

Positive Complementarity and the Receiving End of Justice: The Case of Myanmar

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Policy Brief Series No. 104 (2020)

1. Connecting the Dots: Responsiveness and Positive Complementarity

Sanctions and rewards figure prominently in most compliance theories. In the context of international criminal law, some argue that regimes suspected of core international crimes should be sanctioned consistently and held accountable before the International Criminal Court ('ICC'). Others argue that States can be persuaded, through respectful dialogue, into prosecuting their own for core international crimes. In different circumstances, there is truth to both positions.¹ But as a guide for action, neither punishment nor persuasion is entirely satisfactory. Consistent sanction can backfire; consistent persuasion may simply fall on deaf ears. How do we know when to persuade and when to punish? It may appear easy to judge with hindsight in a *post hoc* sociological study. While one is still living history, this is a difficult question, but a right one to ask.

The notion of 'responsive regulation' suggests that governance should be responsive to the regulatory environment and to the conduct of the regulated in deciding whether intervention is needed.² Governments can be responsive to how effectively citizens or corporations are regulating themselves, before deciding whether to escalate intervention. Responsive regulation started as a theory of business regulation and has been applied to different fields such as crime control and peace-building.³ Not only the State, but private entities and civil society can make use of the responsive regulation theory in their efforts to form and implement policy goals.

This policy brief considers responsive actions by actors of complementarity in international criminal law, especially by the Office of the Prosecutor ('OTP') of the ICC. The principle of complementarity recognises that national jurisdictions have primacy over ICC Statute crimes. It seeks to ensure genuine investigation and prosecution by national criminal justice. Only when national jurisdiction fails, may the ICC exercise its complementary jurisdiction. This is not a mere principle of admissibility of cases before the ICC, but should be understood as a constitutional principle of the emerging order of international criminal justice where the ICC is a central

actor.

If we turn the coin of this principle, we see the interest of the ICC States Parties in ensuring adequate ability and willingness to investigate and prosecute ICC crimes at the national level. This interest actually goes wider: it is in the interest of all stakeholders in the emerging system of international criminal justice that national will and ability is strengthened. This was recognised by a resolution on the importance of taking 'positive steps' to reinforce complementarity at the ICC Review Conference in Kampala in 2010.⁴ The main content of this resolution has been repeated several times by the ICC Assembly of States Parties, and has led to a number of positive steps being taken by civil society, States and international organisations. This informal programme of action has been referred to as 'positive complementarity' or 'active complementarity'.⁵

'Positive complementarity' seeks to bring about national proceedings not just through threat or coercion, but also encouragement and assistance. The logic of responsive regulation is compatible with 'positive complementarity' thus understood. It implies a preference for self-regulation or domestic prosecution where possible, before external intervention materialises. Insights from responsive regulation may therefore inform the operation of 'positive complementarity'.

2. Responsive Pyramid

A responsive pyramid (Figure 1) tends to combine strategies of persuasion and sanction in a dynamic model.⁶ It first tries persuasion and/or capacity-building before escalating up a pyramid of increasing levels of sanction, with incapacitation at the top.⁷ The pyramid model recognises that restorative justice, deterrence and incapacitation are in themselves all flawed theories of compliance.⁸ It seeks to compensate the weaknesses of one theory with the strengths of another.⁹ It appeals to virtues and rational avoidance of negative consequences, before escalating to incapacitation. The pyramid of actions therefore 'channels' the virtuous and rational actors *down*

⁴ Resolution RC/Res.1, 8 June 2010 (<https://www.legal-tools.org/doc/de6c31>).

⁵ See Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer*, Torkel Opsahl Academic EPublisher ('TOAEP'), Oslo, 2011 (<http://www.toaep.org/ps-pdf/8-bergsmo>).

⁶ Braithwaite, 2017, p. 120, see above note 1.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹ See John Braithwaite, "Types of responsiveness", in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications*, ANU Press, 2017, p. 118.

² *Ibid.*, p. 117.

³ See, for example, John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety*, State University of New York Press, Albany, 1985; John Braithwaite, "The Essence of Responsive Regulation", in *University of British Columbia Law Review*, vol. 44, no. 3, pp. 475-6.

the pyramid.¹⁰

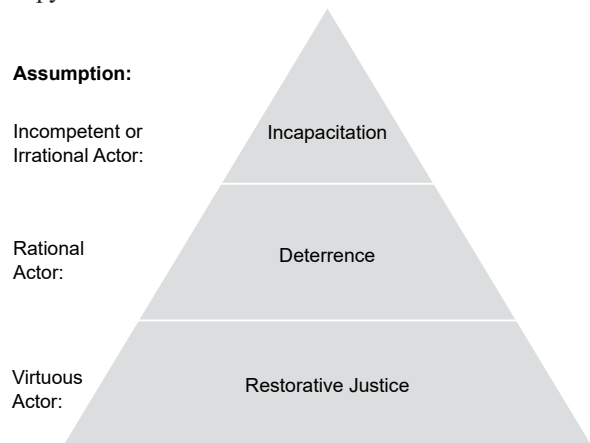


Figure 1: Integrating restorative, deterrent and incapacitation justice (by John Braithwaite).¹¹

It has been argued that even with the most serious matters such as core international crimes, it is better to start with dialogue at the base of the pyramid.¹² The first step in the pyramid would be dialogue and capacity-strengthening with a view to restoring domestic criminal justice (see Figure 2 below). This step is often underestimated and underused in seeking accountability for atrocity crimes. The pyramid model gives the more respectful, less costly option a chance to work first. When such efforts fail, sanctions may be applied to scare domestic actors into self-accountability. The pyramid shows that non-compliance through inaction, denial, playing tricks is a “slippery slope”¹³ which leads to incapacitation – in the case of positive complementarity, incapacitation of domestic accountability processes and takeover by the ICC.

The proposed pyramid of actions in Figure 2 can be used during the pre-trial process when the admissibility issue is still alive. Before incapacitation happens, complementarity actors should be able to “de-escalate”¹⁴ to the base of the pyramid when necessary. For example, when there are positive developments in domestic justice, the ICC-OTP and other actors should encourage and facilitate assistance, without necessarily terminating the ongoing preliminary examination or investigation.



Figure 2: Responsive pyramid for ‘positive complementarity’ (by the present author).

With possibilities of both escalation and de-escalation, the pyramid is “firm yet forgiving”¹⁵ in its demands of compliance. The ordering of strategies in the pyramid is not just about being cost-effective, it also has normative advantages. Externalisation of accountability is seen as more legitimate and procedurally fair after less coercive, more respectful means have been tried.¹⁶ This interactive process is good for norm-internalisation. Always counting on the worst behaviour of the other can lead to complete disengagement and attacks on the legitimacy of the institution itself, which are typical scenes of ideological battles.¹⁷

3. Policy and Practices of the Office of the Prosecutor of the International Criminal Court

Bearing in mind these two pyramids, I now turn to the ICC-OTP as a central actor and *de facto* facilitator of ‘positive complementarity’. The OTP’s work would seem to broadly correspond to the responsive pyramids. As a matter of declared policy, the OTP encourages genuine national investigation and prosecution.¹⁸ In practice, it has encouraged and assisted national proceedings, as shown by a 2018 Human Rights Watch report¹⁹ which assesses the impact of the OTP’s preliminary examinations on national justice in Colombia, Georgia, Guinea, and the United Kingdom. To open space for national proceedings, the OTP carried out activities such as country visits, assisting in the development of prosecutorial strategies, identifying specific benchmarks with national prosecuting authorities, and brokering assistance from other international actors.²⁰ In each situation, the report identifies positive domestic developments which are “at least partly attributable to the OTP’s engagement”²¹.

In none of these four situations can it be said that there has been complete success in national accountability, but the engagement itself creates legitimacy and relevancy for the ICC. It shows that the OTP is not competing with national justice, or adopting an aggressive approach to jurisdiction; quite the opposite, the Office is open, listening, encouraging and ready to help. It builds the OTP’s credibility as an impartial judicial actor in the eyes of the affected governments.

Every situation is different. Carrots work better than sticks in some contexts, and sticks better than carrots in others. And the same strategy does not always have the same effect on the same party.²² There may be a change of mind of key political or mili-

¹⁵ *Ibid.*

¹⁶ This advantage is spelled out in Kristina Murphy, “Turning Defiance into Compliance with Procedural Justice: Understanding Reactions to Regulatory Encounters through Motivational Posturing”, in *Regulation and Governance*, volume 10, no. 1, 2016, pp. 93–109, cited in *ibid.*, p. 120.

¹⁷ For more on norm-internalisation and polarisation, see Morten Bergsmo, “Double Standards and the Problem of Access to International Law”, CIL-RAP Film, 16 November 2019, Yangon (www.cilrap.org/cilrap-film/191116-bergsmo/); Martti Koskeniemi, “Between Impunity and Show Trials”, in *Max Planck Yearbook of United Nations Law*, vol. 6, 2002.

¹⁸ ICC-OTP, *Policy Paper on Preliminary Examinations*, November 2013, paras. 100–103 (<https://www.legal-tools.org/doc/acb906>).

¹⁹ Human Rights Watch (‘HRW’), *Pressure Point: The ICC’s Impact on National Justice; Lessons from Colombia, Georgia, Guinea, and the United Kingdom*, May 2018.

²⁰ *Ibid.*, Appendix 2.

²¹ *Ibid.*, p. 6.

²² For more on self-accountability, see Morten Bergsmo and SONG Tianying (eds.), *Military Self-Interest in Accountability for Core International Crimes*, Second Edition, TOAEP, Brussels, 2018 (<http://www.toaep.org/ps-pdf/25-bergsmo-song-second>).

tary actors, sometimes in the right direction. It is the Prosecutor's judgement to decide when to escalate and when to de-escalate. Many may rightly see the responsive pyramid as common sense. But common sense can be a rare quality in situations of extreme polarisation. So how can the ICC-OTP's policy and the proposed pyramid of actions be applied to the Bangladesh/Myanmar situation, where a non-State Party is involved?

4. Positive Complementarity and Non-States Parties: The Case of Myanmar

If the jurisdiction of the ICC extends to a non-member State, so should 'positive complementarity'. As when dealing with States Parties, the OTP should start from the bottom of the responsive pyramid with non-States Parties, that is, with respectful dialogue. This would seem to be the OTP's policy and practice. In the Bangladesh/Myanmar situation, after the opening of preliminary examination, the OTP sought direct communication with both Bangladesh (the referring State Party) and Myanmar (the territorial non-State Party).²³ Myanmar declined to have contact when the Prosecutor requested information for preliminary examination in December 2018.²⁴ This situation has entered the investigation stage following authorisation by a Pre-Trial Chamber on 14 November 2019.²⁵

Since then, both civilian and military authorities of Myanmar have taken positive steps towards accountability. On 26 November 2019, the government formed a Special Unit on International Criminal Justice under the Union Attorney General, "to strengthen internal capacity and expertise, and provide legal opinion to relevant Ministries on issues related to international criminal law".²⁶ On 11-12 December 2019, in her opening and closing statements before the International Court of Justice, the *de facto* head of state, State Counsellor Aung San Suu Kyi, repeatedly emphasised Myanmar's commitment to domestic accountability.²⁷ She listed 12 locations in northern Rakhine where war crimes may have been committed in an internal armed conflict.²⁸ Her statement was soon followed by domestic proceedings.

On 20 January 2020, the Independent Commission of Enquiry ('ICOE'), a special-investigation procedure established for Rakhine allegations by the President of Myanmar, submitted its Final Report with 30 Annexes, amounting to more than 450 pages in total.²⁹ This was followed by immediate actions by both the Judge

Advocate General and Attorney General with a view to bringing necessary investigations and prosecutions.³⁰ On 21 February 2020, the Judge Advocate General revealed that his Office would proceed to investigations of the incidents of Maung Nu and Chut Pyin villages, pursuant to ICOE findings. Together with the Inn Din incident (where an earlier court-martial has been completed)³¹ and the ongoing court-martial regarding the incident in Gutarpyin,³² the four incidents are among the 12 locations of likely crimes mentioned by Aung San Suu Kyi before the International Court of Justice. The Maung Nu and Chut Pyin incidents currently under military justice proceedings are widely seen as among the most serious incidents by UN and NGO reports and were used by the ICC-OTP in seeking authorisation to open investigation.³³ On 8 April 2020, to facilitate domestic investigations, the government issued a directive to preserve evidence and property in northern Rakhine.³⁴ Two other presidential directives were released with a view to preventing crimes of genocide and related hate speech.³⁵

The political will towards self-accountability has apparently emerged. Given that these words and actions came quickly after the opening of an investigation, the ICC proceedings have probably played an incentivising role. Political will to accountability is a valuable commodity. If there is indeed a change of mind of key political and military actors, the Prosecutor should de-escalate to the base of the pyramid with verbal encouragement and offers of support. This is another question than whether the Office should pause its ongoing investigation. It only means that the demand for compliance needs to be 'firm yet forgiving'. To nourish a potentially fragile political will towards accountability, the Prosecutor can do two things.

First, the OTP can publicly acknowledge the positive steps taken by the authorities of Myanmar towards domestic accountability and encourage them to do more. A responsive approach in public communication means the stick of externalisation of accountability is lowered and complemented by the carrot of recognition and encouragement whenever positive steps are taken by national authorities. Such acknowledgement would not compromise the OTP's position regarding admissibility. It is not about whether the initial steps already satisfy the admissibility threshold, but about their very existence and constructive direction. The Prosecutor could even use a caveat that her acknowledgement does not prej-

lection of the ICC Legal Tools Database (<https://www.legal-tools.org/>).

²³ ICC, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar ('Situation in Bangladesh/Myanmar'), OTP, Request for Authorisation of an Investigation Pursuant to Article 15, 4 July 2019, ICC-01/19-7, paras. 32, 231 (<https://www.legal-tools.org/doc/8a47a5>).

²⁴ *Ibid.*, para. 231.

²⁵ ICC, Situation in Bangladesh/Myanmar, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, ICC-01/19-27 (<https://www.legal-tools.org/doc/kbo3hy>) ('Article 15 Decision').

²⁶ Ministry of the Office of the State Counsellor, "The Government formed a Special Unit on International Criminal Justice", 26 November 2019 (<https://www.legal-tools.org/doc/ytm3pg>).

²⁷ International Court of Justice, *The Gambia v. Myanmar* (Application of the Convention on the Prevention and Punishment of the Crime of Genocide), Verbatim Record, 11 December 2019, pp. 12-20 (<https://www.legal-tools.org/doc/yfx6vt>); Verbatim Record, 12 December 2019, p. 35 (<https://www.legal-tools.org/doc/biinik>).

²⁸ *The Gambia v. Myanmar*, 11 December 2019, p. 15, para. 11, see above note 27.

²⁹ The executive summary of ICOE Report is publicly available (<https://www.legal-tools.org/doc/h3k7jz>). Annexes 16-28 are available in the Myanmar Col-

³⁰ Republic of the Union of Myanmar, Office of the President, Press Release, 21 January 2020 (<https://www.legal-tools.org/doc/2tgev9>). Military: Statement of Tatmadaw on the ICOE's Final Report, 22 January 2020 (<https://www.legal-tools.org/doc/a2on6x>); Announcement by the Office of the Judge Advocate General, 21 February 2020 (<https://www.legal-tools.org/doc/rjttmy>). Civilian: Formation of the Criminal Investigation and Prosecution Body, 24 January 2020 (<https://www.legal-tools.org/doc/wnjsah>); Holding the First Meeting of the Criminal Investigation and Prosecution Committee (<https://www.legal-tools.org/doc/bf9lvt>).

³¹ Reuters, "Seven Myanmar Soldiers Sentenced to 10 Years for Rohingya Massacre", 11 April 2018 (<https://www.legal-tools.org/doc/756e09>).

³² Myawady in English, "Court-Martial Assembles at Local Regiment", 6 December 2019 (<https://legal-tools.org/doc/tvv77c>).

³³ Article 15 Decision, para. 82, see above note 25.

³⁴ Office of the President, "Preservation of evidence and property in areas of northern Rakhine State", Directive No. 2/2020, 8 April 2020 (<https://www.legal-tools.org/doc/3er2r3>).

³⁵ Office of the President, "Compliance with the Convention on the Prevention and Punishment of the Crime of Genocide", Directive No. 1/2020, 8 April 2020 (<https://www.legal-tools.org/doc/jucuhj>); Office of the President, "Prevention of Incitement to Hatred and Violence", Directive No. 3/2020, 20 April 2020 (<https://www.legal-tools.org/doc/mqiq9l>).

dice the admissibility assessment. Nor would such acknowledgement undermine the OTP's role as an impartial judicial actor. It would do quite the opposite.

We may be surprised by what positive communication can do – as it has rarely been practised before. By being not just an accuser of lack of willingness or ability of a non-State Party, but also an impartial witness of positive steps, the ICC-OTP could mitigate distrust and open up communication. As a matter of fact, such measures would not cost anything. They do not require increased budgets, changed rules, or adoption of yet another policy paper. They simply require the Office to be proactive and more responsive in its communication. They do not depend on any external actors and can be implemented overnight.

Second, the OTP should perhaps try again to establish communication with the Government of Myanmar, directly or indirectly, with a view to understanding and assisting accountability processes at the national level. It should first inform itself of any assistance that may have already been provided, out of public view. If it modestly concludes that it may be useful and possible, the Office could offer to broker or encourage assistance from other actors, as was already done in Guinea.³⁶ Potentially helpful measures may include reporting on the Prosecutor's monitoring activities, and exchanging lessons learned and best practices to support domestic investigative and prosecutorial strategies.³⁷ This is a delicate task, as it requires mutual trust. The Office should avoid the impression that it is competing with the national jurisdiction.³⁸ When faced with a uniquely funded international actor such as the ICC-OTP, national actors may be intimidated by a sense of competition, which may undermine mutual trust. After all, 'positive complementarity' is not about who can do faster and better, but the interdependence and mutual reinforcement of national and international jurisdictions.³⁹ That said, in some situations, capacity-strengthening may not benefit from an involvement of the ICC-OTP. Third-party assistance – sometimes invisible to the public – may have better effect, without political risks.

5. Consistency with Stated Policy Objectives

These proposed actions are consistent with stated ICC-OTP policy on 'positive complementarity'. The result of positive engagement by the OTP may be full-scale national proceedings, partly national and partly ICC proceedings, or no genuine national investigation and prosecution. The point is that the OTP – by showing a basic will to go an extra mile – should avoid being perceived as discouraging contributions to make domestic justice possible. It is not good for the ICC if the OTP is seen as bending over because of strong civil society pressure to externalise accountability. By treating a non-State Party fairly, the OTP may also provide some reassurance to those governments

³⁶ HRW, 2018, p. 17, see above note 19.

³⁷ OTP, 2013, para. 102, see above note 18.

³⁸ Aung San Suu Kyi, "Give Myanmar Time to Deliver Justice on War Crimes", *Financial Times*, 23 January 2020.

³⁹ OTP, 2013, para. 100, see above note 18.

that have adopted a wait-and-see approach towards the Court, rather than turning them away.

On the other hand, silence and inaction of the OTP in the face of Myanmar's numerous positive steps within the span of a few months may be interpreted negatively. It is already highly sensitive when the Court seeks to exercise jurisdiction over non-States Parties, who are not under any treaty obligation to co-operate with the Court. The feeling of arbitrariness and estrangement can be acute. Silence and inaction may create the perception that the OTP is closed to dialogue, discourages and competes with national proceedings, or has no trust in domestic criminal justice professionals, either of which would be harmful.

Not only the OTP, but also other complementarity actors such as States, international organisations and NGOs, can make use of the responsive pyramid. Fair-minded observers should recognise that political will to self-accountability now exists in Myanmar. It is time for complementarity actors and donors to take some positive steps. They share responsibility for making domestic accountability work.⁴⁰ They can do so by reverting to the base of the pyramid: dialogue and offers to assist with capacity-strengthening. Surfing on the moral high ground should not prevent us from coming down to the common sense of conversation in the interest of constructive, long-term solutions to the problem.

More empirical research should be undertaken to improve the responsive pyramid of 'positive complementarity'. The Bangladesh/Myanmar situation, like other situations before the Court, holds great promise for sociological research. The self-interests, institutional culture, and professional judgement of the ICC – a public international organisation – have already been (and will continue to be) subjected to microscopic scrutiny by scholars and the public. Further insights could be gained through sociological studies of other complementarity actors mentioned above, of their agency and competition for influence.⁴¹ All actors should continuously reflect on and improve their course of action. Whatever their mandate, they remain morally and socially accountable for what they do and fail to do.

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ISBN: 978-82-8348-089-4.

TOAEP-PURL: www.toaep.org/pbs-pdf/104-song.

LTD-PURL: www.legal-tools.org/doc/y0vjb2.

⁴⁰ See Bergsmo, 2019, above note 17. This is also recommended by the 2018 HRW Report based on case studies, see pp. 18, 19, above note 19.

⁴¹ This is a growing discourse. See, for example, the conference on "Power in International Criminal Justice: Towards a Sociology of International Justice", 28-29 October 2017, films of presentations available at <https://www.cilrap.org/events/171028-29-florence/>. See also Yves Dezalay and Bryant G. Garth (eds.), *Lawyers and the Construction of Transnational Justice*, Routledge, 2012.



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