over-arching "positive" complementarity doctrine should serve to strengthen domestic jurisdiction,¹³⁹ the Prosecutor has denied any ambition to act as a "development agency".¹⁴⁰ Though

135 Phil Clark, *Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of the Congo and Uganda*, in: Carsten Stahn and Mohamed El Zeidy (eds.), above n.18, 1203.

136 Nidal Jurdi, above n.134, 180.

137 W.W. Burke-White, *Reframing Positive Complementarity*, in: Carsten Stahn and Mohamed El Zeidy (eds.), above n.18, 341, 347.

138 Marlies Glasius, *A Problem, Not a Solution: Complementarity in the Central African Republic and Democratic Republic of Congo*, in: Carsten Stahn and Mohamed El Zeidy (eds.), above n.18, 1204, 1218.

139 Carsten Stahn, *Taking Complementarity Seriously: On the Sense and Sensibility of "Classical", "Positive" and "Negative" Complementarity*, in: Carsten Stahn and Mohamed El Zeidy (eds.), above n.18, 233, 262.

140 ICC Assembly of States Parties, *Report of the Bureau on Stocktaking: Complementarity*, UN Doc. ICC-ASP/8/51 of 18 March 2010, para.42.

the OTP and Registry have instead accepted a more catalytic role as co-ordinators of assistance by States and international non-governmental organizations, critics have argued uncontested admissibility might “shrink” domestic willingness to pursue other cases (after all, self-referral is presented by its advocates as a fulfilment of the State’s duties)¹⁴¹ or foster free-riding on the ICC,¹⁴² while the ICC’s myopic focus on its high-profile cases may result in the neglect of perpetrators that in theory have been left to the State.¹⁴³ There exists a risk (one possibly already realized) that the Court will operate on a cynical model of “an inwardly focused court whose primary concern is not the well-being of societies recovering from mass atrocities, but instead the maintenance of a docket that will maximize the Court’s own visibility and prestige”.¹⁴⁴ Though presented as collaboration, burden-sharing in effect often means the Court assumes almost all responsibility for prosecution. In DR Congo, Uganda, Central African Republic, Côte d’Ivoire and Mali, the States concerned have been very reluctant to assume their putative share of the burden.

27. None of these criticisms invalidate self-referrals per se—as noted above, there are many advantages to uncontested admissibility and a rational division of labour. These criticisms are relevant, however, insofar as they show that self-referrals contradict as many of the principles of the Rome Statute as they support. Burden-sharing has involved the Prosecutor and Court in a significant degree of judicial policy-making, which usually takes the form of either reactive gap-filling or proactive judicial activism.¹⁴⁵ While the embrace of self-referrals in reaction to unexpected and unforeseen cases of complete State inactivity can be considered an example of necessary gap-filling (where an institution has failed to articulate a specific rule governing an emerging dilemma), the expressed, systematic preference for burden-sharing mimics a more ambitious form of judicial activism by relaxing justiciability requirements to expand the court’s jurisdiction, loosely construing the applicable law and thereby progressively expanding it.¹⁴⁶ On the basis of the above criticisms, burden-sharing looks less like the revitalization of the Rome Statute than a gloss for what Akhavan describes as “the temptation of institutional self-perpetuation”.¹⁴⁷ A large, multi-layered, multi-skilled system of international criminal justice achieving with the State a common goal of non-impunity is attractive if one assumes the global community is a more appropriate frame of reference than a national one, but it is not what was agreed at

141 Takemura, above n.16, 613.

142 William W. Burke-White, above n.121, 62.

143 Alexander Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 *Virginia JIL* (2009–2010), 108, 143.

144 *Ibid.*, 160.

145 Jared Wessel, above n.24, 386.

146 *Ibid.*, 386–387.

147 Payam Akhavan, above n.98, 532.

Rome, where only a residual primacy was left to the ICC. On this view, burden-sharing may not represent the realization of complementarity, but rather its failure.

28. Why then has burden-sharing emerged to prominence if it is open to political favouritism, less consensual than imagined, contradictory to the onus placed on States and premised on a questionable assumption that States can selectively lose and regain their competences to undertake trials? One could argue it is a predictable and pragmatic emanation from the unanticipated frequency of self-referral, but advocates of such a role have not been content to leave it at that. Burden-sharing has been presented by its supporters not as a reactive policy to State inactivity but as a key organizing principle. As noted earlier, since at least 2006, the Prosecutor has admitted a formal “policy of inviting and welcoming voluntary referrals as a first step in triggering the jurisdiction of the Court”.¹⁴⁸ If the context-specific claims made for each self-referral are questionable for their politicization, lack of consensuality and failure to ensure fulfilment of the domestic share of the burden, it is necessary to turn to the larger, more systematic claims made for the policy. As the next section goes on to argue, these claims flow from the cosmopolitan identity of the Court’s actors and supporters, a community concerned more with progressively developing the Court in a vertical direction than the more horizontal nature of the negotiated Statute would suggest.

V. Interpreting the Rome Statute: Transcending State Primacy

29. Three main interpretative techniques on the progressive-cosmopolitan end of the interpretative spectrum have been employed to argue that the Rome Statute demands a more activist, burden-sharing Court. The first is the argument that the Statute is merely provisional, awaiting progressive development through statutory interpretation and practice. The second is to argue the Rome Statute is in fact a constitutional document, while the third is to identify ambiguities in the complementarity regime, the resolution of which requires recourse to the teleology of the Statute. All three approaches draw heavily on the open-ended and aspirational language of the Preamble.

30. It is best to begin with the first of these. Though some cosmopolitans were disappointed with the Rome Statute’s apparent privileging of State sovereignty, others subsequently adopted a more optimistic view that the Rome Statute was designed to “enhance and bring to fruition the modern, Kantian model of the international community [...] a practical and symbolic articulation of the scheme and a powerful push to its full realization”, implying there was something latent and emancipatory within the Statute that could later transcend ostensible textual limitations.¹⁴⁹ Notwithstanding the clearly-expressed desire of States to place the initiative with States and to limit the Prosecutor’s role, there has always been a sense among supporters of the ICC

148 Office of the Prosecutor, above n.15, 7.

149 Antonio Cassese, above n.40.

that the Court agreed in 1998 is something merely provisional that will evolve in a more cosmopolitan direction. Jessberger and Geneuss admit the ICC “is not (*yet*) a true supra-national legal institution”¹⁵⁰; Cassese positioned the Court within a “transitional period” in which new values will eventually transcend embedded sovereign conditions¹⁵¹; while Stahn argues the Statute is “geared towards long-term change” and that this “should be kept in mind in interpretation”.¹⁵² The more sceptical Newton saw the key test of the Court’s first twenty years as whether it could erode the principles of State sovereignty that thus far limit it.¹⁵³ There was little suggestion by States Parties at Rome or 2010’s Kampala Conference that the ICC Statute contains within it the seeds of a gradually more vertical Court system. At the latter, States Parties appeared to fire a shot across the bows of self-referrals by passing a resolution confirming that the struggle against impunity required first and foremost that States prosecute serious crimes committed in their territory or by their nationals.¹⁵⁴ However, the view that the Statute can be subject to evolutionary, progressive re-interpretation fits very much with the cosmopolitan worldview, one in which the international order is in a “primitive state” that will inevitably change over time,¹⁵⁵ and where international law consists of previously imperfect obligations in a constant but gradual process of being perfected.¹⁵⁶ As Koskenniemi puts it,

International law is vindicated, not as a ready-made institutional design, but rather as a completely open-ended political project, a professional commitment to imagine different futures and to be ready to criticize whatever present there is, and thus make room for that which is emerging.¹⁵⁷

31. This tension between textual restraints and an apparently natural, constitutional evolution of the Statute has been present since its earliest days. As noted in the introduction, the question of whether the Statute would be interpreted as a constitutional instrument of the global order, as opposed to a simple treaty, was all-important in seeing how far it could go as a political project. A constitutional view would require a

150 Florian Jessberger and Julia Geneuss, above n.2, 1087.

151 Antonio Cassese, above n.40.

152 Carsten Stahn, above n. 139, 280.

153 Michael A. Newton, above n.3, 123.

154 International Center for Transitional Justice, Meeting Summary of the Retreat on Complementarity after Kampala: The Way Forward (2010), 1 (<http://ictj.org/sites/default/files/ICTJ-Global-Complementarity-Greentree-2010-English.pdf> (accessed 24 November 2013)).

155 Paul Kahn, above n.42, 13.

156 Patrick Hayden, above n.35, 83.

157 Martti Koskenniemi, above n.39, 486.

functional approach to the Rome Statute for the simple reason that is *has* to function, being the foundation for a rule of law for an entire community—questions of intent and vitality would become primary bases of interpretation and would give judges freedom to promote the functionality of the Court.¹⁵⁸ By contrast, if it was treated as a standard treaty interpreted under the Vienna Convention, judicial actors would naturally adopt a more textualist approach, with reference to the intent and purpose of the treaty made only where the text would lead to an absurd result—gaps, vitality and function would find little place in the inquiry.¹⁵⁹ International criminal tribunals have a marked tendency towards the former approach—as Megret puts it, there is “occasionally a constitutional quality to claims of verticality, as if international criminal tribunals [...] sought to portray themselves as no longer as simply an inspired manifestation of the inter-state world, but as one of the first manifestations of a cosmopolitan one”.¹⁶⁰ The aggrandizement of the ICC’s function bears the hallmarks of this approach. Notwithstanding the restrictions of the Statute, scholars on the cosmopolitan wing of the Court argued the ICC was a manifestation of the international community’s self-constitutionalization incorporating individuals as “world citizens”,¹⁶¹ a “Constitutional Moment in international law—a decision to equilibrate the constitutional, organic structure of international law, albeit *sotto voce*”.¹⁶² Weller, noting the wide-scale participation of States and 250-plus worldwide NGOs, contends that the Rome Conference exercised the functions of an international constitutional convention.¹⁶³ On these lines, Sadat argued the Rome Statute should be treated like the UN Charter as a nascent constitution, through which “the international community, including not only states but global civil society, seized upon imaginative ways to bring about the shifts in constitutional structure necessary to permit international law to respond to the needs of international society and changing times”.¹⁶⁴

32. It has long been accepted that human rights advocates frequently apply less rigorous standards of analysis to certain international legal provisions in order to support their desired policy positions.¹⁶⁵ Expansive interpretation of international legal

158 Laura M. Pair, *Judicial Activism in the ICJ Charter Interpretation*, 8 *ILSA J. Int’l & Comparative L.* (2001), 181, 192, cited in Jared Wessel, above n.24, 407.

159 *Ibid.*, 191.

160 Frédéric Mégret, above n.5, 220.

161 Bardo Fassbender, *Comments on Chapters 1 and 2 of Frédéric Mégret and Gerben Kor*, in: Jan Kleffner and Gerben Kor (eds.), above n.66, 73, 75.

162 Leila Nadya Sadat, above n.84, 79.

163 Marc Weller, *Undoing the Global Constitution: UN Security Council Action on the International Criminal Court*, 78 *Int’l Affairs* (2002), 693, 700.

164 Leila Nadya Sadat, above n. 84, 79.

165 Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, in: *Academy of European Law* (ed.), *Collected Courses of the Academy of European Law* (1995), 153, 166.

instruments tend to foster an uncritical reception by supporters of international criminal law as victories of humanitarianism over sovereignty.¹⁶⁶ There exists much scope for conflict between “strict” and “liberal” interpretations throughout the Rome Statute, with diametrically opposed views of the role of the State.¹⁶⁷ For example, El Zeidy demonstrates a conflict between Article 19(4)’s fortification of the State’s duty to prosecute and Article 19(8)–(11)’s reinforcement of the Court’s ability to intervene, arguing that an emphasis by the Court on the former would suggest the Rome vision of complementarity had succeeded, while an emphasis on the latter would show the ICC emerging as a supra-national institution “with implied primacy which, although not reflected in its statute, is reflected in its practices”.¹⁶⁸ Indeed, the Court itself has admitted that “[t]he importance of complementarity can be considered from various points of view, such as those of the States-parties, the ICC or the accused”, acknowledging a potential clash of interpretations between Court and States Parties.¹⁶⁹

33. Notwithstanding the deluge of commentary on the drafting processes of Article 17 and its place within the Statute overall, advocates and scholars have demonstrated a strong desire to unmask instances of vagueness, ambiguity and unclearness in the provisions of Article 17 that would permit clarification through teleological reasoning.¹⁷⁰ The best example of this is Delmas-Marty, who argues that exploitable ambiguities and lacunae in the Rome Statute can be found and that these arise as a result of the fact that the Court is dominated by a politically sovereign model despite operating principally within a universalist legal framework.¹⁷¹ On similar lines, Stahn finds “normative ambiguity” in the Statute’s admissibility regime, opening it to development of policies on forum allocation that the “deceptive” wording of Article 17 appears to preclude.¹⁷² The Statute as a whole certainly contains gaps, inconsistencies and overlaps that flow from the rushed nature and equivocal compromises of the Rome Confer-

166 Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 *Leiden JIL* (2008), 925, 957.

167 Andreas Muller and Ignaz Stegmiller, *Self-Referrals on Trial: From Panacea to Patient*, 8 *JICJ* (2010), 1267, 1288.

168 M. El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008), 274.

169 Katanga Appeal, above n.115, para.17.

170 Jared Wessel, above n.24, 403, citing John Fowles, *Compounding the Counter-majoritarian Difficulty through “Plaintiff’s Diplomacy”: Can the International Criminal Court Find a Solution?*, 2013 *BYU LR* (2003), 1129, 1166–1167.

171 Mireille Delmas-Marty, *Ambiguities and Lacunae: The International Criminal Court Ten Years On*, 11 *JICJ* (2013), 553, 553 (Preamble).

172 Carsten Stahn, above n.139, 244.

ence.¹⁷³ However, the explicit wording of the Preamble (replete with references to the State's duty to prosecute) and Articles 17–19 (replete with confirmations of the ICC's subsidiarity) are areas in the Statute that deliberately leave little room for ambiguity, representing as they do very hard-fought reconciliation of the tension between sovereignty and universalism, showing little of the dubiety and nuance diplomats typically use to bridge gaps between substantively different positions.¹⁷⁴ At best, the texts of Article 17 and the Preamble offer limited, and often contradictory support for the concept of burden-sharing. Complementarity was the “deal-breaker” in negotiations on the creation of the ICC¹⁷⁵—its *raison d'être* was to provide “detailed procedural guidance designed to balance sovereign enforcements against unreasonable extensions of ICC prosecutorial power”.¹⁷⁶ The drafters deliberately tried to leave as little opportunity as possible for later reinterpretation of the Statute¹⁷⁷ lest support for it be unravelled.¹⁷⁸ They appear to have been unsuccessful.

34. When deciding the extent of their own powers, agents within international tribunals can either do so on an inductive, bottom-up reasoning that anchors verticality in the actual text of the treaty or a deductive, top down reasoning that infers verticality from a “pure idea” of international criminal justice drawn less from explicit provisions than the spirit and purpose of the text, loosely defined concepts of inherent jurisdiction and the transcendental quality of the institution's goals.¹⁷⁹ In justifying burden-sharing, supporters of the concept began to depart from strict textual arguments derived from the horizontal nature of the Rome Statute to a type of teleological-constitutional reasoning based on the implicit normative premises on which the Rome Statute is based, which of necessity incorporates a greater degree of verticality. As Mégret argues, this implied verticality “captures and is constitutive of the identity of [International Criminal Tribunals] in a way that no amount of detailed study of discreet provisions of the statutes of tribunals can fully convey.”¹⁸⁰ These “naturalist-functionalist” interpretations are based on a combination of *telos* and necessity which have “an almost inebriating effect in which the sky is the limit when it comes to the range of powers that the tribunals can grant

173 M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text*, Vol. 1 (2005), 193.

174 John D. Holmes, *The Principle of Complementarity*, in: Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues Negotiations and Results* (1999), 41, 41 and Sharon Williams, above n.65.

175 Kristina Miskowiak, *The International Criminal Court: Consent, Complementarity and Cooperation* (2000), 40.

176 Michael A. Newton, above n.3, 116 [abstract].

177 Mahnoush Arsanjani and W.M. Reisman, above n.21, 389, fn.18.

178 John D. Holmes, above n.174, 74.

179 Frédéric Mégrét, above n.5, 198–199.

180 *Ibid.*, 181.

themselves through *Kompetenz–Kompetenz*".¹⁸¹ In terms of teleology, advocates of expansive roles for the ICC can point to the gravity of crimes, the link to global security, its superior standards of fair trial and the need to clarify international law as purposive justifications for broadening the opportunities for activity, disregarding textual provisions that suggest a more limited remit for the Court.

35. The best examples of this expansive, verticalizing and constitutional conception of the Rome Statute are those which urge a reading of the Statute as not merely compatible with burden-sharing, but as mandating it. Though Article 17 appears clear in its prescriptions, Stahn argues that this is just an institutional, dispute resolution dimension of complementarity (though, as the previous section argues, this "disputive" paradigm is somewhat exaggerated). There is, he argues, a second, *unspoken* but broader "systemic" dimension that organizes a distinct legal system in which the ICC and domestic jurisdictions reinforce each other to institutionalize accountability for mass crimes.¹⁸² In identifying this system (which no-one at the Rome Conference appears to have noticed, or at least referred to) he eschews a strictly text-based approach, and instead prefers to base his conclusions on three over-arching meta-principles of effectiveness, impartiality and fairness.¹⁸³ These meta-principles are in turn structured around four fundamental components, namely forum selection, vertical and horizontal dialogue, mutual co-operation and incentive-based compliance under which a decision about the proper forum for justice is not exclusively based on national failure, but can instead take into account the comparative advantages of domestic and international forums in dividing labour.¹⁸⁴ Similarly, Robinson, though acknowledging that the Statute represents a systemic preference for national prosecutions, refers to the Preamble aims to "end impunity", ensure crimes "must not go unpunished" and "enhanc[e] international cooperation", to demonstrate that the Statute shows concern for effectiveness at any level.¹⁸⁵ He argues that in any case falling short of a State undertaking effective prosecutions without political, logistical, financial or political barriers, a managerial approach where the choice of forum is decided by comparative advantages (effectiveness, efficiency, impact) should apply.¹⁸⁶ Along similar lines, Sadat has argued competences should be repartitioned between national and international jurisdictions on the basis of a quasi-federal organization,¹⁸⁷ while Gioia contends that the Statute set up a pluralist system in which complementarity

181 *Ibid.*, 200.

182 Carsten Stahn, above n.108, 90–91.

183 Carsten Stahn, above n.139, 233 (abstract).

184 *Ibid.*, 239–240 and 264 and Darryl Robinson, above n.32, 99.

185 *Ibid.*, 96.

186 *Ibid.*, 99.

187 Leila Nadya Sadat, above n.84, 11.

operates as a device to allow joint, simultaneous pursuance of the ultimate goal of ending impunity.¹⁸⁸

36. When weighing up a case-hungry ICC against a shattered national justice sector, the comparative advantage will invariably lie with the former, especially if the concerns of the international justice community in highest-quality trial, victim involvement, consistency with the corpus of international criminal jurisprudence etc. are prioritized. As Megret notes elsewhere, a tribunal's comparative reliability in the fight against impunity is always central to claims for its verticality.¹⁸⁹ This comparative advantage (a phrase which finds no place in the Statute or *travaux préparatoires*) may explain the general support for the self-referrals from reasonably functional States like Uganda—from the perspective of a global system of justice, allocation of senior criminals to The Hague and less serious criminals to the State is both a rational and a preferable division. It is hard to argue against concepts like co-operation, fairness and non-impunity. These readings of the Statute do not actively violate either the text or the spirit of the Statute. However, their position on the cosmopolitan-progressivist end of the interpretative spectrum is made apparent from their reliance on selective, self-serving readings of the Statute's complementarity provisions and Preamble.

37. To begin with the latter, Stahn and Robinson agree that effectiveness “played an important, if not dominant, role in the justification of complementarity”.¹⁹⁰ However, this assertion runs contrary to the historical record of what the States agreed in the Statute negotiations. State delegations rejected the initial International Law Commission inclusion of “effectively” in what became Article 17 because they worried that a concern with effectiveness would allow the Court to intervene wherever it believed it could investigate, prosecute or try more efficaciously than the State.¹⁹¹ The qualifier “genuinely” in Article 17 in relation to investigation and prosecution was preferred to a concept of effectiveness to specifically preclude the ICC from assuming jurisdiction simply because it could undertake proceedings with greater competence or speed,¹⁹² making it difficult to accept it could form an over-arching meta-principle for the Rome Statute even where one adopts a systemic view of it. Similarly, both Stahn and Robinson also refer to fairness as a fundamental criterion guiding admissibility under a managerial system.¹⁹³ Stahn cites Article 54(1)(c) requiring the Prosecutor to “fully respect the rights of persons”, Article 55 (rights of persons during an investigation), Article 67 (rights of the accused) and Article 21(3) specifying that application

188 Federica Gioia, above n.73, 1106, 1115 and 1116.

189 Frédéric Mégrét, above n.5, 214.

190 Carsten Stahn, above n.139, 276 and Darryl Robinson, above n.32, 96.

191 Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 *Crim. L. Forum* (2006), 255, 273.

192 John D. Holmes, above n.174, 674.

193 Carsten Stahn, above n.139, 247 and Darryl Robinson, above n.32, 96.

and interpretation by the Court must be consistent with internationally recognized human rights.¹⁹⁴ However, these provisions apply to the Court when it is trying a case but do not relate to the admissibility of that case before this point is reached—as Mégret and Samson argue, to apply Article 21(3) “as a basis for the Court to insist upon admissibility is a considerable stretch”.¹⁹⁵ Again, it is hard to accept a principle like fairness that was rejected both by the majority of scholars¹⁹⁶ and the Prosecutor¹⁹⁷ as a grounds for admissibility in cases of contested admissibility could form one of the over-arching meta-principles that would underpin the putative “Rome System of Justice.” As for the supposed impartiality meta-principle underpinning the managerial system, it was noted earlier that the complementarity regime was built on the presumption that the ICC was not inherently superior to domestic jurisdictions by reason of its independence of the State.¹⁹⁸ It was furthermore noted earlier that the operation of self-referrals in practice have called into question the Court’s impartiality given its reliance on the territorial State’s government and its tendency to focus on rebels over State actors.

38. Self-serving interpretations are also visible elsewhere. Stahn rightly distinguishes between the ordinary exercise of admissibility when the State undertakes inadequate proceedings (where the Court’s action is residual), on the one hand, and situations where the State is completely inactive, or claims to be (where the Court enjoys primacy). He therefore argues that tests of willingness and ability in Article 17 are relevant in the former, but are not prerequisites in the case of uncontested admissibility—there is no need to inquire into them and thereby raise the types of awkward questions that might call into question the good faith of the self-referral. This view is correct and corresponds with the position of the Court in the *Katanga*¹⁹⁹ and *Bemba Gombo*²⁰⁰ admissibility hearings. However, in justifying his systemic-managerial view of

194 Stahn, above n.139, 247–248.

195 Frédéric Mégret and Marika Giles Samson, above n.101, 575.

196 Heller’s rejection of the “due process” thesis is the most cited example, but see his partial qualification of it: Kevin Jon Heller, *Why the Failure to Provide Saif with Due Process is Relevant to Libya’s Admissibility Charge*, *Opinio Juris* (2012) (<http://opiniojuris.org/2012/08/02/why-the-failure-to-provide-saif-with-due-process-is-relevant-to-libyas-admissibility-challenge/> (accessed 5 November)).

197 The Office of the Prosecutor has rejected suggestions that due process deprivations in Libya generally or the Gaddafi and Senussi cases particularly should have led to a finding of unwillingness. See *Prosecution Response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01), ICC Doc. 11-167-Red, 5 June 2012, at paras.8 and 45.

198 Michael A. Newton, above n.100, 64.

199 *Katanga Appeal*, above n.115, para. 78.

200 *Prosecutor v Bemba Gombo*, Case No. ICC-01/05-01/08 OA 3, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of

complementarity, he resurrects the provisions of Article 17 (plus Articles 18 and 19 which flow from contested admissibility challenges) from obsolescence to demonstrate the Court's concern with effectiveness, impartiality, fairness and co-operation even though the articles in question are clearly premised on State activity.²⁰¹ In effect, he is arguing that Article 17 is irrelevant in questions regarding the legality of individual self-referrals, but is of use in illustrating the comportment of a systematic policy of inviting self-referrals with the Rome Statute as a whole.

39. Stahn furthermore supports his managerial theory of the ICC by pointing to Article 54(1)(b), which requires the Prosecutor to "take appropriate measures to ensure the effective investigation and measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court", and Article 93(10), which allows the ICC to co-operate with States to enable them to carry out genuine investigations and prosecutions.²⁰² Though these powers are certainly consistent with a burden-sharing system, they are equally consistent with an approach where the State is assisted in its primacy. Indeed, these articles were formulated with this in mind.²⁰³ Meta-principles of encouragement for, or deference to, national proceedings, find an equally strong textual basis as guiding principles for Rome Statute interpretation as those of effectiveness, fairness or impartiality, if not stronger.

40. None of this is to argue burden-sharing is impermissible, a disingenuous reading of the Statute or unwise, though credible cases can and have been made on all three scores. However, it does show how selective teleological approaches to interpreting the Rome Statute can become. Mégret, though not referring to burden-sharing, succinctly describes the typical course of cosmopolitan expansion of the purposes of international criminal tribunal as follows:

The claim [to verticality] begins as something grounded in various indicia, only to elevate itself gradually to higher spheres, via the teleological and the implied, until it becomes derived from sheer identity ("we are international") and necessity ("we must be able to prosecute these crimes").²⁰⁴

Burden-sharing's growth from limited, context-specific necessity based on an unforeseen gap in the text to aggrandizing constitutional principle provides an excellent example of this subtle claim to greater verticality in action.

24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges" (19 October 2010), para.107.

201 See e.g. Carsten Stahn, above n.139, 250–251.

202 *Ibid.*, 265.

203 See e.g. Sharon Williams, above n.65

204 Frédérick Mégret, above n.5, 217.

VI. Conclusion

41. This article has explored the cosmopolitan faith of international criminal lawyers, activists and judges in international criminal law and the resulting teleological impulse to apply expansive modes of interpretation to admissibility provisions in the interests of maximizing the impact of its main institution, the ICC. The largely unforeseen frequency with which uncontested admissibility would emerge freed the Prosecutor to enunciate and then develop a burden-sharing policy that distributes responsibility in confronting international crime to either partner, depending on the forum of greatest convenience, which of course will normally lie in The Hague. The Court has embraced this policy by accepting self-referrals in individual cases, and the academic and advocacy communities have supplied the intellectual justifications for a broader policy of proactive burden-sharing built upon it. Admissibility, of course, is but one example of this cosmopolitan tendency to loosely construe applicable provisions to increase the coverage of international criminal law. Robinson, pointing to the by-now familiar broadening of the scope of criminal liability through doctrines like command responsibility and joint criminal enterprise notes a commonly-used interpretative technique whereby (i) a purposive interpretive approach is explicitly adopted; (ii) it is assumed that the exclusive object and purpose of an international criminal law enactment is to maximize a certain interest such as victim protection (or judicial activity, or clarification of the law); and (iii) this presumed object and purpose is allowed to dominate over other considerations, "including if necessary the text itself".²⁰⁵ Just as a preoccupation with maximizing the protection of victims leads to a simple, one-dimensional, teleologically driven task of identifying the broadest articulation of a given crime to widen the net of culpability,²⁰⁶ a preoccupation with maximizing the role of the ICC can lead to a one-dimensional, teleologically driven impulse to widen the net of jurisdiction. The problem with such teleologically selective reasoning is that it conflates a general justifying aim of the criminal law system (protection of fair trial values or prosecution of crimes by a globally authoritative ICC) with the question of whether a given action (punishing a particular individual or assuming the State's duty to punish) is justified in a particular instance. This can only serve to foster contradictions with the fundamental principles (like fair trial or the State's duty to prosecute) the system was designed to uphold.²⁰⁷

42. This article has argued that, contrary to the presentation of burden-sharing by its advocates, there was nothing inevitable about its emergence as a policy option, and nor is it something explicitly required by the Rome Statute. In adopting burden-sharing initially, the unforeseen frequency of voluntary self-referral (to the extent it was unforeseen and not actively solicited) can explain the first instances of this policy, but to turn this

205 Darryl Robinson, above n.166, 934.

206 *Ibid.*, 937.

207 *Ibid.*, 938.

into an organizing principle of the Court required a specific, conscious choice. This choice was adopted in part due to the institutional imperative to remain busy, but primarily flowed from a cosmopolitan assumption that the ICC is a better venue for trials of the most serious international crimes than the domestic forum to which primacy was reluctantly conceded in Rome. As noted in the introduction, in international law three schools of interpretation are typically applied, namely (1) the textual approach; (2) the intent-based approach; and (3) the object and purpose approach. The textual approach provides support for (or, more accurately, does not explicitly contradict) self-referrals in the narrow case of uncontested admissibility, but does not appear to ground a more expansive policy of actively seeking them or dividing labour consensually. The intent-based approach brings us back to the Rome Statute negotiations and highlights the emphasis placed on vindicating State primacy and the explicit rejection of a comparative advantages approach based on efficiency, fairness or perceived impartiality. An object and purpose approach argument can certainly be made that the Rome Statute establishes a shared task in combatting impunity between the ICC and the State which can be allocated based on certain competences. However, an equally strong, and less selective, case can be made out that it is not a shared task but merely a shared goal, the tasks of which are exercised separately on the basis of a tiered jurisdiction where the State is expected to exercise its responsibility to prosecute.

43. Robinson has argued that the study of the ideological commitments of human rights advocates and humanitarians is important in understanding ICC developments as their “assumptions and methods of argumentation [are] not only a cause of departures from fundamental principles, but also furnishes the analytical steps by which such departures are effected and provides the legal plausibility that allows the departures to pass unnoticed”.²⁰⁸ The emergence of burden-sharing yields a good example of this phenomenon in action. The ICC disappointed many when it failed to ground a single, universal community based on a shared morality. However, as the preambular quote at the start of this article by Koller suggests, cosmopolitan-inclined actors have always proven willing to exploit any cracks and fissures to push international criminal law in a direction which may not necessarily correspond with that envisioned by its creators, but which will build towards establishing a more cosmopolitan institution. The Statute outlines a common goal for States and the Court to achieve State prosecutions, but this has purposively and over time become conflated with a common task through a selectively teleological reading of the Statute. The purpose of this article was not to argue that burden-sharing is unwise. The acceptance of State referrals, the fundamental building-block of burden-sharing, is the only practical response to instances of complete State inaction or voluntary referral. It is also imperative in the initially narrow set of circumstances envisaged in the Expert Paper, namely where the State justice system is too incapacitated to undertake any trial or where antagonists in a stalemated conflict see the

208 Darryl Robinson, above n.166, 930.

Court as the only acceptable neutral arbiter. The broader question of whether the Court by reason of its greater expertise, neutrality and global role is better suited to the most senior prosecutions in weakened States (bearing in mind the explicit assumption in burden-sharing that the State is capable of undertaking at least some trials) is one that reasonable people will disagree over. What this article has concerned itself with, however, is how burden-sharing manifests the cosmopolitan impulse to disregard apparent textual limitations to gradually increase the role and verticality of international tribunals through selectively purposive readings of statutes. Burden-sharing helps realize the Rome Statute as a living instrument and assists it in avoiding unhelpful sovereign restrictions that diminish its effectiveness as a constitutional instrument of a more human global order, but we should not pretend this development was inevitable, mandated or imperative. It was chosen, and in justifying this choice, familiar modes of cosmopolitan-constitutionalist treaty interpretation have been applied that have taken the Court in a direction not envisaged in the 1998 negotiations. Teleological, constitutionalist arguments about international criminal law fundamentally premised on the field's virtue and indispensability have operated to enable an ICC established as a residual watchdog to become a (Trojan?) workhorse in individual situations, enthusiastically dissuading States from prosecuting and rendering merely optional the State's duty to prosecute that was so central to the agreed jurisdictional scheme in the Statute.