

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

Prosecuting the three core crimes: Complementarity in light of Africa's new international criminal Court.

A doctoral thesis submitted in fulfilment of the requirements for the degree PhD in the Faculty of Law of the University of Western Cape.

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DECLARATION

I, Mfundo Mahlakanipane Sabioson Nkosi declare that the work presented in this mini-thesis is original. It has never been presented to any other Institution of higher learning. Where the works of other people have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the PhD Degree in International Human Rights Law.

Signed.....*MM.SNKOSA*

Date.....2019/03/01.....

Supervisor: Prof. A. Dube

Signed.....



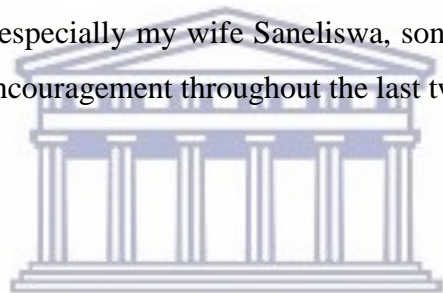
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ABSTRACT

The principle of complementarity forms the basis upon which the International Criminal Court (ICC) exercises its jurisdiction. This principle of international law first appears in the Preamble to the Rome Statute and then the admissibility provisions under Article 17 of the Rome Statute, which outline that the Court will declare a case inadmissible where it is being investigated or prosecuted by a state which has jurisdiction over it; unless the state is unwilling or unable to genuinely carry out the investigation or prosecution. Alternatively where the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state to genuinely prosecute. This principle implies that the ICC is a court of last resort and will therefore not intervene in a case where the state of commission is either able or willing genuinely to investigate and prosecute perpetrators of grave crimes.

It is common cause that Africa has been the staging area of mass atrocities for decades. The indictment of Kenyan president Uhuru Kenyatta's and his deputy William Ruto, Hissene Habre case, and the indictment and issuance of an arrest warrant against the Sudanese President Omar El-Bashir are instructive in this regard. The ICC'S actions created the perception of bias, injustice and inequity. This prompted a sharp reaction from African states, which threatened a mass withdrawal from the Rome Statute in 2013. The one positive spin off from the AU reaction was the expansion of the jurisdiction of the merged court to include a criminal chamber in 2014, thus creating Africa's first international criminal court, the African Criminal Court (ACC). This development was the result of the discontent and frustration of the African continent towards the work of the ICC, which was perceived as focusing only on African cases, whilst ignoring the litany of cases coming from other regions of the world.

The creation of a regional court with jurisdiction over, *inter alia*, war crimes, crimes against humanity, genocide and aggression, which also fall within the jurisdiction of the ICC is unprecedented in international law, and challenges prevailing notions of complementarity. This thesis departs from the standpoint that Africa has continuously stated that it is committed to ending impunity by punishing perpetrators of the three core crimes. It thus assesses if the introduction of the ACC flows, at least partially from that obligation. It further assesses what the impact of the strained ICC-AU relations will be on the operations and effectiveness of the new

court. Apart from the above, the fundamental enquiry of this thesis is how the concept of complementarity will be used to navigate this new and fragile relationship



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KEY WORDS

Complementarity

African Union

Universal Jurisdiction

Impunity

Jurisdiction

International Criminal Court

War Crimes

Crimes against Humanity

Genocide

The Rome Statute



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LIST OF ABBREVIATIONS

| | |
|------|---------------------------------|
| AU | African Union |
| ACC | African Criminal Court |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| UJ | Universal Jurisdiction |
| UN | United Nations |
| UNSC | United Nations Security Council |



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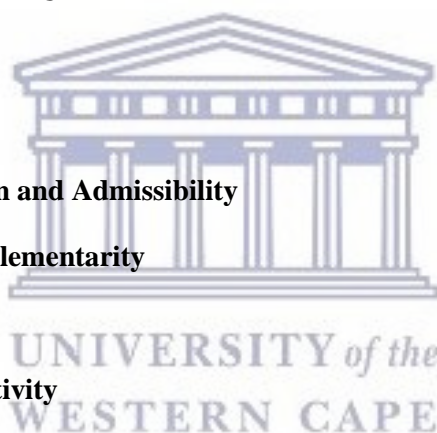
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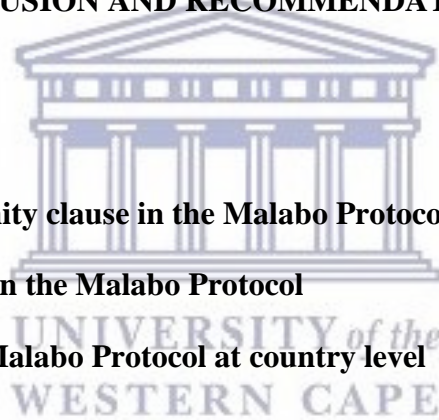
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Chapter One - Overview of the study

1. Background

The principle of complementarity can be defined as a functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primary jurisdiction. This is nothing other than a principle of priority among several bodies able to exercise jurisdiction.¹

The principle regained some interest with the adoption of the Rome Statute in 1998, in which the principle of primacy of jurisdiction recognized in the statutes of the two earlier *ad hoc* tribunals, the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR respectively), was reshaped into a principle of complementarity for the benefit of member states.²

The Rome Statute of the International Crime Court (ICC) was adopted at a diplomatic Conference in Rome on 17 July 1998 and came into force on 1 July 2002.³ Senegal became the first country to ratify the statute after 14 January 1999.⁴ The Democratic Republic of Congo (DRC) was also the 60th state to ratify the Rome Statute, thereby allowing it to enter into force. As of June 2015, a total of 123 countries were state parties to the Rome Statute. Out of these, 34 are African states, 19 are Asia-Pacific states, 18 are from Eastern Europe, 27 are from Latin America and Caribbean states and 25 are from Western Europe and other states.⁵ The above facts and statistics show that the African continent has the highest number of state parties to the Rome Statute and has played a significant role in firming up the Rome Statute system over the years. The ideal expectation is that these high numbers automatically translate into tremendous support for the ICC in Africa. The reality, however, is that there is an escalating trend of discord between Africa and the ICC,⁶ and, therefore, the high number of the Rome Statute ratifications from the African states is a clear demonstration of numerical support for the ICC rather than a genuine rational support from the African political circles.⁷

The principle of complementarity in international criminal law requires the existence of both national and international criminal justice systems, functioning in a subsidiary manner for the

¹ Brown BS 'Primacy or complementarity: Reconciling the jurisdiction of national courts and International criminal tribunals' (1998) 23 *Yale Journal of International Law* 386.

² Newton MA 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the ICC' (2001) 167 *Military Law Review* 20.

³ The Rome Statute of the International Criminal Court is often referred to as the International Criminal Court Statute or the Rome Statute

⁴ International Commission of Jurists, Senegal: Senegal is the First State to Ratify the International Criminal Court's Statute available at www.icj.org (accessed on 28 March 2015).

⁵ Du Plessis M 'Implications of the AU decision to give the African Court jurisdiction over international crimes' (2013) *Institute for Security Studies* 235.

⁶ Article 13 of the Rome Statute which highlights the circumstances under which the ICC may exercise jurisdiction.

⁷ Rome Statute Signature and Ratification Chart available at www.iccnw.org/countryinfo/worldsignsandratifications.html (accessed on 16 April 2017).

reduction of crimes of international law. Essentially, when the domestic system fails to do so, the international system intervenes and ensures that the perpetrators do not go unpunished. The principle of complementarity is based on a compromise between respect for the principles of state sovereignty and universal jurisdiction.⁸ In other words there is an acceptance by a state that those who have committed international crimes may be punished through the creation and recognition of international criminal bodies. The Rome Statute is of course an accurate illustration of this idea and probably the most sophisticated.⁹

Many scholars of international justice regarded the principle of complementarity as a means of giving the last word to the ICC when states fail to fulfil their obligations in good faith. This is probably where the balance lies in the principle of complementarity between the states and the ICC. Even though the principle of complementarity can be identified elsewhere,¹⁰ the principle of complementarity is a means of attributing primacy of jurisdiction to national courts. Yet it includes a 'cover or safety net' allowing the ICC to review the exercise of jurisdiction if the conditions specified by the Statute are met. Secondly, the principle of complementarity in the ICC Statute is not only a general principle as stated in the preamble and in Article 1,¹¹ but also includes concrete means of implementation, for the Statute lays down conditions relating to the exercise of jurisdiction.¹² They allow the ICC some scope for possible interpretations and could lead it to be regarded as an arbitrator.¹³ The principle of complementarity will definitely leave member states free to initiate proceedings, but will also leave the ICC to decide whether the process has been satisfactory or not. There must be an impartial, reliable and depoliticised process for identifying the most important cases of international concern, evaluating the action of national justice systems with regard to those cases and triggering the jurisdiction of the ICC when it is truly necessary.¹⁴ The responsibility to prosecute perpetrators of the three core crimes therefore rests on the shoulders both of states and of the ICC. The test of whether perpetrators will be successfully prosecuted will depend on how the two find the right balance.

⁸Jann K 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86-113.

⁹Cassese A *International Criminal Law* (2003) 285.

¹⁰ Under the Statutes of the ICTY (Article 9) and the ICTR (Article 8), another version of the complementarity principle was adopted in the form of concurrency of Jurisdiction. National courts and the international tribunals were granted concurrent jurisdiction to try international crimes referred to in the Statutes, but in the event of dispute, the Statutes gave primacy to the international tribunals.

¹¹ Preambular para. 10: 'The International Criminal Court ... shall be complementary to national jurisdictions.'

¹² As described in Articles 17f.

¹³ Holmes JT 'Complementarity: National courts versus the ICC' in A Cassese P Gaeta J R W D Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 672.

¹⁴Brown BS 'Primacy or complementarity: Reconciling the jurisdiction of national courts and International criminal tribunals' (1998) 23 *Yale Journal of International Law* 386.

The two principles that of universal jurisdiction and that of complementarity are entwined. As enshrined in the ICC Statute, the principle of complementarity should be considered as a safety valve allowing for rationalisation and the improved efficiency of the principle of universal jurisdiction. The principle of complementarity first of all respects two functioning principles of international law, namely the principle of state sovereignty and the principle of primacy of jurisdiction regarding criminal prosecutions.¹⁵ Secondly, the principle of complementarity offers the state the right to exercise jurisdiction under any of the accepted international law jurisdictional links; and to decide what to do with the perpetrator according to its own penal rules.¹⁶ This was echoed by the President of the Rome Conference who averred that in accordance with the principle of complementarity between the ICC and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws for crimes falling under the jurisdiction of the ICC.¹⁷

The principle of complementarity must be neither underestimated nor overestimated. It will not remedy all deficiencies in the efforts of the international community or individual states to try perpetrators of international crimes.¹⁸ It is intended to help states and the international community, through the instrumentality of international tribunals to better enforce international criminal justice. It can be seen as a procedural tool allowing the international community to take back the initiative if states are unable or omit to exercise their jurisdiction.¹⁹ The principle of complementarity is intended to offer states and the international community a possible way out when the absence of trial or punishment for international crimes would be unacceptable.²⁰ The possibility of a trial could have a deterrent effect on perpetrators who otherwise feel safe because they know that no prosecution will be undertaken against them. Although this is probably not enough to stop those who commit war crimes, crimes against humanity, genocide or any other international crime, at

¹⁵ This is an integral part of the ICC Statute. As outlined by some authors See for example Kriangsag Kittichaisaree, *International Criminal Law*, Oxford University Press, Oxford, 2001, 25f), this was not the case for the ICTY and the ICTR, since their statutes provided for primacy of the international *ad hoc* Tribunal and complementarity or at least concurrent jurisdiction for the national courts. Under the ICC Statute the system is inverted.

¹⁶ Markus B 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 *Max Planck Yearbook of United Nations Law* 606.

¹⁷ Rome Conference press release L/ROM/22, 17 July 1998. The statement was made in relation to the possibility for states to impose the death penalty for these types of crimes. According to Article 80 of the Statute, this question is left to the state's own legal system and is not affected by the ICC Statute; it is not directly connected to jurisdiction but shows how procedural aspects and the overall criminal justice system are linked to the issue of jurisdiction.

¹⁸ Gevers C & Du Plessis M 'Another stormy year for the International Criminal Court and its work in Africa' (2010) 35 *South African Yearbook of International Law* 163.

²⁰Carnero E 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From No Peace without Justice to No Peace with Victor's Justice' (2005) 18 4 *Leiden Journal of International Law* 835 837.

least the mechanism does exist and should be backed up as a means of progress towards a better implementation of international humanitarian law and human rights law.²¹

It is also important to note that the principle of complementarity could also help to resolve some problems that are not necessarily the result of legal failures but are related instead to diplomatic or political problems.²² The principle also offers an alternative solution to internal legal dilemmas. Even though universal jurisdiction is the responsibility of the state, the internal legal or political system can make the assertion of jurisdiction impossible for reasons outside the state's volition. If the state considers its jurisdiction impossible to exercise, the principle of complementarity offers a possibility of handing it over. Universal jurisdiction can then be regarded as initiated by states through an active use of that principle.²³ For example, of the previous cases brought before the ICC by the end of 2005, three revealed the state's incapacity to prosecute people suspected of international crimes.²⁴ In those cases (the Democratic Republic of the Congo,²⁵ Uganda and the Central African Republic)²⁶ the matter was referred directly to the ICC by the state, which considered those trials of such criminals before its own courts would be impossible; the latest case involving Sudan was referred to the ICC by the UN Security Council.²⁷ In all these cases the Prosecutor did not himself initiate the prosecutions, showing that the principle of complementarity cannot be seen as a one-way principle but rather as offering possibilities of co-operation between the state authorities and the ICC.²⁸ In terms of the overall situation, the principle of complementarity represents progress towards the prosecution of international crimes and should rule out any hope of safe havens for those offenders.²⁹ Yet it would certainly be mistaken to see the principle of complementarity as a final remedy to the inadequacies of universal jurisdiction. It should instead be regarded as an interim stage in improving the situation rather than as a definitive

²¹UN Security Council Resolution 1593, UN Doc S/RES/1593 (2005) adopted on 31 March 2005.

²² Meernik J 'Justice and peace? How the International Criminal Tribunal affects societal peace in Bosnia' (2005) 42 *Journal of Peace Research* 271 289.

²³ As opposed to a 'passive use of the principle of complementarity' in which the state will not take any initiative if unable or unwilling to try the perpetrators of international crimes. A positive attitude will show the concern of states to try those criminals, seeking to find through the ICC the structure and means they do not have.

²⁴Carsten S 'One Step Forward, Two Steps Back? Second Thoughts on a Sentence-Based Theory of Complementarity' (2012)53 *Harvard International Law Journal* 183 196.

²⁵Democratic Republic of the Congo v Belgium (2002) ICJ Report.

²⁶Sriram C L & Pillay S (eds) *The ICC Africa experiment: The Central African Republic, Darfur, Northern Uganda and the Democratic Republic of the Congo: Peace versus justice? The dilemma of transitional justice in Africa* (2009) 317.

²⁸Ankumah E & Kwakwa E (eds) 'African perspectives on international criminal justice Ghana: Africa Legal Aid' (2005) 246.

²⁹ Mirceva, S Global Policy Forum, 'Why the International Criminal Court is Different', available at www.globalpolicy.org/intjustice/icc/2004/0126different.htm (accessed 24 July 2017).

achievement. It is a means, not a goal! Like any other means, it needs political will to be effective and efficient. Moreover, the principle itself is not without handicaps.³⁰

The so called most powerful nation in the world the United States of America (USA) is not a member state to the ICC and has made it clear on numerous occasions that they do not intend to ratify the Rome Statute. Under president Gorge W Bush administration the USA has repeatedly stated that one of its reasons for opposing the ICC is the belief that states, not international institutions, should be primarily responsible for ensuring justice in the international system.³¹The objection raised by the USA and many others is the result of a misconstruction of the articles contained in the Rome Statute.³² The principle of complementarity governs the exercise of the ICC's jurisdiction. According to the principle of complementarity, states have the primary responsibility to prosecute and try alleged perpetrators of genocide, crimes against humanity and war crimes. The ICC may only exercise jurisdiction when national systems fail to do so,³³ either because there is an absence of proceedings or because they are unable or unwilling to carry out the investigations or prosecutions they may have initiated.

There are various factors that contributed to the AU'S having an overwhelming desire to formulate a court with criminal jurisdiction to prosecute international crimes. One of the major factors that led to the establishment of the ACC was that African leaders felt that Africans were being tried in foreign imperialistic courts. This was being done either by domestic courts for example Belgium in the Lubanga case,³⁴ or the ICC.³⁵

1.2 Aims and objectives of the thesis

The establishment of a regional court like the ACC brings about the debate around the principle of complementarity, which has always been largely viewed as a mechanism to allow the investigation and prosecution of matters only when national courts were unable or unwilling to do so. With the birth of the ACC with jurisdiction over the same crimes as the ICC, the question of which court claims primacy cannot be ignored. It is important to note, however, that this tension would not arise

³⁰ Olivier L 'Complementarity in action' available at <http://www.osisa.org/openspace/regional> (accessed on 6 March 2017).

³¹ US Department of State, Fact Sheet: The International Criminal Court, available www.state.gov/t/pm/rls/fs/2002/23426.htm6/8/05 (accessed on 24 July 2017).

³² Roy S Lee 'The International Criminal Court: The Making of the Rome Statute; Issues, Negotiations, Results' (199) *Kluwer Law International* 42 60.

³³ Grossman M American Foreign Policy and the International Criminal Court, Remarks to the Centre for Strategic and International Studies, Washington DC, May 6, 2002 available at www.state.gov/p/9949.htm6 (accessed on 12 May 2017).

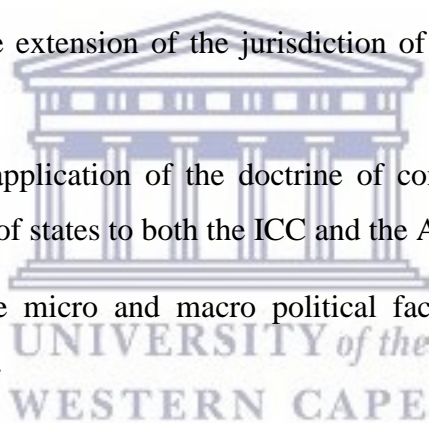
³⁴ Halberstam M 'Belgium's universal jurisdiction law: Vindication of international justice or pursuit of politics?' (2003)25 *Cardozo Law Review* 247.

³⁵ Murungu CB 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1068.

in all instances falling within the jurisdiction of the ACC. This is because only crimes are common between the ICC and the ACC.³⁶ Additional to these, the ACC also has jurisdiction over ten more crimes, bringing the total to 14 crimes. The ACC would also have jurisdiction over transnational crimes such as genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenaries, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression.³⁷ The concern of this thesis is the impact of the introduction of the ACC in the complementarity principle in respect of the three core crimes only, namely genocide, war crimes and crimes against humanity. This is because potential complementarity issues are only likely to arise where the two courts overlap, namely in situations where prosecutions of the three core crimes of genocide, war crimes, and crimes against humanity are at play.³⁸

The thesis therefore aims to:

- (1) Trace the origins and evolution of the complementarity principle.
- (2) Examine what effect the extension of the jurisdiction of the ACC will have on criminal justice in Africa.
- (3) Assessing the practical application of the doctrine of complementarity and the potential conflict in the obligation of states to both the ICC and the ACC.
- (5) Investigate what are the micro and macro political factors at play in the relationship between the AU and ICC.



1.3 Significance of the study

The significance of this study derives from the need to make a contribution to the debate around the newly created ACC. It is also driven by the need to contribute to the growing literature on the doctrine of complementarity, especially when it comes to the prosecuting of the three core crimes in light of Africa's new ACC. This study is also motivated by the desire to discuss the African human rights system and examine ways of further strengthening it and enabling its mechanisms to fulfil its mandate more effectively under the new and still rapidly changing circumstances such as the newly established ACC. The study will evaluate the successes and failures of the AU in the protection and promotion of human rights on the continent. The study of the principle of

³⁶ Rod J 'Complementing Complementarity: The principle of Complementarity in the Rome Statute of the International Criminal Court' available at www.isrcl.org/Papers/Jensen.pdf (accessed on 24 May 2004).

³⁷Article 28A of the African Criminal Court (The Amendment Protocol).

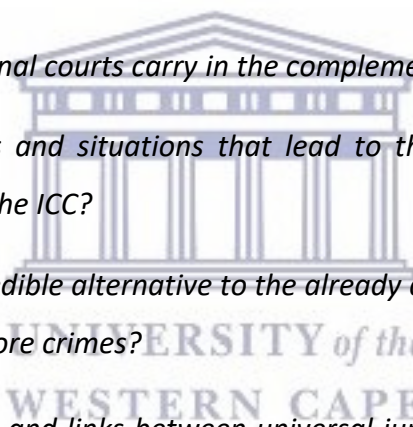
³⁸ Hondora T & Tawanda D 'The African Union and the ICC: Standing for Human Rights or Against?' 09 October 2013 <http://www.theafricareport.com/North-Africa/african-union-and-the-icc-standing-for-human-rights-or-against.html> (accessed on 11 April 2015).

complementarity within the African human rights system is a significant exercise in that it provides an opportunity to understand the efforts that are being made by all stakeholders to work towards protection and promotion of human rights in Africa. Further, this study is significant in that it analyses the existing debate on criminal jurisdiction of the new court and whether it will offer a credible alternative to the ICC with regards to the prosecuting of the three core crimes. Also all current written works reviewed the ACC when the treaty establishing it was only a draft.

A crucial feature of this thesis, and one which has not been thoroughly been researched thus far, is the issue of whether regional and sub-regional courts carry any weight in the complementarity calculus. Furthermore the study is significant since it will probe if the AU can indeed offer African solutions to African problems.

1.4 Research Questions

The determination of the AU on the establishment of the ACC, gives rise to the following three fundamental questions:

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- (a) What weight do regional courts carry in the complementarity calculus?*
 - (b) What are the factors and situations that lead to the fragmentation of the relation between the AU and the ICC?*
 - (c) Will the ACC offer a credible alternative to the already discredited ICC in Africa in respect of prosecuting the three core crimes?*
 - (d) What are the conflicts and links between universal jurisdiction and complementarity in light of the ICC implementing legislation already enacted by a handful of African states?*

1.5 Hypothesis

The creation of the ACC has brought about the debate on the issue of jurisdictional clashes between the ICC and the ACC as a regional court. It is vital to note that complementarity will not become an issue until the new ACC is fully operational. According to the ICC prerequisite that there should exist evidence of actual steps in an investigation, rather than the promise of future investigations authority, the mere possibility of an investigation in the future by the ACC would be unlikely to persuade the ICC to cede jurisdiction. As with the cases from Libya and Kenya,³⁹ Article 17 of the Rome statute requires proof of an actual investigation underway in an alternate forum not simply

³⁹ Kindiki K 'The proposed integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal difficulties and merits' (2007) 15(1) *African Journal of International and Comparative Law* 138.

the availability of an alternate forum where such an investigation can proceed.⁴⁰ The thesis will be driven by the hypothesis that the principle of complementarity and the prosecution of the three core crimes in the light of the new African criminal court present an unprecedented dimension in international criminal law thus stimulating the debate of the role of regional courts which the Rome Statute does not mention when addressing the matter of application of the principle of complementarity.

1.6 Provisional literature review

It must be mentioned from the outset that this literature review is focused on those authors and materials which define the scope of the thesis. In this regard, I have only utilised pivotal works in the area of the principle of complementarity in the light of the new ACC.

The creation of the ACC with expanded criminal jurisdiction presents unforeseen complications. The Rome Statute did not anticipate that regional courts would exercise criminal jurisdiction over crimes that would otherwise be tried by the ICC. The Rome Statute allows cases to be transferred to states that demonstrate the willingness and ability to prosecute, but makes no mention of regional courts such as the ACC. In the light of the language of Article 17, this thesis seeks to investigate and analyse the concept of complementarity in the light of the ACC's jurisdiction. Furthermore the thesis will explore the question whether regional courts carry any weight at all in the complementarity calculus. Presently, there is no existing legal basis for ICC cases to be deferred to regional courts.⁴¹ It seems, however, that in the current political atmosphere that the ACC will be utilized as a weapon to spearhead new challenges to the ICC's jurisdiction in the African continent.

El Zeidy states that the principle of complementarity in international criminal law requires the existence of both national and international criminal justice systems functioning in a subsidiary manner for curbing crimes of international law: when the former fails to do so, the latter intervenes and ensures that the perpetrators do not go unpunished.⁴² The principle of complementarity is based on a compromise between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction,⁴³ in other words there is an acceptance by the former that those who have committed international crimes may be punished through the creation and recognition of

⁴⁰ Bosco D 'Why is the International Criminal Court picking only on Africa?' Washington Post available at www.washingtonpost.com/2013-03-29/international-criminal-court-african-union-central-african-republic (accessed on 23 May 2017).

⁴¹ William W& Burke-White T 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal* 53.

⁴² El Zeidy MM 'The principle of complementarity: A new machinery to implement international criminal law' (2002) *Michigan Journal of International Law* 870 900.

⁴³ Benzing M 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity' (2002) 7 *Max Plank Yearbook of United Nations Law* 591 610.

international criminal tribunals. Until the Amendment Protocol in 2014, the ICC Statute was by far the best illustration of this idea and probably the most sophisticated. The history of its adoption is a reminder of how states wanted to keep control of the situation and act as primary players, not as spectators, showing their concern for respect for the principle of sovereignty.⁴⁴ However, commentators of international criminal justice regarded the principle of complementarity as a means of giving the last word to the ICC when states fail to fulfil their obligations in good faith. This is probably where the balance lies in the principle of complementarity between the states and the ICC.

The ACC's Statute and Protocol (the Amendment Protocol) in Article 3 states that the ACC is vested with an original and appellate jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the provisions of the Statute.⁴⁵ It is yet to be seen how the ACC will fit into the international criminal justice system. With respect to national jurisdictions, the decision of the AU Assembly in 2009 stated that the ACC jurisdiction would be complementary to that of national courts.⁴⁶ This simply means that the ACC will function in a similar fashion to the ICC, allowing national courts to first assume jurisdiction over crimes. This would then require state parties to incorporate within their domestic jurisdiction, laws providing for the prosecution of all new crimes under the ACC.⁴⁷ The real challenge for the ACC, however, will be at the international level.⁴⁸

Clarke views the creation of the ACC as a sign of tensions that exist between the AU and the ICC. Some commentators have therefore concluded that the AU is creating the ACC as a parallel process to the ICC in Africa.⁴⁹ Others have argued that once the ACC is empowered with an international crimes mandate, this may signal a mass exit from the Rome Statute by African states.⁵⁰

To curb impunity the ICC and ACC mechanism of the international court should only come into play when the state is unable or unwilling to genuinely investigate and prosecute alleged crimes. This requires the establishment of real positive complementarity, including building the capacity of

⁴⁴ Cassese A *International Criminal Law* (2003) 285.

⁴⁵ Article 3 of the African Criminal Court (The Amendment Protocol).

⁴⁶ Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Sirte, 1–3 July 2009, 5.

⁴⁷ Henzelin M, Heiskanen V & Mettraux G 'Reparations to Victims Before the International Criminal Court: Lessons from international mass claims processes' (2006) 17 *Criminal Law Forum* 317-344

⁴⁸ Jalloh H & Bensouda F 'International criminal law in an African context' in du Plessis M (ed) *African Guide to International Criminal Justice* (2008) 27-40.

⁴⁹ Clark P (2011) 'The Limits and Pitfalls of the International Criminal Court in Africa' [available at www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-in-africa](http://www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-in-africa) (accessed 29 February 2017).

⁵⁰ Africa Plots Mass Walk Out from ICC available at www.capitalfm.co.ke/news/2011/03/africa-plots-mass-walkout-from-icc/ (accessed 30 April 2016).

African national judicial, prosecutorial and investigative mechanisms to handle serious crimes of international concern.⁵¹

Pichon highlights that when analysing the relationship between complementarity, admissibility and jurisdiction, the ICC has already held that:

'Complementarity is the principle reconciling the states' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes; admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the ICC to proceed.⁵² Accordingly, admissibility can be regarded as the tool allowing the implementation of the principle of complementarity in respect of a specific scenario.'⁵³

By regulating the substantive requirements for the inadmissibility of a case, Article 17 gives effect to the principle of complementarity. The requirements set out in both articles apply to preliminary admissibility rulings in the Rome Statute and Article 18 in the Amendment Protocol, with regard to the challenges to the admissibility of a case before either Court. The Rome Statute and Article 18 of the Amendment Protocol and also to the Prosecutor's decisions to initiate an investigation under Article 53(1) and (2). Article 13 and 18 and 19 provide the procedural framework for admissibility determinations, although, depending on the stage of proceedings and the specific issue, other articles may come into play as well.⁵⁴

The admissibility test as, set down in Article 17 of the Rome Statute, consists of two main prongs; the first is complementarity, which is governed by Article 17(1) (a) to (c) of the Rome Statute,⁵⁵ and the second is gravity, governed by Article 17(1)(d) of the Rome Statute.⁵⁶

Under the Rome Statute, the first prong of the 'admissibility test', complementarity, encompasses three situations in which a case can be rendered inadmissible:

(a) If the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution Article 17(1)(a).⁵⁷

⁵¹Peace Justice and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity (2013) *International Peace Institute* 37 56.

⁵²*Prosecutor v Joseph Kony Vincent Otti, Okot Odhiambo and Dominic Ongwen* 377 34.

⁵³ Pichon J 'The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court' (2008) 8 *International Criminal Law Review* 188.

⁵⁴*Prosecutor v Ruto et al.* 38 (30 August 2011).

⁵⁵ The Appeals Chamber in the case *Prosecutor v Lubanga* (14 December 2006) 23 distinguished between complementarity, as encompassing article 17 (1)(a) to (b), and the *ne bis in idem* principle, contained in subparagraph (c). Therefore, although subparagraph (c) also serves as a substantive requirement delineating the jurisdictions, it can be seen as a distinct part of the admissibility test, separate from complementarity.

⁵⁶*Prosecutor v Ruto* ICC 47 (30 May 2011).

(b) It has been investigated by a state with jurisdiction which decided not to prosecute the person concerned, unless the ‘decision resulted from the unwillingness or inability genuinely to prosecute’ Article 17 (1) (b);⁵⁸

(c) The person concerned has already been tried for the conduct in question and a trial by the ICC is not allowed under the Statute’s *ne bis in idem* rules Article 17 (1)(c).⁵⁹

Complementarity itself contains a further test which is two ‘folds’.⁶⁰ Article 4 of the Constitutive Act of the AU enumerates the principles according to which the AU functions. In particular, paragraph (h) empowers the Union to intervene in a member state in case of grave circumstances, namely: war crimes, genocide and crimes against humanity.⁶¹ Paragraph (m) and (o) respectively refer to respect for democratic principles, human rights, the rule of law and good governance; and respect for the sanctity of human life,⁶² condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.⁶³ The decision by the AU Assembly in February 2009 which requested the African Commission to examine the possibility of empowering the Merged Court with powers to try international crimes makes clear reference to Article 4(h) of the Constitutive Act and to the commitment of the AU to fighting impunity. The amendment Protocol further recalls these principles in the recital part.⁶⁴ Thus, in the view of the AU Assembly, Article 4, and in particular paragraph (h), is the legal basis for the establishment of the International Law Commission’s (ILC) Article on the Responsibility of states for Internationally Wrongful Acts Section.⁶⁵

Thus when one analyses the AU’s legal bases for establishing the ACC, it is clear that it flows from the obligations of states to arrest and prosecute the perpetrators of international crimes. This obligation is translated into the well-known ‘*aut dedere aut judicare*’ duty. This is an obligation to on states to prosecute or extradite persons suspected of committing genocide, war crimes, or crimes against humanity if the person is in the states territorial jurisdiction,⁶⁶ in an effort to effectively fight

⁵⁷ 17 (1)(a) of the Rome Statute.

⁵⁸ Article 17(1) (b) of the Rome Statute.

⁵⁹ Article 17 stipulates the requirements under which the case is inadmissible before the Court, not the requirements for the case to be admissible before the Court. As Robinson states, this is a subtle point, but a noteworthy one nevertheless.

⁶¹Article 4(h) of the Constitutive Act of the African Union.

⁶²Robinson D ‘The Mysterious Mysteriousness of Complementarity’ (2010) 4 *Criminal Law Forum* available at <http://ssrn.com/abstract=1559403> (accessed on 23 April 2017).

⁶³Article 4(m) and (o) of the Constitutive Act of the African Union.

⁶⁴Assembly of the African Union, ‘Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction’ 12th Ordinary Session of the Assembly of the Union, Addis Ababa, 1-3 February 2009, Doc. Assembly/AU/Dec.213(XII), para. 3.

⁶⁵Murungu CB ‘Towards a Criminal Chamber in the African Court of Justice and Human Rights’ (2011) 9 *Journal of International Criminal Justice* 1068.

⁶⁶McGoldrick P & Donnelly E *The permanent International Criminal Court: Legal and policy issues* (2004) 56.

against impunity.⁶⁷ Scholars argue in support of the customary status of the duty to bring to justice the perpetrators of the most heinous crimes, at least for the territorial state and the state of nationality.⁶⁸ This is confirmed by the numerous declarations and treaties that embody the obligation.⁶⁹

The resolution of the UN General Assembly on 'The Principle of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity' is notable in this regard'.⁷⁰ 'It provides that states shall cooperate with each other on a bilateral or multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose'.⁷¹ Although the resolutions of the General Assembly are not legally binding, they have an important political weight and can lead to customary international law and binding treaties.⁷² It is then fitting that the AU fully establishes the ACC as a regional court empowered to prosecute international crimes as an expression of this interstate cooperation in order to honour their international obligation to exercise criminal jurisdiction over those responsible for international crimes and, therefore, finds its legal basis in the combination of these principles.⁷³

It is worth noting that the Convention on the Prevention and Punishment of the crime of Genocide establishes, in its Article 4, an obligation to try any person charged with genocide before a competent tribunal of the territorial state or before international penal tribunals (interpreted as including regional criminal courts) which may have jurisdiction to do so.⁷⁴ The reference to international penal tribunals in the provision constitutes perhaps an even more persuasive reason to give room for a regional court with jurisdiction similar to that of ICC, regarding the crime of genocide.⁷⁵

Abass suggests that as the AU is not party to the Rome Statute, it does not require any authorization from the treaty to create its own court with identical jurisdiction to the one of the ICC.⁷⁶ This

⁶⁷ Manirakiza P 'L'Afrique et le systeme de justice penale internationale' (2009) 3 *African Journal of Legal Studies* 23.

⁶⁸ Van der Wilt H 'Universal Jurisdiction under Attack An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States' (2011) 9 *Journal of International Criminal Justice* 104.

⁶⁹ Geneva Conventions I to IV (respectively Articles 49, 50, 129 and 146), Preamble of the Rome Statute, para. 6

⁷⁰ G.A. Res. 3074 (XXVIII) 'The Principle of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity', 3 December 1997.

⁷¹ Ibid. Principle 3.

⁷² Sarooshi D 'The peace and justice paradox: The International Criminal Court and the UN Security Council' (2004) 78.

⁷³ Manirakiza P 'L'Afrique et le systeme de justice penale internationale' (2009) 3 *African Journal of Legal Studies* 23.

⁷⁴ Article 4 of the Convention on the Prevention of Genocide See Murungu CB 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1068.

⁷⁵ Abass A 'The proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects', (2013) 60 *Netherlands International Law Review* 47.

⁷⁶ Abass A 'The proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects', (2013) 60 *Netherlands International Law Review* 49.

assertion must, however, be mitigated by the fact that some of the member states of the AU are parties to the Rome Statute, and must comply with its provisions. They cannot make use of the international organization that constitutes the AU to dodge their international obligations under the Rome Statute without incurring international responsibility, according to Article 61 of the Draft Articles on the Responsibility of International Organizations.⁷⁷ It follows that, although the Rome Statute is not binding on the AU in itself, its provisions must be observed because of the dual membership of certain African states, and *de facto*, the AU is equally subjected to any provision conditioning the establishment of a similar court in its region.

With the above said, one notices the absence, in the Statute of the ICC, of any provision restricting the establishment of courts empowered with identical jurisdiction to the ICC. Indeed, if the reading of the Rome Statute does not provide a legal basis for the ACC,⁷⁸ it does not prevent its creation either.⁷⁹ In the same way, there is no rule of international law that prohibits the existence of several institutions in charge of the same purposes and objectives.⁸⁰ It can be sustained that the creation of the ACC finds its legal basis in the international obligation to prosecute and punish perpetrators of international crimes and to a certain extent in Article 4(h)(m) and (o) of the Constitutive Act of the AU, and its conflicting jurisdiction with the ICC is not illegal under the Rome Statute.

As the ACC does not owe its existence to the Rome Statute as outlined above but is established by its own constitutive instrument, under international law, it is a new entity completely independent of the ICC.⁸¹ Furthermore, there is no hierarchy between treaties in general international law; the two jurisdictions would co-exist on an equal ground.⁸² The Vienna Convention affirms that disputes concerning treaties as in the case with other international disputes should be settled by peaceful means and in conformity with the principle of justice and international law, recalling the determination of the peoples of UN to establish conditions under which justice and respect for the obligations arising from treaties can be maintained.⁸³ This means that the envisaged ACC may not be subservient to the ICC, nor the other way around.⁸⁴ As Abass puts it, if there was any relationship between the two institutions, it will not follow from a legal obligation imposed on one

⁷⁷Article 61 of the Draft Articles on Responsibility of International Organizations, adopted by the ILC in 2011.

⁷⁸The validity of the principle of complementarity as enshrined in Articles 1 and 17 of the Rome Statute as a legal basis for the creation of an African Criminal Court is much debated in literature. See *infra*, Chapter 4 which comes back to this principle.

⁷⁹Abass A 'The proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects' (2013) 60 *Netherlands International Law Review* 47.

⁸⁰ *Ibid*, 79.

⁸¹ *Ibid*, 79.

⁸² Tladi D 'The African Union and the International Criminal Court: The battle for the soul of international law' (2009) 6 *South African Yearbook of International Law* 57-69.

⁸³Vienna Convention on the law of Treaties 23 May 1969.

⁸⁴Murungu C B 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1075.

court to the benefit of the other (for instance an obligation of deferral), but from the rational interest to not obstruct their shared ambition: the pursuit of international criminal justice.⁸⁵

As the ACC and ICC would have overlapping spheres of jurisdiction in the circumstances previously mentioned,⁸⁶ but, at the same time, would operate totally independently from each other, it is easy to foresee the problematic situations that might arise. Admittedly, the principle of *ne bis in idem* will not be endangered, as both Statutes provide that no person who has already been tried by another court for the international crimes in their jurisdiction shall be tried by them with respect to the same conduct.⁸⁷ If problems arise from the similarity of jurisdiction, it will be at the very first stage, when a situation occurs that needs to be addressed before a criminal court.⁸⁸ The following sections must distinguish between two situations. On the one hand, the entities that can turn to both courts to address a situation in which one (or more) international crime appears to have been committed will face a dilemma choice between the two institutions. On the other hand, entities entitled to refer a situation to either the ICC or the ACC might be confronted with divergent wills with respect to the court which should be referred to.⁸⁹

African states which are parties to both Statutes will be entitled to refer to Article 14 of the Rome Statute or Article 29 of the ACC Statute which comes to play in a situation where both courts are equally competent. Therefore, they will be placed in a delicate position facing a dilemma: which court should they prefer? For the remainder,⁹⁰ the Amendment Protocol is suspiciously silent on the relationship between the two criminal courts. In the absence of guidelines, African states will be left alone in navigating the relationship between the two courts. It is probable that, when confronted with the choice between the two institutions, African states are likely to favour the ACC. This comes from the fact that their project to establish an ACC was probably motivated by an anti-ICC sentiment, due to the recent tensions with the ICC and the UN Security Council.⁹¹ Such a court will thus be deemed more suitable to deal with African situations because it addresses Africa's concerns of injustice in the way international justice has been rendered while striving to the same goal: fighting impunity. The ICC will have no other option but to rely on the good faith of African states

⁸⁵ Abass A 'The proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects', (2013) 60 *Netherlands International Law Review* 47.

⁸⁶ *Ibid* 49.

⁸⁷ Article 20 of the Rome Statute and New Article 46I of the Statute of the African Court.

⁸⁹ Kleffner Jann K 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 5 *Journal of International Criminal Justice* 86 113.

⁹⁰ Viljoen F 'AU Assembly should consider human rights implications before adopting the amending merged African court protocol' available at <http://africlaw.com> (accessed on 08 June 2017).

⁹¹ Du Plessis M 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes' available at <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes> (accessed on 27 June 2015).

in assessing which court is more suitable for a case, friendly relationship with the ACC and its voluntary cooperation to carry out its work.⁹²

By virtue of Article 29 of the Amendment Protocol, as amended by Article 15 of the Draft Protocol, 'the following entities shall be entitled to submit cases to the Court on any issue or dispute provided for in Article 28(a) state parties to the present Protocol; (b) The Assembly, the Peace and Security Council, the Parliament and other organs of the Union authorized by the Assembly; (d) the Office of the Prosecutor.' According to Article 13 of the Rome Statute there are three means of triggering the exercise of the jurisdiction of the ICC: referral of a situation by a state party to the Prosecutor, referral of a situation by the Security Council of the UN to the Prosecutor and initiation of an investigation by the Prosecutor himself.⁹³ There is likely to be a clash when one of these referrals to the ICC occurs while an entity entitled to do so, is willing to submit the same case to the ACC.⁹⁴ In the absence of rules of hierarchy between the two institutions, the question is: which court should be seized with the case? Which one should have the priority over the other in launching the prosecutions? A potential solution to this issue is examined in the forthcoming chapter.⁹⁵

If entities entitled to refer a situation to the ACC wish to contest the exercise of jurisdiction by the ICC, they can rely on Article 19 of the Rome Statute which deals with challenges to the admissibility of a case before the ICC. The provision stipulates that such challenges may be made on the grounds referred to in Article 17 of the Rome Statute by, *inter alia*, 'a state which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted that particular case'.⁹⁶ Admittedly, 'an accused or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58 of the Rome Statute'⁹⁷ Challenges to the admissibility of a case shall take place at the earliest opportunity, prior to the trial, and shall be referred to the Pre-Trial Chamber prior to the confirmation of the charges or to the Trial Chamber after confirmation of the charges.⁹⁸

The impression is that the ICC should take a back seat wherever the national system is able to deal effectively and appropriately with international crimes committed within its jurisdiction or

⁹²Abass A 'The proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects' (2013) 60 *Netherlands International Law Review* 47.

⁹³Draft Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament(4 July 2014).

⁹⁴ Kane I & Motala A C *The creation of a new African court of justice and human rights* in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights* (2008).

⁹⁵Manirakiza P 'L'Afrique et le systeme de justice penale internationale' (2009) 3 *African Journal of Legal Studies* 23.

⁹⁶Article 19 para. 2 (b) of the Rome Statute.

⁹⁷Article 19 para. 2 (a) of the Rome Statute.

⁹⁸Fatou B & Hassan J *International criminal law in an African context*. In Max du Plessis (ed), *The African guide to international criminal justice* (2009) 30 45.

involving the state's national and no other mechanism is needed to do justice.⁹⁹ This is in line with the principle according to which states have the international duty to exercise criminal jurisdiction over those responsible for international crimes.¹⁰⁰ It can then be said that the principle of complementarity does not raise a question of jurisdiction because both courts are competent but a question of admissibility before the Court.¹⁰¹

In Article 17 of the Rome Statute and in the jurisprudence of the ICC, the admissibility test relates to national investigations,¹⁰² prosecutions and trials concerning the case at hand.¹⁰³ The question to be answered is whether the states with jurisdiction over a particular matter have remained inactive in relation to that case or are unwilling or unable in the sense of Article 17 of the Rome Statute to deal with the matter.¹⁰⁴ In the *Lubanga case*, the ICC held that a case would be admissible if those states with jurisdiction over it remain inactive in relation to that case.¹⁰⁵ In other words, the ICC only needs to begin an analysis with regard to unwillingness and inability when a state is inactive in investigating or prosecuting a particular accused.¹⁰⁶ Moreover, national proceedings must encompass the same person and the same conduct as alleged in the proceedings before the court.¹⁰⁷ If we had to assume that the practical issues of resources and workload will be overcome before the entry into force of the Amendment Protocol and that the ACC would prove to be active in investigating, prosecuting or trying a particular case without western interference by none AU members. Article 17 of the Rome Statute,¹⁰⁸ refers to the terms 'states with jurisdiction over the

⁹⁹Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc. S/2005/60, para. 568.

¹⁰⁰Preamble of the Rome Statute, para. 6.

¹⁰¹ Odinkalu CA 'Complementarity , Competition or Contradiction : the Relationship between the African Court on Human and Peoples' Rights and Regional Economic Courts in East and Southern Africa' presentation to the Conference of East and Southern African States on the Protocol Establishing the African Court on Human and Peoples' Rights', Gaborone, Botswana, 9-10 December 2003 available at www.africancoalition.org/content_files/files/ChidionComplementarity(accessed on 15 April 2016).

¹⁰²Article 17 para. 1 (a) of the Rome Statute.

¹⁰³It must be noted that, in the view of the ICC, there is a second part to the admissibility test which relates to the gravity threshold. (*The Prosecutor v Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, 24 February 24 2006, para. 29). This issue is not developed here as the crimes at stake, falling in the overlapping jurisdiction of the courts, have, *de facto*, reached the degree of gravity required by the Statutes.

¹⁰⁴ *The Prosecutor v Thomas Lubanga Dyilo* para. 29.

¹⁰⁵Interpretation a contrario of Article 17, paras 1 (a) to (c) of the Rome Statute (*The Prosecutor v Thomas Lubanga Dyilo*, Ibid. note 66, para. 29).

¹⁰⁶ Sadat LN 'A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity', available at <http://law.wustl.edu/harris/CAH/docs/CompHistoryFinal01-06-11.pdf>, (accessed on 23 April 2015) .

¹⁰⁷*The Prosecutor v Thomas Lubanga Dyilo*, para. 31.

¹⁰⁸ D Deya 'Worth the Wait: Pushing for the African Court to exercise jurisdiction for international crimes International Criminal Justice Open space' February 2012 available at <http://www.osisa.org/openspace/regional/african-court-worth-wait> (accessed on 10 April 2015).

¹⁰⁹ Article 17.1 of the ICC Statute provides criteria of admissibility linked to the principle of complementarity: 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a

case' thus some scholars have indeed sustained that the principle of complementarity only leaves room to national criminal jurisdiction,¹¹⁰ An opposite to what was suggested in the Report of the Committee of Eminent African Jurists on the Case of Hissène Habré.¹¹¹ With this respect, it is submitted that the jurisdiction of the planned Criminal Chamber is the expression of all jurisdictions of the African states which will have ratified the Amendment Protocol. Arsanjani states that even in cases of state inaction, the ICC should take into consideration unwillingness or inability, so the case cannot be found admissible before the ICC merely on the ground of state inactivity.¹¹² A form of this single-fold test was highlighted by Katanga's defence in support of the appeal against the decision of the Trial Chamber on the admissibility challenge in the case of *Germain Katanga and Mathieu Ngudjolo Chui*.¹¹³ The defence stated that it would discourage states from prosecuting domestically and would thereby endanger the correct application of the principle of complementarity if the ICC was to accept the view that a state which is able to prosecute is fulfilling its duty to prosecute international crimes by transferring cases to the ICC and by fully cooperating with it.¹¹⁴ According to this argument, the ICC should intervene only when a state is genuinely unwilling or unable to take action to support the prosecution of the crimes.¹¹⁵ Therefore, genuine willingness and ability to carry out proceedings would have to be taken into account even in cases of inaction.¹¹⁶

The suggestion that a state not conducting any proceedings is in fact unwilling and the view that inaction on the part of the state is a subset of unwillingness has also arisen, and can even be detected in some ICC decisions.¹¹⁷ For instance, the Trial Chamber noted that Democratic Republic of Congo is 'quite clearly unwilling to prosecute the case' and hence dismissed the admissibility

State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.

¹¹⁰Murungu CB 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1075.

¹¹¹Regarding the African Court of Justice and Human Rights, 'The Committee proposes that this new body be granted jurisdiction to undertake criminal trials for crimes against humanity, war crimes and violations of Convention against Torture. The Committee also noted that there is room in the Rome Statute for such a development and that it would not be a duplication of the work of the International Criminal Court.' Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, submitted to the Assembly of the African Union, Ordinary Session, (2006), available at http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf (accessed on 14 April 2015).

¹¹²Arsanjani MH & Weisman W *The Law-in-Action of the international Criminal Court* (2005) Faculty Scholarship Series available at http://digitalcommons.law.yale.edu/fss_papers. (accessed on 27 May 2017).

¹¹³ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (*Prosecutor v Katanga and Chui*) ICC-01/04-01/07-1497, 25 September 2009, § 85.

¹¹⁴*Democratic Republic of the Congo v Belgium* (2002) 14 General List No. 121 (International Court of Justice) I.C.J. Reports (2002) (judgment).

¹¹⁵ Stapleton S 'Ensuring a Fair Trial in the International Criminal Court: Statutory interpretation and the impermissibility of derogation' (1999) 31 *New York University Journal of International Law and Politics* 535 592.

¹¹⁶ Paolo B 'Complementarity of the International Criminal Court to the national Criminal Jurisdictions', in Lattanzi, S & William A 'Essays on the Rome Statute of the International Criminal Court', il Sirente, 21 50.

challenge. It also mentioned the importance of determining the ‘intentions of the state to institute proceedings against the persons in question’.¹¹⁸ However, the implicit hint in favour of the single-fold test by the Trial Chamber in this decision was clearly rejected later, first by the Appeals Chamber in the same case and then by the Pre-Trial Chamber in its decisions on the admissibility challenge in the two Kenyan cases.¹¹⁹

The debate has thus seemingly found closure in confirmation of the twofold test by the ICC. The ICC established that ‘in case of inaction, the question of unwillingness or inability does not arise’. It has underscored that states ‘unwillingness or inability genuinely to carry out proceedings, contained in subparagraphs (a) and (b) of Article 17, cannot be the starting point when determining whether the case is inadmissible because complementarity concerns, first and foremost, the existence or absence of national proceedings.’¹²⁰ The Court can turn to the willingness and ability of the state genuinely to carry out the proceedings only when it determines that national proceedings of a certain quality exist. In other words, even when a state is willing and able genuinely to carry out the proceedings, if the proceedings requirement is not fulfilled, the case is admissible and the ICC can take over.¹²¹

This conclusion clearly follows from the text of Article 17, subparagraphs (a) and (b), which states: The same conclusion is also supported by teleological interpretation and the overall goal of the Rome Statute, that of putting an end to impunity which cannot be achieved if the state is inactive, regardless of whether it is willing or able to prosecute. As the Appeals Chamber pointed out, if the opposite interpretation were accepted, the ICC would be unable to exercise its jurisdiction as long as the state is theoretically willing and able to investigate and prosecute the case, even though the state has no intention of doing so.

This would lead to thousands of victims denied justice.¹²² Yet, although the two-fold test is clearly supported by the text of Article 17, it can be legitimately criticized for the fact that it separates states inaction from unwillingness or inability in a way that can create tensions with the duty of every state to prosecute international crimes and the role of the ICC as the Court of ‘last resort’.¹²³

¹¹⁸ El Zeidy MM ‘The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State’s Party Referral to the ICC’(2005)5 *International Criminal Law Review* 99 105.

¹¹⁹ Pre-Trial Chamber II found: Thus, while the Chamber welcomes the express will of the Government of Kenya to investigate the case sub judice, as well as its prior and proposed undertakings, the Chamber's determination on the subject-matter of the present challenge is ultimately dictated by the facts presented and the legal parameters embodied in the Court's statutory provisions. *Prosecutor V Ruto et al.*

¹²⁰Ibid.

¹²¹*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.supra note 75, ICC-01/04-01/07-1497, 25 September 2009, § 85.

¹²²Ibid,122

¹²³ Nabil N ‘Some Lessons on Complementarity for the International Criminal Court Review Conference’ (2009)5*The South African Yearbook of International Law* 28 56.

states may (temporarily) refrain from prosecuting core crimes for various reasons that go beyond 'inability' or 'unwillingness', such as various political, financial, logistical, local, or even external reasons this can be also viewed as evidence of inability; the lack of resources to successfully prosecute. In addition, by failing to prosecute, states can purposely render cases admissible before the ICC. It should also bear in mind that states can choose not to prosecute offenders as an intention of building peace and reconciliation as was the case in South Africa. Apartheid was a crime against humanity yet the post 1994 South African Government chose peace and reconciliation rather than prosecution.

This can defeat the whole purpose of the complementarity mechanism,¹²⁴ especially if we bear in mind the possibility of self-referrals, and the ability of governments to selectively externalize difficult cases, thus relieving themselves of the pressure to prosecute the crimes enumerated in the statute.¹²⁵ Notwithstanding this undesirable consequence of the prevailing interpretation of Article 17 of the Rome Statute, the only reasonable approach to this theory is that the case can be found admissible before the ICC whenever national proceedings are not ongoing, without the need to discuss the willingness or ability of the relevant state and without having to consider the reasons behind the state's decision not to prosecute.

To further examine 'willingness' or 'ability' in the absence of ongoing or past proceedings would indeed equate to put the cart before the horse.¹²⁶ However, this conclusion has recently been called into question by the Pre-Trial Chamber's Decision on Libya's challenge which reopened a number of different issues and again brought a twist in the practical application of complementarity. The Court declaratively upheld the twofold test and clearly stated that it must first establish the existence of proceedings and only then may it proceed to the second leg of the test;¹²⁷ yet, it went on to discuss Libya's ability to carry out proceedings despite its findings that Libya had not demonstrated that it was investigating the same case as the ICC. It remains to be seen whether the Pre-Trial Chamber's decision will be upheld or overturned on appeal.

Many scholars have questions related to the international legal obligation to prosecute and punish international crimes and this has generated massive discussion.¹²⁸ While most commentators agree that international crimes should be prosecuted and punished pursuant to international law,¹²⁹ the

¹²⁴Ibid., 31.

¹²⁵Arsanjani M H & Weisman W 'The Law-in-Action of the international Criminal Court (2005) Faculty Scholarship Series' available at http://digitalcommons.law.yale.edu/fss_papers. (accessed on 27 May 2017).

¹²⁶*Prosecutor v Katanga and Chui*

¹²⁷*Prosecutor v Gaddafi*, ICC-01/11-01/11-344-Red, 31 May 2013.

¹²⁸ Human rights professionals have figured most prominently in the debate. Other participants include journalists, academics and political leaders.

¹²⁹ Orentlicher D F 'Settling accounts the duty to prosecute human rights violations of a prior regime' (1991) 100 *Yale Law Journal* 2537.

content of the duty to prosecute and punish these crimes under the substantive body of international law remains contentious. Many commentators argue that international law hardly places any restraints on a state's discretion in the punishment of international law crimes.¹³⁰ A principal reason for this is that key sources of the duty to prosecute international crimes fail to expressly oblige states to prosecute and punish violations. A further argument is that state practice so far is inconsistent.¹³¹ States have a right not a duty under customary international law to prosecute, a duty can only arise out of treaty obligation from the Rome Statute not international customary law.

While the term 'complementarity' has been utilized specifically by the global and the regional international regimes considered, the term does not take on exactly the same meaning in every context. Put differently, although the term may appear universal, its application or functioning in practice differs according to each specific context.¹³² This point is important in order to demonstrate that complementarity in the context of the African human rights system needs to be interpreted with due regard to the specific context of the system. Under the ICC administration,¹³³ complementarity apparently functions as an instrument of limitation to dictate priority of jurisdiction. Arguing that complementarity in the Rome Statute applies to all the institutions of criminal justice and not just the courts, one scholar opposes that complementarity limits the powers of the ICC vis-à-vis national institutions.¹³⁴ Another commentator argues that one of the most important roles of the principle of complementarity is to encourage the state party to implement the provision of the Statute, strengthening the national jurisdiction over those serious crimes listed in the Statute.¹³⁵ In effect, there is complementarity of purpose which is to prevent impunity for international crimes, but complementarity favours priority of action by national systems.¹³⁶

In the making of a protocol to merge the African Court of Justice and the African Human Rights Court, the term 'complementarity' was once again employed in the legal framework of the AU.¹³⁷ In Article 27(2) of the Protocol on the Statute of the African Court of Justice and Human Rights (Court Statute), the ACC is invited to bear in mind the complementarity it maintains with the African Commission and the African Committee of Experts on the Rights and Welfare of the Child

¹³⁰ Henkin A 'Conference Report' in Justice and Society Program of the Aspen Institute State Crimes: Punishment or Pardon (1989)92 *Aspen Institute Report* 62.

¹³¹ Schachter O 'The obligation to implement the Covenant in domestic law' in L Henkin (ed) *The international bill of rights* (1981) 311.

¹³² Edelenbos C 'Human rights violations: A duty to prosecute?' (1994) 7 *Leiden Journal of International Law* 5; Amnesty International Universal jurisdiction The duty of states to enact and implement legislation (2001).

¹³³ Boed R 'The effect of a domestic amnesty' (2000) 33 *Cornell International Law Journal* 297.

¹³⁴ Tallgren H 'Completing the 'International Criminal Order'(1998) 67 *Nordic Journal of International Law* 120.

¹³⁵ Dinstein Y 'International criminal law' (1985) 20 *Israel Law Review* 206 225.

¹³⁶ Scharf M 'Swapping amnesty for peace' (1996) 31 *Texas International Law Journal* 1.

¹³⁷ The African Court of Justice was established by Art. 5 of the AU Constitutive Act 2000.

(Committee of Experts)¹³⁸ in the course of making its rules of court. Moreover, in Article 38 of the Court Statute relating to the procedures before the ACC, the Court is again required to take into account the complementarity between the court and other treaty bodies of the Union.¹³⁹ Effectively, this Court Statute has consolidated complementarity as a defining principle in the relationship between judicial and non-judicial or quasi-judicial human rights supervisory bodies in the African human rights system. It also has to be noted that in the entire situation involving complementarity, drafters in the African human rights system have stopped short of giving a clear definition of complementarity and how it ought to function in the system.

1.7 Methodology

The thesis contains a combined descriptive and analytical study on the prosecution of the three core crimes with special focus to complementarity in light of the ACC. The thesis was conducted using comparative desktop research. The information used was obtained from primary sources such as treaties, protocols, draft laws, reports, and relevant secondary sources, particularly text books, journal articles, internet resources and other materials that are relevant to the principle of complementarity, therefore there is no need for obtaining an ethics clearance from the university. This thesis is written with the underlying presumption that the principle of complementarity and the prosecution of the three core crimes in the light of the ACC present an unprecedented dimension in international criminal law. In the thesis literature concerning the ICC, the principle of complementarity and the principle of universal jurisdiction are dealt with. Different legal instruments, with the Rome Statute are also examined to describe how complementarity works in practice. Reports and documents of the preparatory work that led to the creation of the Rome Statute and the principle of complementarity is explored. Conventions and state practice addressing the principle of universal jurisdiction and the doctrine interpreting them is looked at for establishing the development and functioning of universality.

1.8 Chapter structure

Chapter 1 – Introduction of the subject matter and general overview of the study.

Chapter 2 – An analysis of the origin of the concept of the complementarity. The chapter will be a detailed examination of the evolution and current understanding of the principle of complementarity in relation to national and international jurisdiction.

¹³⁸ The African Committee of Experts on the Rights and Welfare of the Child (African Child Right Committee) is the treaty body established in Article. 32 of the African Charter on the Rights and Welfare of the Child to ‘promote and protect the rights and welfare of the child’ in Africa.

¹³⁹Article 38 of the Rome Statute.

Chapter 3 – A discussion of issues of admissibility of a case by the ICC and various points for admissibility, namely complementarity, double jeopardy (*ne bis in idem*) and gravity will be highlighted. The chapter proceeds to cite preliminary rulings regarding admissibility and challenges to jurisdiction and admissibility were considered. The chapter then concludes by analysing the rationale for implementing legislation and how specifically South Africa adopted its implementing legislation.

Chapter 4 – An examination of the relations between the AU and the ICC with a view to determining the root causes of the animosity. There will also be a brief look at matters of state referrals, linkage between Africa and the Rome Statute and Africa's numerical legacy.

Chapter 5 – This chapter looks at the rationale of creating the ACC with jurisdiction over international crimes. Furthermore an in-depth analysis of the Malabo protocol will be conducted sighting the strengths and weaknesses of the establishment of the ACC. The chapter will also explore the relationship between the ACC and the ICC and concludes with outlining the potential areas of concurrent jurisdiction between the ICC and the ACC.

Chapter 6 – This chapter argues that the Malabo Protocol reconceptualises the idea of transitional justice mechanisms as varying approaches meant solely to address the legacy of abuse in one nation, and proposes that transitional justice mechanisms can also encompass regional and transnational efforts to respond to mass human rights violations especially in the African continent. It also highlights the fact that the Malabo Protocol seeks to correct perceived biases in international criminal justice. The chapter also provides a brief overview of the domestic, hybrid and international criminal trials in Africa that have informed the development of the ACC, and argues that the Malabo Protocol offers the Continent an important, alternative vision of regional criminal justice. The chapter concludes that the regional court in the form of the ACC could arguably tailor criminal accountability to the context, needs and aspirations of the Continent.

Chapter 7 – Conclusion and Recommendations.

Chapter Two - The origin and evolution of the principle of complementarity

2.1 Introduction

The previous chapter focused on the introduction of the subject matter and the general overview of the study. This chapter will analyse the origin of the concept of the complementarity and provide a detailed examination of the evolution and current understanding of the principle in relation to national and international jurisdiction. In addition the chapter will trace the principle of complementarity from the first efforts at international prosecution, after the First World War, the Leipzig, Nuremberg and Tokyo Trials which established the framework for the foundation of the permanent ICC on 25 January 1919 when the Preliminary Peace Conference began in Paris, France. The chapter then traces the evolution of the concept through the drafting of the 1937 Treaty on Terrorism, and the post-Second World War tribunals. It will further scrutinize the work of the International Law Commission that led to the drafting of the Rome Statute of the ICC, all the way to the establishment of the draft statute with the UN General Assembly in 1994. The chapter will also examine the post-Rome developments, particularly the original interpretations of the relevant provisions of the Rome Statute by both the Office of the Prosecutor and the Pre-Trial Chambers.

Complementarity is a principle which represents the idea that states, rather than the ICC, will have priority in proceeding with cases within their jurisdiction. This principle means that the ICC will complement, but not supersede, national jurisdiction. National courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions, but the ICC will act when national courts are 'unable or unwilling' to perform their tasks.¹⁴⁰

The principle of complementarity is the basis for the operation of the ICC. It organizes the functional relationship between domestic courts and the ICC. The principle has become critical to the functioning of contemporary international criminal law. The establishment of the ICC was the first time in history a permanent International criminal institution was created.¹⁴¹ The road towards the establishment of the Rome Statute has been a long one with the international Military Tribunal (IMT), International Military Tribunal for the Far East (IMTFE), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) preceding it. These forerunners affected the creation and the shaping of the ICC. The International Law Commission contributed with the base for the discussions of the Rome Conference in 1998. Toward the end of the Rome Conference, the Rome Statute of the ICC was

¹⁴⁰ Lee RS *Introduction, in the International Criminal Court: the making of the Rome Statute: issues, negotiations, results* (2002) 27

¹⁴¹ Williams S 'Article 17: Issues of Admissibility Commentary on the Rome Statute of the International Criminal Court (1999) 383 392.

embraced. On 1 July 2002 the International Court was created after the required amount of 60 state ratifications of the Rome Statute was reached.

The principle of complementarity was the compromise of the views of the negotiating states in the Preparatory Committees and during the Rome Conference. The principle of complementarity characterises the relationship between the ICC and national courts. When national courts are unwilling or not able to genuinely complete examinations and indictments of perpetrators of international crimes (genocide, war crimes and crimes against humanity), the ICC will be entitled to step in continue with such prosecutions instead.

2.2 The predecessors to the International Criminal Court

Since the principle of complementarity is the corner stone of the ICC, it is vital when tracing the historical evolution of the principles of complementarity the origins of the ICC itself. As the first permanent institution for international criminal justice the ICC's main objectives is to be seized of cases concerning violations of the most serious crimes of concern universally. Before the formation of the ICC, there were *ad hoc* courts within international criminal arena and these courts were important in the development of the ICC. Without these predecessors the international community would most likely not be ready for a permanent criminal court such as the ICC. To fully understand the future it is significant to have knowledge about the historical facts, particularly when it regards serious crimes of concern to the international community as a whole remain unpunished.

2.3 The Leipzig, Nuremberg and Tokyo Trial

The Leipzig, Nuremberg and Tokyo Trials established the framework for the foundation of the ICC. World War one came to an ended on 11 November 1918, and on 25 January 1919 the Preliminary Peace Conference began in Paris, France. The Conference set up the Commission on the Responsibility of the architects of the War and on Implementation of Penalties, and a larger part of this commission proposed for the making of a specially appointed tribunal. This tribunal would be overseen by the League of Nations and would focus on the prosecution and discipline of the perpetrators.¹⁴² The work of the Commission brought about the Treaty of Peace between the Allied and Associated Powers and Germany on 28 June 1919. Similarly, this arrangement accommodated specially appointed tribunals to convey to trial 'persons blamed for having conferred acts infringing upon the laws and traditions of war'.¹⁴³ These tribunals never succeeded because of the danger of political instability in Germany. Rather national indictments were performed in Leipzig in Germany. The Leipzig trials were not effective because of the only a small number of persons were

¹⁴² Ove B 'International Criminal Law in Historical Perspective, Comments and Materials' (2002) 13.

¹⁴³ Treaty of Peace Between the Allied and Associated Powers and Germany, (Treaty of Versailles), 28 June 1919, Articles 227 and 228

punished and the sentences were viewed as generally light.¹⁴⁴ The experience from the consequences of World War one demonstrated that political contemplations had beaten worldwide equity, yet it can be said that it built up a premise for the advancement of International criminal law.¹⁴⁵

The end of the Second World War saw the beginning of the Nuremberg Trials in November 1945 and the permanent seat of the tribunal was in Berlin yet the only trial was held in Nuremberg. The Court was composed of four judges from the victorious states and each state also appointed a Chief Prosecutor.¹⁴⁶ The Tribunal had jurisdiction over crimes against peace, war crimes and crimes against humanity and they were included in Article 6 of the Charter of the Nuremberg International Military Tribunal of 8 August 1945. Individual responsibility was established for these crimes.¹⁴⁷ The judgment came on 1 October 1946 and it included 22 convictions and among them eleven death penalties.¹⁴⁸ The judges were convinced that the proceedings were based on universal jurisdiction over 'acts universally recognized as criminal, which are largely considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances.'¹⁴⁹ The Supreme Commander of the Allied Powers, General MacArthur, signed a proclamation which established an 'International Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offences which include crimes against peace'(IMTFE) on 19 January 1946. The IMTFE based its work on the same three categories of crimes as the Nuremberg Charter, namely crimes against peace, war crimes and crimes against humanity.

The Nuremberg Tribunal has set an excellent example and platform for the Tribunals for the former Yugoslavia and Rwanda, and the establishment of the ICC; and they continue to inspire the creation of new tribunals, such as the ICC .¹⁵⁰ There has been some criticism of the IMT. Many have said that the IMT prosecutions were biased and targeted only one side because only the defeated were tried. Further, there were many procedural faults and *ex post facto* legislation when it came to the crimes against peace and humanity.¹⁵¹ The main criticism has been that the creation of the Tribunal

¹⁴⁴ Bassiouni M 'The Statute of the International Criminal Court, A Documentary History' (1998) 5.

¹⁴⁵ Ove B 'International Criminal Law in Historical Perspective, Comments and Materials' (2002) 13.

¹⁴⁶ *Ibid.*

¹⁴⁷ Yves B 'Judging War Criminals, The Politics of International Justice, The Hague' (1999) 33.

¹⁴⁸ Ove B 'International Criminal Law in Historical Perspective, Comments and Materials' (2002) 13

¹⁴⁹ Christopher C 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability Law & Contemporary Problems (1996) 167.

¹⁵⁰ The Statute of the Iraqi Special Tribunal has many provisions that have their origin in the statutes and jurisprudence of the IMT, IMTFE, ICTY, ICTR and ICC. The Statute is available at www.cpa-iraq.org/human_rights/Statute.htm, (accessed on 2 July 2014).

¹⁵¹ Yves B 'Judging War Criminals, The Politics of International Justice, The Hague' (1999) 33.

was not in conformity with customary international law, which would have required the negotiation of a treaty at an international diplomatic conference.¹⁵² The Nuremberg trial displayed elements of the principle of complementarity when a decision was made that individuals, including heads of State and those acting under orders, could be held criminally responsible under international law. The judgment additionally affirmed the primacy of international law over national law, asserting that international law imposes duties and liabilities upon individuals as upon States has long been recognized. The very essence of the Nuremberg Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law.¹⁵³

The fact that actions were permitted or even required under domestic law provided neither excuse nor justification for a violation of international law. Nazi leaders were tried for acts committed against their own citizens as well as for atrocities committed as an occupying power. This was the first clear legal demonstration that both individuals and States are responsible under international law for acts that may fall within a State's national jurisdiction. In contrast to the strong legacy of Nuremberg, the Far Eastern Commission and Tokyo Tribunal that followed World War II were highly politicized.¹⁵⁴ Unlike the Nuremberg Charter, this tribunal was based upon a military order issued by the commanding officer of the Allied armed forces. The tribunal itself was fraught with procedural irregularities and marred by abuses of judicial discretion and had no clear elements of the principle of complementarity. Defendants were chosen on the basis of political criteria rather than criminal behaviour, and their trials were generally perceived to be unfair.

2.4 The ICTY and the ICTR

The ICTY and the ICTR were each created by an *ad hoc* resolution of the United Nation Security Council (UNSC) for the purpose of restoring international peace and security in a particular situation. It should be noted that Chapter VII of the UN Charter gives the UNSC the authority to make recommendations, or decide what measures should be taken to maintain or restore international peace and security in the former Yugoslavia and Rwanda. When creating both the ICTY and the ICTR the UNSC was acting under this authority. Assessing both the work of the ICTY and ICTR it becomes apparent that the UNSC resolved that extraordinary measures were required to 'protect compelling humanitarian interests in the context of a situation identified as a

¹⁵² Yves B 'Judging Criminal Leaders, The slow Erosion of Impunity, The Hague' (2002) 43.

¹⁵³ Mumford R 'Building Upon A Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference' (1999) (8) *Journal of International Law and Practice* 159.

¹⁵⁴ Joyner C 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability' (1996) 59 *Law & Contemporary Problems* 167.

threat to international peace and security.’¹⁵⁵ The specific nature of these responses is reflected in the fact that the jurisdiction of each of the tribunals is both territorially and temporally limited. The critical argument here is that the tribunals represent specific responses to particular situations and their jurisdiction does not extend beyond the mandate set by the UNSC. The prospects of a veto by any of the five permanent members of the UNSC could hinder the work of the tribunals, and therefore their assessment of the creation of the tribunals must have been that the tribunals were not a significant threat to their state sovereignty.¹⁵⁶

The establishment of the ICTY and the ICTR was a catalyst for the development of the ICC. The work of the tribunals showed that an international criminal judicial system is possible and necessary. Fundamentally the two tribunals have legitimized the prosecution of international crimes, and contributed to increased public awareness of gross human rights violations; thus creating a considerable and solid jurisprudence, which was previously unavailable.¹⁵⁷ Their formation brought forward the question of the proper relationship between the jurisdiction of national courts and the of that international criminal court. Both Article 9 in the ICTY statute and Article 8 in the ICTR statute, provide that each of these two international tribunals shall have simultaneous jurisdiction with national jurisdictions to prosecute persons for violations of international humanitarian law.¹⁵⁸ The UNSC determined that to work effectively, the tribunals must have primacy over national criminal jurisdictions. Subsequently, while national courts shared concurrent jurisdiction with the tribunals, the latter could at any stage of proceedings claim primacy over the national courts and so become seized of a prosecution. This concept of primacy emphasizes the inherent supremacy of the jurisdiction of the tribunals but it has the effect of compromising the sovereign privileges of states by requiring them to defer to the jurisdiction of the tribunals.

Alternatively, the concept of primacy can be viewed in the light that the tribunals have the ability to request the national courts to submit a certain case to the tribunals at any stage of the procedure. There is a slight difference between the primary provisions of the two statutes. The ICTY Statute highlights that it has ‘primacy over national courts’¹⁵⁹ and the ICTR Statute states the ICTR has ‘primacy over the national courts of all states’,¹⁶⁰ and this change proposes a more absolute UNSC

¹⁵⁵ Brown B ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’ (1998) 23 *Yale Journal International Law* 407.

¹⁵⁶ Rod J ‘Complementing Complementarity: The principle of Complementarity in the Rome Statute of the International Criminal Court’ available at www.isrcl.org/Papers/Jensen.pdf (accessed on 24 July 2004).

¹⁵⁷ Jonathan J ‘International Criminal Law and the Role of Domestic Court’(2001) 95 *The American Journal of International Law* 122.

¹⁵⁸ Statute of the International Tribunal for the Former Yugoslavia, New York, 25 May 1993, as amended 13 May 1998.

¹⁵⁹ ICTY Statute, Article 9(2).

¹⁶⁰ ICTR Statute, Article 8(2).

consensus regarding the concept of primacy.¹⁶¹ The *Tadic case* was the first case in which an individual was indicted, tried and convicted by the ICTY, and it was also the first case that focused on the concept of primacy.¹⁶² *Tadic* was charged on several counts of crimes against humanity, war crimes and violations of the laws or customs of war.¹⁶³ After the deferral of the case and the transfer of *Tadic* to ICTY in The Hague, the deferral of the case was challenged. The defence argued that there had been an unlawful establishment of the International tribunal,¹⁶⁴ an unjustified primacy of the International tribunal over competent domestic courts,¹⁶⁵ and that there existed a lack of subject-matter jurisdiction.

The assault on the primacy of the tribunal was based on three factors or grounds, firstly that the primacy violated the competence of a state to establish domestic jurisdiction over crimes that have been committed on its territory.¹⁶⁶ Secondly, it was disputed that the principle of state sovereignty has been violated,¹⁶⁷ and lastly that the transfer of the case from Germany violated the principle of *jus de non evocando* (the right to be tried by his national courts under his national laws).¹⁶⁸ The Appeals Chambers rejected the argument that the primacy of the Tribunal of violating domestic jurisdiction and state sovereignty, and stated: ‘this would be a mockery of law and a disloyalty to the international community’s need for justice, thus should the concept of state sovereignty be allowed to be raised successfully against human rights.’¹⁶⁹ The Appeals Chamber also dismissed the claimed violation on the principle of *jus de non evocando*, concluding “this principle is not breached by the transfer of jurisdiction to an international tribunal created by the UNSC acting on behalf of the community of nations.”¹⁷⁰ Accordingly, the Appeals Chamber dismissed the second ground for appeal and held that primacy is an imperative tool for the functioning of an international tribunal:

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be

¹⁶¹ Brown B ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’ (1998) 23 *Yale Journal International Law* 407.

¹⁶² Brown B ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’ (1998) 23 *Yale Journal International Law* 407.

¹⁶³ Prosecutor v. Tadic, No IT-94-1-T (ICTY December 14, 1995) (Tadic and Borovnica indictments) (amended), available at www.un.org/icty/indictment/english/tad-2ai951214e.htm (accessed on 13 July 2017).

¹⁶⁴ Prosecutor v Tadic, No IT-94-1 (ICTY October 2, 1995), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction [hereinafter Appeals Decision on Jurisdiction], pages 6-27, paras. 9-48, available at www.un.org/icty/tadic/appeal/decision-e/51002.htm (accessed on 10 July 2015).

¹⁶⁵ Ibid, 28-38, paras. 49-64.

¹⁶⁶ Appeals Decision on Jurisdiction, 31, para 54.

¹⁶⁷ Appeals Decision on Jurisdiction, 31, para 55.

¹⁶⁸ Appeals Decision on Jurisdiction, 37, para 61.

¹⁶⁹ Appeals Decision on Jurisdiction, 35, para 58.

¹⁷⁰ Appeals Decision on Jurisdiction, 37, para 62.

a perennial danger of international crimes being characterized as ‘ordinary crimes’ (Statute of the International Tribunal, art. 10, para. 2(a), or proceedings being ‘designed to shield the accused, or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)).¹⁷¹

The most significant reason for granting the tribunals primacy over national jurisdictions was to avoid a situation where various courts exercise parallel jurisdiction over an accused person. Total pandemonium could manifest if courts from numerous countries were granted contemporaneous jurisdiction to initiate proceedings against the same war criminal from the Yugoslav conflict.¹⁷² The main objective of establishing the ICTY and the ICTR was to restore peace and security in the territories of Rwanda and the former Yugoslavia. The unwillingness or inability of the national authorities of those regions to prosecute the perpetrators of serious international crimes was another contributing factor.¹⁷³ It was through the passing of UNSC Resolution 827 which formulated the ICTY that the UNSC made known its intent to end the crimes being committed at the time, to bring the perpetrators to book and to contribute to the restoration and maintenance of peace. Since the ICTY and the ICTR had the specific and important tasks of helping to bring peace to the former Yugoslavia and Rwanda, they needed something more than concurrent jurisdiction. That is the reason why primacy over the jurisdictions of national courts was included in the Statutes of the ICTY and the ICTR.¹⁷⁴

Without the IMT, IMTFE, ICTY and ICTR the ICC would probably still be nothing more than an idea. These predecessors have influenced the creation of the ICC and their experiences have been the foundation of the negotiations for the Court. Their existence shows that there is a need for a permanent criminal court. The Treaty of Versailles in France set the tone for an international tribunal, but none was established. Notwithstanding this, the basis for the further expansion of international criminal law was initiated. The ICTY and ICTR inspired the development of the ICC and strengthened the discussion around the jurisdiction of a permanent international court. The IMT was a part of the development of the principle of universal jurisdiction, because the judges considered that this jurisdictional link was the basis for its proceedings. It was concluded in the *Tadic case* that the primacy enjoyed by that international tribunal was imperative for it to function correctly. The ICTY and ICTR, which were non-permanent UNSC, were quite restricted in jurisdiction in respect of the crimes, territory and duration.

¹⁷¹ Appeals Decision on Jurisdiction, 36, para 58.

¹⁷² Brown B ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’ (1998) 23 *Yale Journal International Law* 398.

¹⁷³ Jelena P ‘Accountability for international crimes: From conjecture to reality’ (2002) 84 *International Review of the Red Cross* 15.

¹⁷⁴ Brown B ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’ (1998) 23 *Yale Journal International Law* 396.

2.5 The International Law Commission and the road to Rome

The end of the Cold War saw a rise in a relaxation in the awareness of human rights and a obsession with the concept of state sovereignty.¹⁷⁵ The idea of creating a permanent criminal court was included in the agenda of the UN in July 1989 since Trinidad and Tobago demanded an entry on the agenda regarding the creation of an international criminal court with jurisdiction over drug offences. The General Assembly then requested the International Law Commission (ILC) to report on the creation of an international criminal court for the prosecution of individuals engaged in drug trafficking. During this same time the ILC was also busy with formulating the Draft Code of Crimes against the Peace and Security of Mankind.¹⁷⁶ The ILC finally prepared a draft statute for an international criminal court that would have jurisdiction over all international crimes.¹⁷⁷ At a later stage the General Assembly summoned the ILC to probe further the idea of an international criminal jurisdiction and the issue of formulating an international criminal court.¹⁷⁸

In 1992 the General Assembly asked the ILC to undertake the process of drafting a statute for an international criminal court as a matter of importance.¹⁷⁹ Again in 1993, it extended the mandate. The ILC presented a report with its draft statute to the GA in 1994,¹⁸⁰ and the Assembly set up an *ad hoc* Committee to review the substantive and administrative issues arising out of the ILC's draft statute.¹⁸¹ In 1995 the General Assembly created a Preparatory Committee (Prep Com) on the Establishment of an International Criminal Court, which met between 1996, 1997 and concluded its work in April 1998.¹⁸² The PrepCom had the task to formulate a universally acceptable consolidated text of a convention for an international criminal court. The PrepCom prepared such a draft statute, and this was to be considered by a conference in Rome.¹⁸³

As stated in the previous chapter the principle of complementarity is the compromise between the balance of state sovereignty and international criminal jurisdiction, which was created after enormous debates within the PrepCom before and during the Rome Conference.¹⁸⁴ Some states

¹⁷⁵ Farbstain S 'The effectiveness of the exercise of jurisdiction by the International Criminal Court: The issue of Complementarity' (2001) 13, available at www.ecmi.de/doc/download/working_paper_12.pdf (accessed on 24 July 2017).

¹⁷⁶ General Assembly Resolution 44/39 of 4 December 1989.

¹⁷⁷ Bassiouni M 'The Statute of the International Criminal Court, A Documentary History' (1998) 16.

¹⁷⁸ General Assembly Resolutions 45/41 of 28 November 1990 and 46/54 of December 1991.

¹⁷⁹ General Assembly Resolution 47/33 of 25 November 1992.

¹⁸⁰ Report of the International Law Commission on the work of its forty-sixth session, Draft Statute for an International Criminal Court, UN GAOR, 49th Sess., Supp. No 10, at 44, UN Doc. A/49/10 (1994). [Hereinafter 1994 ILC Draft]

¹⁸¹ General Assembly Resolution 49/53 of 9 December 1994.

¹⁸² Kristina M 'The International Criminal Court: Consent, Complementarity and Cooperation' (2000) 14.

¹⁸³ Report of the Preparatory Committee on the Establishment of an International Criminal Court submitted to the Rome Conference, A/CONF.183/2, 14 April 1998.

¹⁸⁴ Farbstain S 'The effectiveness of the exercise of jurisdiction by the International Criminal Court: The issue of Complementarity' (2001) 51, available at www.ecmi.de/doc/download/working_paper_12.pdf (accessed on 24 July 2017).

were in favour of the formation of the ICC but were against an institution that would threaten their sovereignty. Other states, with numerous and non-governmental organizations, particularly from the west, wanted the court to become a wide court clothed with universal jurisdiction.¹⁸⁵ States that were concerned with ensuring respect for state sovereignty and the primacy of national jurisdiction approved the provisions that dealt with complementarity because these provisions acknowledged and touched on the concerns of these states. States and non-governmental organizations which supported the converse position were also relatively satisfied with the compromise.¹⁸⁶ Initial deliberations on the principle of complementarity began at the March-April 1996 session of the Preparatory Committee,¹⁸⁷ The 1994 draft Statute set out the principle in the preamble, which was ‘accentuating further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective’¹⁸⁸

At the 1996 PrepCom sessions, opinions varied among the delegations about the vague definitions of the principle of complementarity in the 1994 ILC Draft Statute. Due to this, the Chairman of the PrepCom requested in the beginning of the 1997 August session, that the head of the Canadian delegation, Mr John Holmes, to manage informal discussions on complementarity.¹⁸⁹ At the conclusion of the August session the PrepCom accepted the new draft article on complementarity. Additional provisions were included to this draft article and the terms ‘unwilling’ and ‘unable genuinely’ were introduced.¹⁹⁰ The progress of complementarity continued during the Inter-Sessional Meeting in Zutphen,¹⁹¹ in the final draft, and during the Rome Conference.¹⁹²

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¹⁸⁵ Farbstain S ‘The effectiveness of the exercise of jurisdiction by the International Criminal Court: The issue of Complementarity’ (2001) 51, available at www.ecmi.de/doc/download/working_paper_12.pdf (accessed on 24 July 2017).

¹⁸⁶ Holmes T ‘The principle of complementarity’, in Lee, Roy S. (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 41.

¹⁸⁷ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), United Nations General Assembly Official Records, Fifty-first Session, Supplement No. 22, A/51/22 (1996), paras. 36-41.

¹⁸⁸ 1994 ILC Draft Statute, Third paragraph, Preamble.

¹⁸⁹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), United Nations General Assembly Official Records, Fifty-first Session, Supplement No. 22, A/51/22 (1996), paras. 849.

¹⁹⁰ Decisions taken by the Preparatory Committee on the Establishment of an International Criminal Court at its fourth Session held from August 4 to 15, 1997, A/AC.249/1997/L.8/Rev.1 (1997), paras. 10-11, Article 35(2).

¹⁹¹ Preparatory Committee on the Establishment of an International Criminal Court, Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, U.N. Doc. A/AC.249/1998/L.13 (1998), paras. 41-43, Article 11.

¹⁹² Report of the Preparatory Committee on the Establishment of an International Criminal Court, *supra* note 47, Article 15.

2.6 The Rome Conference and the creation of the ICC

From 15 June to 17 July 1998, the Diplomatic Conference on the Formation of an International Criminal Court was held at the headquarters of the Food and Agriculture Organization in Rome.¹⁹³ A total of 160 states, 33 intergovernmental organizations and a coalition of 236 non-governmental organizations (NGOs) participated. The massive obstacle for members who were interested in developing a permanent international criminal court was to formulate an idea that could be acceptable and strike a balance between a court gifted with sufficient powers to be effective and the prerogative rights of states, under international law. These include the power of the state to exercise police powers and enforce penal law through their own systems of law enforcement and national courts. The principle of complementarity is the means to accomplish this balance by distinguishing and respecting the primacy of national criminal jurisdictions, while at the same time providing an avenue of recourse if states are unwilling or unable to exercise the responsibilities of primacy in good faith. This is the key to the strength of the ICC. Before the establishment of the ICC there was no universal means accessible at an international level to ensure that states efficiently investigated and prosecuted the perpetrators of the most serious crimes of international concern.

The lack of a universal means to enforce the prosecution of perpetrators led to the philosophy of immunity. The ICC a permanent international institution ready to supplement national criminal jurisdictions if they are unwilling or unable to act against the suspected perpetrators. Its establishment removes the prospect of deferral associated with the creation of *ad hoc* tribunals and the consistency of its constant presence will serve to deter would-be perpetrators from committing article 5 crimes. It must be outlined that without the principle of complementarity it would have been difficult for states to concur on the creation of a permanent international criminal court because this could have been seen as an infringement on the exercise of the sovereign prerogatives of states. Thus it is for this reason that the principle of complementarity has been described as the cornerstone of the Rome Statute, without which the establishment of a permanent court would not have been possible. It can be gleaned from the foregoing that constructing a smooth and acceptable balance such as the principle of complementarity into the Rome Statute was not a matter of coincidence; rather it was the invention of an extensive and unhurried effort on the part of those responsible for drafting and negotiating the Rome Statute to construct an instrument whose central focus would be the principle of complementarity.

¹⁹³ The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, UN. Doc. A/CONF. 183/9 (1998).

2.7 The principle of complementarity in the Rome Statute

The principle of complementarity could be defined as the activation mechanism to the ICC because it outlines which cases will be admissible before the Court. As such it is one of the critical foundations of the ICC.¹⁹⁴ It describes the relationship between the ICC and national courts. When national courts are unwilling or unable to genuinely carry out investigations and prosecutions of the most serious crimes of concern to the international community as a whole, the ICC will do it instead.¹⁹⁵ It should be outlined that the ICC in its current form cannot deal with too many cases and it was considered healthy to leave the majority of cases concerning international crimes to national courts, which can correctly assert their jurisdiction based on a link with the case on the principle of universality or on any of the other accepted forms of jurisdiction under international law.¹⁹⁶

The principle of complementarity defers to states the primary duty for the scrutinising and prosecuting the crimes set out in Article 5 of the Rome Statute.¹⁹⁷ The onus is on the national jurisdictions to ensure that justice is served and in the event of default the ICC will assert jurisdiction over the case. Ideally states would realise their obligations under international law by investigating and prosecuting every crime set out in Article 5 of the Rome Statute.¹⁹⁸ Then the ICC through the application of the principle of complementarity, acknowledging the primacy of national jurisdictions, will have no reason to intervene.¹⁹⁹ Complementarity is mentioned in the Preamble and Article 1, and in greater detail in Articles 12 to 15 and 17 to 18.²⁰⁰ It is also dealt with in Article 19 and Article 20 of the Rome Statute.

¹⁹⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Article 15.

¹⁹⁵ Rome Statute of the International Criminal Court, adopted and opened for signature 17 July 1998, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF. 183/9, 17 July 1998, [Hereinafter referred to as the Rome Statute].

¹⁹⁶ Cassese A *International Criminal Law* (2003) 285.

¹⁹⁷ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Done at Rome on 17 July 1998, (U.N. Doc. A/CONF.183/10), Final Act, Annex 1, Resolution E.,

¹⁹⁸ Rod J 'Complementing Complementarity: The principle of Complementarity in the Rome Statute of the International Criminal Court' available at www.isrcl.org/Papers/Jensen.pdf (accessed on 24 July 2017).

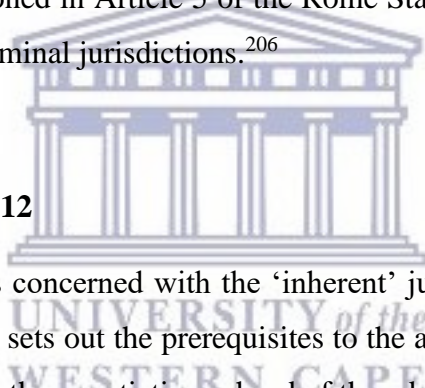
¹⁹⁹ Holmes T 'Complementarity: National Courts versus the ICC', in Cassese A, Gaeta P & Jones J 'The Rome Statute of the International Criminal Court' (2002) 667.

²⁰⁰ Farbstain S 'The effectiveness of the exercise of jurisdiction by the International Criminal Court: The issue of Complementarity' (2001) 52, available at www.ecmi.de/doc/download/working_paper_12.pdf (accessed on 24 July 2017).

2.8 Complementarity in the Preamble and Article 1

It should be noted that the Preamble is not within the functional part of the Rome Statute, this is a clear display of the function of the Court and obligations of the Rome Statute.²⁰¹ The Preamble states that ‘it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes’²⁰² This abstract from the Preamble reinforces the idea that without the intervention by states, the obligation to prosecute will be then automatically transferred to the ICC under the principle of complementarity.²⁰³

In addition in the 10th paragraph of the Preamble the concept of the principle of complementarity appears, where it reiterates the fact that the ICC, shall be complementary to national criminal jurisdictions.²⁰⁴ This demonstrates that the principle is an essential component for the smooth functioning of the ICC, and it is also the basis for complementarity in Article 17 of the Rome Statute.²⁰⁵ The principle is also part of Article 1 of the Rome Statute, which outlines that the ICC was established as a permanent institution with supremacy to exercise its jurisdiction over offenders of the most serious crimes mentioned in Article 5 of the Rome Statute. This article too underscores the complementary to national criminal jurisdictions.²⁰⁶



2.9 Complementarity in Article 12

Article 12 of the Rome Statute is concerned with the ‘inherent’ jurisdiction over the crimes in the Article 5 of the Rome Statute and sets out the prerequisites of the application of jurisdiction.²⁰⁷ This Article was highly debated during the negotiations ahead of the adoption of the Rome Statute. It is closely associated with Article 5 on the subject matter of jurisdiction, Article 13 on the enforcement of jurisdiction and with Article 17 on admissibility. These articles are concerned with the balance between state sovereignty and the appropriate functioning of the ICC. The concept of ‘inherent’ or ‘automatic’ jurisdiction is ambiguous. ‘Automatic’ jurisdiction suggests that additional permission of the court’s jurisdiction is unnecessary when states have disputed the court’s creation. ‘Inherent’

²⁰¹ Farbstain S ‘The effectiveness of the exercise of jurisdiction by the International Criminal Court: The issue of Complementarity’ (2001) 52, available at www.ecmi.de/doc/download/working_paper_12.pdf (accessed on 24 July 2017).

²⁰² Rome Statute, The sixth paragraph, Preamble.

²⁰³ Farbstain S ‘The effectiveness of the exercise of jurisdiction by the International Criminal Court: The issue of Complementarity’ (2001) 51, available at www.ecmi.de/doc/download/working_paper_12.pdf (accessed on 24 July 2017).

²⁰⁴ Rome Statute, *supra* note 62, Preamble.

²⁰⁵ Farbstain S ‘The effectiveness of the exercise of jurisdiction by the International Criminal Court: The issue of Complementarity’ (2001) 51, available at www.ecmi.de/doc/download/working_paper_12.pdf (accessed on 24 July 2017).

²⁰⁶ Rome Statute, *supra* note 64, Article 1.

²⁰⁷ Rome Statute, Article 5 and 12.

suggests that there is no necessity for state permission because the jurisdiction is already a natural and permanent part of the ICC. It is a complex concept, but when talking about ‘inherent’ or ‘automatic’ jurisdiction, reference is made to the ICC capability to try a suspect without having to depend on various states consenting to its jurisdiction.²⁰⁸

The major difference between the ICC and its predecessor, the tribunals is that the ICC was created with the approval of states that will be subject to its jurisdiction.²⁰⁹ A careful assessment of Article 12 displays the great division between negotiating parties in the Rome Conference. Views differed at the Rome Conference because some states wanted the court to have the ability to investigate and prosecute a suspect without first having to obtain state approval. These states wanted ‘inherent’ jurisdiction of the ICC.²¹⁰ On the contrary other states were of the view that the ICC should be obliged to pursue state consent in every case.²¹¹ During the final session of the Prepcom from 16 March to 3 April 1998, the Prepcom was significantly concerned with questions of jurisdiction. Four different approaches for the acceptance of jurisdiction of the ICC were discussed:

- (1) Each state party would be able to choose to or not to accept the jurisdiction of the ICC over all or some of the crimes within the ICC jurisdiction.
- (2) State consent regime, that certain states, for example the custodial state, territorial state and the nationality (active and passive) states, would have to give their consent before the ICC could exercise its jurisdiction in a specific case.
- (3) Each state party would accept the ‘inherent’ or ‘automatic’ concurrent jurisdiction of the ICC by ratification of the Statute for all the core crimes and for every situation that the ICC investigates or prosecutes.
- (4) The ICC would exercise universal jurisdiction over the core crimes, just as its state parties can do under international law.²¹²

The idea that each state party would accept the inherent or automatic concurrent jurisdiction of the ICC by ratification of the statute for all the core crimes and for every situation that the ICC investigates or prosecutes triumphed and was implemented in Article 12(1). This meant that a state which becomes a party to this statute thereby accepts the jurisdiction of the ICC with respect to the

²⁰⁸ Kristina M ‘The International Criminal Court: Consent, Complementarity and Cooperation’ (2000) 14.

²⁰⁹ William S *An introduction to the International Criminal Court* (2001) 54.

²¹⁰ Farbstain S ‘The effectiveness of the exercise of jurisdiction by the International Criminal Court: The issue of Complementarity’ (2001) 51 working paper series. available at www.ecmi.de/doc/download/working_paper_12.pdf (accessed on 24 July 2017).

²¹¹ Kristina M ‘The International Criminal Court: Consent, Complementarity and Cooperation’ (2000) 26.

²¹² Keith H ‘The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court’ (1998) 92 *The American Journal of International Law* 549.

crimes referred to in article 5. This illustrates that the ICC has ‘inherent’ or ‘automatic’ jurisdiction, which is approved by states.

There are some prerequisites to this jurisdiction. It was agreed upon in paragraph 2 of Article 12 of the Rome statute? that the ICC may exercise its jurisdiction if one of the crimes in Article 5 has been committed on the territory of a party to the statute (irrespective of the nationality of the offender), or if the accused person is a national of a state that has signed and ratified the Statute. The Rome Statute extends the definition of territory to include crimes on board a vessel or aircraft. If the acceptance of a state not party to the Statute is required under 12(2), that state can accept the exercise of jurisdiction in respect to the crime in question on *ad hoc basis*.²¹³ Palestine did that but the ICC still refused to investigate Israel’s apartheid like conduct.²¹⁴

Based on the preconditions to the exercise of ICC jurisdiction, numerous cases would be seen as being outside the ICC jurisdiction. Acceptance of the ICC’s jurisdiction by the custodial state or the state of the victim (passive personality principle), does not give the ICC jurisdiction. Consequently, if neither the territorial state nor the nationality state are parties to the Rome Statute or do not approve on an *ad hoc* basis and if there is no UNSC referral, perpetrators of the Article 5 crimes do not have to be concerned about falling within the jurisdiction of the ICC. This will be the situation even if these perpetrators would be in the custody of a state party to the Statute or of a state whose nationals have been killed by the perpetrator.²¹⁵ An example to show this is:

A Sudanese general suspected of having committed torture in Sudan as part of a widespread practice (a crime against humanity) arrives in Botswana. If:

(a) Sudan, as both the territorial state and the state of nationality of the suspect, is not a party to the Statute, and does not accept the court’s jurisdiction with respect to the crimes in question; and then even if

(b) Botswana as the custodial state is a party to the Statute or consents to the ICC jurisdiction in the particular case;

The question of the general’s guilt cannot be tried before the court.²¹⁶ Botswana courts would have jurisdiction over the case and would have to extradite or try the general because Botswana has ratified the Torture Convention.²¹⁷ However the ICC would not be competent to consider the case.

²¹³ Rome Statute, supra note 64, Article 12(3).

²¹⁴ Luban D ‘Palestine and the ICC- Some Legal Questions’ available at <http://www.justsecurity.org> (accessed 15 August 2018).

²¹⁵ Fisher H & Rolf L ‘International and National Prosecution of Crimes under International Law, Current Development’ 44 (2001) 25.

²¹⁶ Kristina M ‘The International Criminal Court: Consent, Complementarity and Cooperation’ (2000) 26.

²¹⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature by General Assembly Resolution 39/46 of 10 December 1984, 1465 U.N.T.S. 85. For ratification status,

It is not always an essential requirement that non-party states agree with the jurisdiction of the ICC for its nationals to become subject to trials before the court. Paragraph 12(2) states that if either the territorial state or the state of which the person accused of the crime is a national, accepts the jurisdiction of the court, the court can exercise its jurisdiction. If an accused person, who is a national of a state that has not accepted the court's jurisdiction, is captured in a state party to the Statute or in a state that has accepted the court's jurisdiction with respect to the alleged crime, this person could be subject of a trial before the ICC, if one of these states is the territorial state, or have accepted the court's jurisdiction on *ad hoc* basis.²¹⁸

An example is An American serviceman has committed war crimes of a serious nature on a large scale in Iraq. If:

- (a) The United States has failed to genuinely prosecute him for the crimes; and
- (b) Neither the United States nor Iraq is a party to the Statute but Iraq decides to accept the court's jurisdiction with respect to the crime in question; then the court would have jurisdiction over the case.²¹⁹

The USA had long started an opposition crusade to the Rome Statute before its inception in July 2002. It claimed that the court could be exploited as an instrument for politically motivated prosecutions against nationals of the USA. One aspect of this crusade was to formulate bilateral immunity agreements with countries to prohibit the submission of USA citizens to the ICC. The USA went on to hold the assertion that bilateral agreements are based on Article 98 of the Rome Statute.²²⁰ This article was intended to avert potential inconsistencies that can emerge out of previously existing agreements, which obliges states to return foreign nationals when a crime allegedly has been committed, and cooperate with the court.²²¹ The second paragraph of the Article deals with these possible discrepancies in harmony with the principle of complementarity, though it gives the country of the accused the first opportunity to investigate and prosecute an alleged crime of genocide, war crimes or crimes against humanity.²²² When critically analysing the USA stance on the bilateral agreements it becomes clear that it is conflicting with the original intention of the drafters Rome Statute's drafters, the language of Article 98 itself and with the overall purpose of the ICC. The onus is on the ICC to decide if these agreements are valid or not, but most likely the court

available at www.untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp, (accessed on 24 July 2004 2017).

²¹⁸ Kristina M 'The International Criminal Court: Consent, Complementarity and Cooperation' (2000) 25.

²¹⁹ Kristina M 'The International Criminal Court: Consent, Complementarity and Cooperation' (2000) 25.

²²⁰ Coalition for the International Criminal Court's website, 'U.S. Bilateral Immunity or so-called "Article 98" Agreements' available at www.iccnw.org/pressroom/factsheets/FS-BIAsSept2003.pdf, (accessed on 24 July 2017).

²²¹ Coalition for the International Criminal Court's website, 'US and the ICC' available at www.iccnw.org/documents/usandtheicc.html (accessed on 24 July 2017).

²²² Ibid.

will declare them invalid because it seems that the United States has manipulated in Article 98 in a way that was not meant by the drafters of the Statute.

2.10 Complementarity in Article 13

During the Rome conference many states wanted the ICC Prosecutor to have similar independence as the Prosecutor of the ICTY and ICTR to begin investigations, in the event a state or the UNSC brings a situation to the Prosecutor's attention.²²³ This was implemented in Article 13 of the Rome Statute and hence the ICC was able to exercise its jurisdiction by referrals from states or the UNSC through the Prosecutor. It could also do this through *proprio motu* investigations initiated by the Prosecutor. Article 13 highlights the circumstances for referral to the Prosecutor by the UNSC, acting under Chapter VII, of a situation in which one or more of the crimes in Article 5 appears to have been committed. When the UNSC refers a situation to the ICC, the ICC powers concerning territorial and nationality limitations on jurisdiction in Article 12 increases. No state consent is required, not even from nationals of states not party to the Statute. The ICC is then fully capable of exercising jurisdiction over the case, in a similar manner to the permanent *ad hoc* Tribunals as the ICTY and the ICTR.²²⁴

The Prosecutor can start *proprio motu* investigation by examining the seriousness of evidence received and concluding that it is sufficient information to continue with an investigation. He must then submit a request for the authorization of an investigation to the Pre-Trial Chamber.²²⁵ Numerous *proprio motu* investigations began based on information given to the Prosecutor by victims.²²⁶ There are three aspects that the Prosecutor must deliberate on before determining whether there is a reasonable basis for starting an investigation, and there are: (1) that a crime within the ICC's jurisdiction has been or is being committed; (2) that the case would be admissible under the complementarity regime in article 17; and (3) that the case would serve the interests of justice.²²⁷ The second aspect, that the case would be inadmissible under the complementarity regime under article 17, demonstrates the significance of the principle of complementarity, even in the commencement of the proceedings.²²⁸ The *proprio motu* role of the Prosecutor is to certify cases that come before the court, because states can be reluctant for different reasons to submit cases to the court and further that any one of the 5 permanent members in the UNSC can use its veto-power

²²³ Keith H *The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court* (1998) 549.

²²⁴ Stojanka M 'Global Policy Forum, Why the International Criminal Court is Different', available at www.globalpolicy.org/intjustice/icc/2004/0126different.htm (accessed on 18 July 2025).

²²⁵ Rome Statute, Article 13(c) and Article 15.

²²⁶ Holmes T 'Complementarity: National Courts versus the ICC' in Cassese A; Gaeta P and Jones J (ed) *The Rome Statute of the International Criminal Court: A Commentary* (2002) (1) 667.

²²⁷ Rome Statute, Article 53.

²²⁸ Holmes T 'Complementarity: National Courts versus the ICC' in Cassese A; Gaeta P and Jones J (ed) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 680.

stop a certain motion from being passed that can prevent a case from further investigation. Article 13 is an important element of the jurisdiction calculus and the complementarity regime. The court may exercise jurisdiction over the Article 5 crimes under this article, and it strikes a balance between state sovereignty and the imperative trigger mechanisms that permits the ICC to exercise jurisdiction over cases involving gross human rights violations.²²⁹

A further obstacle for the Prosecutor is found in Article 18 of the Rome Statute, which is concerned with preliminary rulings regarding admissibility. It comprises an extensive list of prerequisites that the Prosecutor must verify before commencing an investigation. An example of such a prerequisite is the requirement that all state parties and those states, which would normally exercise jurisdiction over the crimes concerned, will submit information at an early stage about the referral of a situation to the prosecutor by a state party, and that the prosecutor has concluded that a reasonable basis exists to start an investigation or the prosecutor has initiated a *proprio motu* investigation.²³⁰

This article introduces an extra step on the complementarity principle, which reveals a definite case has been recognized.²³¹ Article 18 is based on a suggestion from the USA.²³² The USA was sceptical about a possible politically motivated prosecutor and had the view that it was rational that ‘when an investigation of an overall situation is initiated, relevant and capable national governments be given an opportunity under the principle of complementarity to take the lead in investigating their own nationals or others within their jurisdiction.’²³³ This article can be explained ‘as a further procedural filter to the benefit of states’ sovereignty.’²³⁴

2.11 Complementarity in Article 17

Article 17 of the Rome Statute is concerned with the matter of admissibility and is at the heart of the principle of complementarity. The article clearly refers to the Preamble and Article 1, and it outlines the practical application the principle of complementarity.

Article 17 states that the ICC cannot declare its jurisdiction over a case, when a state is investigating or prosecuting the crimes in Article 5 in good faith, which demonstrates that the ICC is

²²⁹ Farbstein S ‘The effectiveness of the exercise of jurisdiction by the International Criminal Court: The issue of Complementarity’ (2001) 63, available at www.ecmi.de/doc/download/working_paper_12.pdf (accessed on 24 July).

²³⁰ Rome Statute, Article 18(1).

²³¹ Holmes T ‘Complementarity: National Courts versus the ICC’ in Cassese A; Gaeta P and Jones J (ed) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 680.

²³² Proposal Submitted by the United States of America: Preliminary rulings regarding admissibility, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1998/WG.3/DP.2.

²³³ David J ‘The United States and the International Criminal Court’, *The American Journal of International Law* (1999) 12 15.

²³⁴ El Zeidy MM ‘The principle of complementarity: A new machinery to implement international criminal law’ (2002) *Michigan Journal of International Law* 870 900.

complementary to national criminal jurisdictions.²³⁵ Paragraph (1)(a) of Article 17 mentions that a case is inadmissible, when ‘the case is being investigated or prosecuted by a state that has jurisdiction over it, unless the state is unwilling or unable to genuinely carry out the investigation or prosecution’. Paragraph (1) (b) gives another reason for declaring a case inadmissible, and that is if the case has been investigated by a state that has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute. A third ground for determining whether a case is inadmissible is if the accused person already has been subject to a trial for the same offence, and a fourth ground is if the case is not of such gravity that it is justified for the ICC to try it.²³⁶ Since Article 17 states that ‘the ICC shall determine that a case is inadmissible’, it is up to the ICC to determine, based on its interpretation and application of the Statute, whether a state is willing and able to carry out the investigation or prosecution. The two terms ‘unwilling’ and ‘unable’ are explained in paragraphs 2 and 3 of Article 17, but it falls totally within the competence of the Court as to how to interpret the term ‘genuinely’.²³⁷ The term ‘genuinely’ is linked to both the ‘unwillingness’ and the ‘inability’, because the court must be satisfied that the willingness or in ability to investigate or prosecute a case was not genuine.²³⁸

When a national justice system is unwilling to openly resume the investigative and prosecution roles without a genuine intention to fulfil that function in reality, or when it embarks on sham trial just to prevent the accused from further trials because of the rule of a double threat.²³⁹ Unwillingness also occurs when there has been an unwarranted delay in the proceedings, which actually shows that the national authorities have no intention to render justice and bring the accused person to trial. In addition when there exists no independence or fairness in the proceedings or in any other case when the manner in which the case is handled reveals that there is no intent to bring the accused to justice.²⁴⁰ A great illustration of unwillingness is likely to occur is when a government that has committed gross human rights violations is still in power such as the Al bashir regime in Sudan.²⁴¹

Inability as captured in the Statute can manifest in a situation where there is a failure of the institution of a state including the judicial ones. The state can be willing to investigate or prosecute,

²³⁵ Farbstein S ‘The effectiveness of the exercise of jurisdiction by the International Criminal Court: The issue of Complementarity’ (2001) 51, available at www.ecmi.de/doc/download/working_paper_12.pdf (accessed on 24 July 2017).

²³⁶ Rome Statute, Article 17(1)(c) and (d).

²³⁸ William S *An introduction to the International Criminal Court* (2001) 67.

²³⁹ William S *An introduction to the International Criminal Court* (2001) 71.

²⁴⁰ Cassese A *International Criminal Law* (2003) 352.

²⁴¹ Kristina M *The International Criminal Court: Consent, Complementarity and Cooperation* (2000) 68.

but it does not have the ability to do so especially those states whole are experiencing internal armed conflicts.²⁴² A state is unable to carry out the investigation or prosecution, when it cannot obtain the accused person, the necessary evidence and testimony or any other reason for inability. Another example occurs when national legislation makes it impossible for the judge to initiate proceedings against an accused person because of, for example, an amnesty law or a statute of limitation.²⁴³ Inability will also be likely to occur when there is lawlessness or serious chaos within a state, and in situations in which the government does not have control over its security cluster agencies this can lead to civil unrest.

A state cannot completely determine that its nationals will not become subjects to trials in other states, and due to that it cannot be certain that its nationals will not become subject of a trial in front of the ICC. Since Article 17 makes use of the term ‘state’ and not state party’, this means the article can be applicable to states that are not party to the Rome Statute. When making reference to the example of a USA military personnel accused of committing war crimes on the territory of Iraq. If the military personnel is captured in Iraq, the ICC would not have jurisdiction over the case because neither the US nor Iraq have ratified the Rome Statute. This situation changes if Iraq decides to accept the jurisdiction of the ICC over war crimes on an *ad hoc* basis under to Article 12(3). If Iraq is unwilling or unable to genuinely investigate or prosecute the case, the principle of complementarity steps in and the ICC has jurisdiction over the USA national. It is worth noting that the above position of Article 17 referring to the term ‘state’ and not state party’ is against both the Vienna convention and customary international principle that a treaty cannot be used to impose rights and obligations on non- parties. In an attempt to prevent the implementation of jurisdiction by the ICC the USA government could make sure that the crimes in Article 5 of the Rome Statute are crimes within its national criminal legislation. Furthermore it can investigate and prosecute every potential breach of those crimes within its own legislation. By taking such action the USA government determines that none of its citizens will become subject to trial in front of the ICC, because the principle of complementarity makes the case inadmissible before the ICC. It can be debated that even if the USA conducted an investigation, as a non-party to the Rome Statute, the ICC could choose under the principle of complementarity that this investigation was not genuine and establish its own investigation, despite the fact that the USA is not obliged to cooperate with the ICC because it has not ratified the Rome Statute.²⁴⁴ The USA has little to fear here. If the USA is investigating and prosecuting violations of the crimes in Article 5 in good faith, it will be very

²⁴² Holmes T ‘Complementarity: National Courts versus the ICC’ in Cassese A, Gaeta P & Jones J *The Rome Statute of the International Criminal Court* (2002)1 667.

²⁴³ Cassese A *International Criminal Law* (2003) 284.

²⁴⁴ David J ‘The United States and the International Criminal Court’ *The American Journal of International Law* (1999)15.

hard, almost impossible, for the ICC to prove that the USA is unwilling or unable, and the principle of complementarity will not provide the ICC with jurisdiction.

In an example where a UN peace keeper from India commits war crimes in a state that has ratified the Rome Statute, and then he runs and seek refuge in DRC where he is later captured. The DRC has accepted the jurisdiction of the ICC on *ad hoc* basis for the crime in question. The ICC would not have jurisdiction over the UN peace keeper if the DRC government claims jurisdiction over the case on the basis that the crime is provided for in an international treaty and that the suspect is currently in the territory of DRC, or on the ground of universality. Furthermore if the DRC displays in good faith that they are willing and able to conduct an appropriate and impartial trial the ICC may not exercise its jurisdiction because of the principle of complementarity.²⁴⁵ In a situation where DRC is unwilling or unable to investigate or prosecute the case, then the question that lingers on is if the complementarity principle applies to the exercise of the principle of universal jurisdiction or if it only applies to the exercise of territorial jurisdiction? The Rome Statute is not specific which kind of national system the ICC should consider in this situation but the ICC will most likely have jurisdiction if the crime was committed on the territory of a state party or if the criminal is a national from a state party.²⁴⁶ The UN peace keeper from India will not be subject to a trial on the basis of universality in front of the ICC since India is not a member state to the Rome Statute. In addition, the principle of complementarity is applicable when the territorial state or the state of the nationality of the suspected perpetrator are parties to the Rome Statute or when a state consent to the ICC's jurisdiction on an *ad hoc* basis or there is a UNSC referral.

2.12 Complementarity in Article 20

Article 20 of the Rome Statute continues to address the matter of inadmissibility, the principle of *ne bis in idem*. It is a regular consequence of the principle of complementarity in Article 17, because it also prevents the ICC from implementing its jurisdiction when a domestic court already has declared its jurisdiction. Article 20 focuses on cases that have been tried, whereas Article 17 deals investigations and prosecutions. The first paragraph of Article 20 states 'except as provided in this Statute, no person shall be tried before the court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the court.' There is two omissions to this provision: if the proceedings were for the purpose of shielding the person concerned, or if the proceedings were not otherwise conducted 'independently or impartially in accordance with the values of due process acknowledged by international law and were conducted in a manner which, in

²⁴⁵ David J 'The United States and the International Criminal Court' *The American Journal of International Law* (1999)19.

²⁴⁶ Holmes JT 'Complementarity: National courts versus the ICC' in A. Cassese A, Gaeta p (ed) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 672.

the circumstances, was inconsistent with an intent to bring the person concerned to justice.’²⁴⁷ This provides the ICC to supplement those given in Article 17 to define complementarity.²⁴⁸

2.13 Universal jurisdiction definition

The principle of universal jurisdiction is classically defined as ‘a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim’.²⁴⁹ This principle is based on the notion that certain crimes are so harmful to international interests that states are entitled – and even obliged to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim’.²⁵⁰ Universal jurisdiction allows for the trial of international crimes committed by anybody, anywhere in the world. This derogation is traditionally justified by two main ideas.²⁵¹ First, there are some crimes that are so grave that they harm the entire international community. Secondly, no safe havens must be available for those who committed them. Even though these justifications may appear unrealistic, they clearly explain why the international community, through all its components states or international organizations must intervene by prosecuting and punishing the perpetrators of such crimes.²⁵²

As the principle of universal jurisdiction is an issue not only of international but also of national law. States are entitled to grant their own courts universal jurisdiction over certain crimes as a result of a national decision, and not only of a rule or principle of international law. Consequently, the universal jurisdiction principle is not uniformly applied everywhere. While a hard core does exist, the precise scope of universal jurisdiction varies from one country to another, and the notion defies homogeneous presentation. Universal jurisdiction is thus not a unique concept but could be represented as having multiple international and national law aspects that can create either an

²⁴⁷ Rome Statute, Article 20(3).

²⁴⁸ Nikola G ‘National State and International Criminal Justice – How much sovereignty has to be transferred?’ *National Security and International Criminal Justice* (2002) 99.

²⁴⁹ Randall KC ‘Universal jurisdiction under international law’ (1988) 66 *Texas Law Review* 785–788.

²⁵⁰ Robinson M *Foreword, The Princeton Principles on Universal Jurisdiction* (2001) 16.

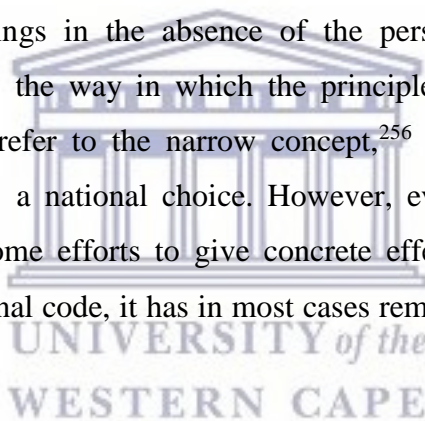
²⁵¹ International crimes are not precisely defined. There are offences recognized by international law as punishable by any country. Traditionally, piracy on the high seas is regarded as one of the first international crimes, grounded on the violation of international customary law. After the Second World War, the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg set out international crimes issuing from both treaty law and customary law (crimes against peace, war crimes and crimes against humanity). Later, treaties and international conventions specified Volume 88 Number 862 June 2006, various forms of prohibited behaviour recognized as international crimes. Principle 2 of The Princeton Principles on Universal Jurisdiction reads: 1. For purposes of these Principles, serious crimes under international law include (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture. 2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law’

²⁵² Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences’ (2000) 2. It should be noted that the principle of universal jurisdiction is not per se limited to criminal jurisdiction and could be extended, for instance, to civil responsibility.

obligation or an ability to prosecute. It is therefore difficult to gain a clear picture of the overall situation.

2.14 Implementation of universal jurisdiction

The recognition of universal jurisdiction by the state as a principle is not sufficient to make it an operative legal norm. There are basically three necessary steps to get the principle of universal jurisdiction working: the existence of a specific ground for universal jurisdiction, a sufficiently clear definition of the offence and its constitutive elements, and national means of enforcement allowing the national judiciary to exercise their jurisdiction over these crimes. If one of these steps is lacking, then the principle will most probably just remain a pious wish.²⁵³ In practical terms, the gap between the existence of the principle and its implementation remains quite wide. From a comparative law perspective, states implement the principle of universality in either a narrow or an extensive manner.²⁵⁴ The narrow concept enables a person accused of international crimes to be prosecuted only if he or she is available for trial, whereas the broader concept includes the possibility of initiating proceedings in the absence of the person sought or accused (trial in absentia).²⁵⁵ This deeply affects the way in which the principle is implemented in actual fact. International law sources often refer to the narrow concept,²⁵⁶ but the decision to refer to the broader concept is quite often a national choice. However, even though some states such as Belgium or Spain have made some efforts to give concrete effect to the principle of universal jurisdiction by amending their penal code, it has in most cases remained unimplemented, thus more theoretical than practical.



²⁵³ The following fourteen principles are usually accepted as the guiding principles on universal jurisdiction. They have been inspired by the Princeton principles, above note 2, and are also referred to by non-governmental organizations (NGOs) promoting the principle of universal jurisdiction. See Amnesty International, 'Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction', May 1999, AI Index: IOR 53/01/99: 1. State courts should be able to exercise jurisdiction over grave human rights violations and abuses and violations of international humanitarian law 2. No immunity for persons in official capacity 3. No immunity for past crimes 4. No statutes of limitation 5. Superior orders, duress and necessity should not be permissible defences 6. National laws and decisions designed to shield persons from prosecution cannot bind courts in other countries 7. No political interference 8. Grave crimes under international law must be investigated and prosecuted without waiting for complaints of victims or others with a sufficient interest 9. Internationally recognized guarantees for fair trials 10. Public trials in the presence of international monitors 11. The interests of victims, witnesses and their families must be taken into account 12. No death penalty or other cruel, inhuman or degrading punishment 13. International co-operation in investigation and prosecution 14. Effective training of judges, prosecutors, investigators and defence lawyers.

²⁵⁴ Cassese A *International Criminal Law* (2003) 285.

²⁵⁵ On this issue of trial in absentia see the ICJ case Democratic Republic of Congo v. Belgium, Warrant Arrest 11 April 2000 Case, 14.02.02. ICJ Rep. 2002.

²⁵⁶ The four Geneva Conventions of 1949 and 1977 Additional Protocol I thereto regarding grave breaches of those Conventions (i.e. of international humanitarian law) or Article 7 of the Convention against Torture. The narrow concept seems to be given preference by a number of international treaties as being more realistic.

2.15 The relationship between the principle of universal jurisdiction and the principle of complementarity

The principle of complementarity as expressed in the ICC Statute should be seen as a protective place allowing for rationalization and the improved efficiency of the principle of universal jurisdiction. The principle of complementarity considers two functioning principles of international law, namely the principle of state sovereignty and the principle of primacy of action regarding criminal prosecutions.²⁵⁷ Second, the principle of complementarity offers the state the right to exercise universal jurisdiction and to decide what to do with the perpetrator according to its own penal rules. Quoting the President of the Rome Conference, regarding the penalties that could be imposed on those who commit international crimes, 'in accordance with the principle of complementarity between the ICC and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws for crimes falling under the jurisdiction of the ICC'.²⁵⁸

The principle of complementarity must be looked at from many different angles and applied accordingly. It may not provide answers and solutions in all the efforts of the international community or individual states to try perpetrators of international crimes. Its intentions are to assist states and the international community, through the Rome Statute, to apply and enforce the principle of universal jurisdiction. It can be seen as a procedural tool empowering the international community to ensure the implementation of the initiative if states are unable or omit to exercise their jurisdiction. The principle of complementarity is intended to offer states and the international community a possible solution when the absence of trial or punishment for international crimes would be unacceptable. That possibility would curb the mentality perpetrators have that no prosecution will be conducted against them. It is not certain that effective prosecution will be initiated, but they will have to live with the thought that prosecution is highly possible. Although this is probably not enough to stop those who commit war crimes, crimes against humanity, genocide or any other international crime, at least the mechanism does exist and should be backed up as a means of progress towards a better implementation of international humanitarian and human rights law.

²⁵⁷ This is an integral part of the ICC Statute. As outlined by some authors (see Kittichaisaree K *International Criminal Law* (2001) 25. this was not the case for the ICTY and the ICTR, since their statutes provided for primacy of the international ad hoc Tribunal and complementarity or at least concurrent jurisdiction for the national courts. Under the ICC Statute the system is inverted.

²⁵⁸ Rome Conference press release L/ROM/22, 17 July 1998. The statement was made in relation to the possibility for states to impose the death penalty for these types of crimes. According to Article 80 of the Statute, this question is left to the state's own legal system and is not affected by the ICC Statute; it is not directly connected to jurisdiction but shows how procedural aspects and the overall criminal justice system are linked to the issue of jurisdiction.

The principle of complementarity could also help to come up with solutions for some predicaments that are related to diplomatic or political problems, and not necessarily due to legal failures. The principle of complementarity also offers an alternative solution to internal legal predicaments. Even though universal jurisdiction is the responsibility of the state, the internal legal or political system can make the assertion of jurisdiction impossible for reasons outside the state's volition. If the state considers its jurisdiction impossible to exercise, the principle of complementarity offers a possibility of handing it over. Universal jurisdiction can then be regarded as initiated by states through an active use of that principle.²⁵⁹ For instance, of the cases brought before the ICC by the end of 2005,²⁶⁰ three revealed the state's incapacity to prosecute people suspected of international crimes.

In those cases (the Democratic Republic of the Congo, Uganda and the Central African Republic) the matter was referred directly to the ICC by the state, which considered that trials of such criminals before its own courts would be impossible; the latest case Sudan was referred to the ICC by the UNSC. In all these cases the Prosecutor did not himself initiate the prosecutions, showing that the principle of complementarity cannot be seen as a one-way principle but rather as offering possibilities of co-operation between the state authorities and the ICC. In terms of the overall situation, the principle of complementarity represents progress towards the prosecution of international crimes and should rule out any hope of getting away with crimes for those who have committed them. Yet it would certainly be a huge mistake to see the principle of complementarity as a final solution to the inadequacies of universal jurisdiction. It should instead be regarded as an interim stage in improving the situation rather than as a definitive achievement. It is a means, not a goal! Like any other means, it needs political will to be effective and efficient. Moreover, the principle itself is not without loopholes and disadvantages.

2.15 Conclusion

There are numerous institutions that contributed to the birth of the principle of complementarity. The IMT, the IMTFE, the ICTY and the ICTR contributed greatly to the creation of the Rome Statute and the principle of complementarity. The international community's uneasiness about the carnage committed in the former Yugoslavia and Rwanda, led to the creation of the ICTY and ICTR as an attempt to prevent future atrocities from happening, furthermore it can be said that the creation of the ICC has contributed to the stimulating of the universal jurisdiction concept. The ICC lacks the primacy that the ICTY and ICTR enjoyed. The application of the complementarity

²⁵⁹ As opposed to a 'passive use of the principle of complementarity' in which the state will not take any initiative if unable or unwilling to try the perpetrators of international crimes. A positive attitude will show the concern of states to try those criminals, seeking to find through the ICC the structure and means they do not have.

²⁶⁰ On these cases see <http://www.icc-cpi.int/cases.html> (accessed 17 July 2018).

principle is strictly distinctive to the ICC and the Rome Statute. The establishment of the ICTY and the ICTR as *ad hoc* institutions was a brilliant step towards minimizing the occurrence of the three core crimes, yet it should be noted that the tribunals were limited in territory, crimes and duration. The inventors of the ICC deliberately limited the primacy of the ICTY and the ICTR. It is for this reason that when the ICC was finally established its inventors omitted the primacy over national courts. This was intended to protect state sovereignty. It was essential for many states that national jurisdictions would have primacy over an ICC. In the final days before the investors of the ICC finalised the formulation of the ICC they had to find a way that the ICC could relate to national jurisdictions and the answer was the principle of complementarity.

The complementarity principle gives national jurisdictions primacy. It only provides the ICC with jurisdiction when national jurisdictions are unwilling or unable to investigate or prosecute. The complementarity principle hampers the transfer of universal jurisdiction from states to the ICC, but it inspires the implementation of universal jurisdiction in national legislation. The Rome Statute does not impose any obligation on state parties to prosecute the crimes in Article 5 of the Rome Statute on a universal or any other basis. Rather, the complementarity principle provides an incentive for states to investigate or prosecute these crimes, by providing a complementing criminal institution, which will do so when states fail. This aspect of the Rome Statute has led to a growing trend of legislative reforms in several countries, because of the principle of complementarity.

The complementarity principle gives jurisdiction over crimes committed on the territory of a state party or by nationals of state parties to the Rome Statute; the use of universal jurisdiction might prove to be highly effective. It is highly unlikely that the ICC can handle every case concerning the crimes within the jurisdiction of the court when the territorial state of the crime or the national state of the accused for some reasons are unwilling or unable to prosecute in a genuine manner. Then, rather than allowing impunity to prevail; universal jurisdiction can fill the gap. Universal jurisdiction could be an effective tool to discourage and prevent serious international crimes by increasing the chance of prosecution and punishment of the perpetrators and reducing impunity for these crimes.

Chapter Three - Implementation of the complementarity principle as outlined in the Rome Statute

3.1 Introduction

The previous chapter analysed the origin of the concept of the complementarity and provided a detailed perspective of the development and current understanding of the principle of complementarity in relation to national and international jurisdiction. Furthermore, the chapter drew the principle of complementarity upon the first attempts of international prosecution of core crimes, after the First World War,²⁶¹ the Leipzig, Nuremberg and Tokyo Trials which established the basis for the groundwork of the permanent ICC on 25 January 1919 the Preliminary Peace Conference began in Paris.²⁶² The previous chapter also examined the post-Rome developments, particularly the original interpretations of the relevant provisions of the Rome Statute by both the Office of the Prosecutor and the Pre-Trial Chambers.²⁶³

This current chapter discusses issues of admissibility of cases before the ICC. The points for admissibility, namely complementarity, double jeopardy (*ne bis in idem*) and gravity, are therefore analysed. Further, the preliminary rulings regarding admissibility and challenges to jurisdiction and admissibility are considered in this chapter. Furthermore the rationale for implementing legislation will be outlined since this chapter acknowledges that the Rome Statute does not expressly oblige states to enact implementing legislation.

The chapter will also expand on discussions of cooperation legislation. Although the Rome Statute requests states to cooperate fully with the ICC, there is no precise provision requiring them to adopt cooperation legislation. This means that states may use pre-existing cooperation mechanisms. In this chapter, it is argued that existing cooperation mechanisms like extradition rules cannot be relied on by states because the cooperation regime under the Rome Statute is different from extradition procedures that exist between states. Therefore cooperation legislation is important, not least for the sole purpose of cooperating fully with the ICC, but also for states to benefit from the 'reverse' cooperation regime introduced in Article 93(10). The chapter extends to examine complementarity legislation and concludes by making an analysis of how South Africa adopted its implementing

²⁶¹Leibman L 'From Nuremberg to Bosnia: Consistent application of international law' (1994) 42 *Cleveland State Law Review* 705

²⁶² The International Military Tribunal of Nuremberg was established through the London Agreement, signed by the four Allies (the United States, the Soviet Union, Great Britain and France) in August 1945; the International Military Tribunal for the Far East (the 'Tokyo Tribunal') was created by the unilateral initiative of General Mac Arthur in January 1946. For a detailed description of the history, activity and the critics addressed to the International Military Tribunals, see, Von Hebel H 'An International Criminal Court a Historical Perspective in H. Von H Hebel JG, Schukking J & (ed) *Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos* (1999) 18-22.

²⁶³ The Statute of the Iraqi Special Tribunal has many provisions that have their origin in the statutes and jurisprudence of the IMT, IMTFE, ICTY, ICTR and ICC. The Statute is available at www.cpa-iraq.org/human_rights/Statute.htm (accessed on 2 July 2015).

legislation forms the basis of the discussion and concludes by reviewing the possible withdrawal of the South Africa from the ICC.

3.1.2 The concepts of jurisdiction and admissibility

The Rome Statute distinguishes between two related concepts; jurisdiction and admissibility. Jurisdiction refers to the legal parameters of the ICC's operations in terms of subject matter (jurisdiction *ratione materiae*),²⁶⁴ time (*ratione temporis*),²⁶⁵ and space (*ratione loci*) as well as individuals (*ratione personae*).²⁶⁶ The preconditions to the exercise of jurisdiction by the ICC are prescribed in Article 12. This article stipulates that the ICC may exercise jurisdiction over crimes committed on the territory of a state party or by nationals of states parties to the Rome Statute. The ICC may also exercise jurisdiction over non-party states who have made an Article 12(3) declaration accepting the jurisdiction of the ICC over crimes committed in their territories.²⁶⁷ Situations in the territories of states non-party to the Rome Statute may also come under the jurisdiction of the ICC where such situations are referred to it by the UNSC acting under its Chapter VII powers of the United Nations Charter.²⁶⁸ Consequently, jurisdiction only identifies the scope of the ICC's legal authority over a situation.

Admissibility on the other hand relates to when the ICC can effectively try a matter over which it has jurisdiction. Considerations of admissibility arise after the ICC has upheld jurisdiction. For this reason, jurisdictional provisions (articles 5-16) logically precede those on admissibility (articles 17-19),²⁶⁹ since if the ICC does not have jurisdiction over a situation, there is no need to conduct an admissibility analysis. On the other hand, the ICC may have jurisdiction over a situation, yet the matter will be inadmissible if certain conditions are not met.²⁷⁰ The admissibility criteria are contained in Article 17, which states: Having regard to paragraph 10 of the Preamble and article 1, the ICC shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;

²⁶⁴ Rome Statute, Articles 5-8 stipulate the Crimes within the Jurisdiction of the ICC.

²⁶⁵ Rome Statute, Article 11 refers to crimes committed after the entry into force of the Statute; which suggests that the Rome Statute cannot be applied retroactively.

²⁶⁶ Schabas W *An Introduction to the International Criminal Court* 3 ed (2007) 175.

²⁶⁷ Cote d'Ivoire and the Palestinian National Authority made such declarations in 2003 and 2009 respectively.

²⁶⁸ Rome Statute, Article 13(b). The referrals of the situations in Darfur Sudan and Libya to the ICC in 2005 and 2011 respectively are examples.

²⁶⁹ Rynjaert C 'Horizontal Complementarity' 874.

²⁷⁰ Schabas W *An Introduction to the International Criminal Court* 3 ed (2007) 175.

- (b) The case has been investigated by a state which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the ICC is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the ICC.²⁷¹

The abovementioned reveals four conditions in which a case will be inadmissible and the ICC is expected to defer to a national proceeding.²⁷² The conditions are: (a) a domestic investigation or prosecution is in progress; (b) a domestic investigation has been completed with a decision not to prosecute; (c) a trial has been completed or (d) the case is deemed not to be sufficiently serious.²⁷³ Admissibility criteria could thus be broadly categorised into two. First, the ICC must carry out an assessment of the national justice system to see whether a state could reasonably be expected to investigate or prosecute genuinely. Second, the ICC must determine that the matter indeed warrants its intervention.²⁷⁴ This implies that the ICC may decide not try a case which comes under its jurisdiction due to other considerations.

3.1.3 The fundamentals of complementarity

Presently, there are no parameters by which complementarity can be evaluated. This is because the jurisprudence of the ICC to date does not encompass an analysis or interpretation of all the components of complementarity. For example, in the *Lubanga* case, the ICC interpreted the phrase ‘case is being investigated’ in Article 17(1) (a). Consequently, the Pre-Trial Chamber I (PTCI) formulated and applied the ‘same person same conduct’ test to decide that for a case to be inadmissible before the ICC, investigations at the national level must encompass the same person and the same conduct for which the suspect is being tried before the ICC.²⁷⁵

The ‘same person same conduct’ test has been applied by the ICC in other cases to reject the admissibility challenge by states.²⁷⁶ In the *Muthaura et al* case, the Appeals Chamber noted that the

²⁷¹ Rome Statute Art 17 (1).

²⁷² Scheffer D & Cox A ‘The Constitutionality of the Rome Statute of the International Criminal Court’ (2008) 98 *JCLC* 3.

²⁷³ Rome Statute, Article 17(1) (d).

²⁷⁴ *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor’s Application for a Warrant of Arrest, ICC-01/04-01/06 10 February 2006, para 29.

²⁷⁵ *The Prosecutor v Thomas Lubanga Dyilo*, Decision concerning Pre-Trial Chamber I Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06-8-Corr.

²⁷⁶ *The Prosecutor v Germain Katanga* ICC-01/04-01/07-1497 OA 8 (Oral Decision of the Trial Chamber II of 12 June 2009 on the Admissibility of the Case) para 81-82; *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-

'same person same conduct' test does not compel a prosecution or conviction of a particular person by national authorities. Rather it compels only a genuine investigation or prosecution of that person.²⁷⁷ Thus under Article 17(1)(a), the first question is whether the same case is being investigated by both the ICC and a national jurisdiction.²⁷⁸ Consequently, Kenya's argument that it was investigating suspects in the 'same hierarchical level' with those indicted by the ICC failed to establish that it was investigating the same suspects as the ICC.²⁷⁹

In the decision of the PTCI of 31 May 2013 in the *Saif Al-Islam Gaddafi* case,²⁸⁰ the phrase 'case being investigated' was again considered and the 'same person, same conduct' test was applied but adjusted to 'substantially' the same conduct.²⁸¹ The PTCI did not consider the element of unwillingness. According to the Chamber, consideration of 'unwillingness' was not necessary at the admissibility challenge stage since the Chamber found that Libya was unable genuinely to investigate and prosecute the suspect not least because of its inability to apprehend him.²⁸²

From the jurisprudence of the ICC it appears that the problem of overlap between national and international jurisdictions has been given an abstract solution through the complementarity regime without an interpretive guide.²⁸³ This is because as noted by the Appeals Chamber in the *Katanga* case,²⁸⁴ in considering whether a case is inadmissible under Article 17(1) (a) and (b), two questions must be asked. The first is empirical; whether there are on-going investigations or prosecutions at the domestic level. The second is whether there have been investigations in the past and the state having jurisdiction has decided not to prosecute the person concerned.²⁸⁵ It is only when these questions are answered in the affirmative that an examination of unwillingness and inability becomes necessary.²⁸⁶ As both elements, along with genuineness and sufficient gravity, are separate from the consideration of whether or not an investigation is being carried out, it is important to see how the ICC would evaluate these elements, in the event that an admissibility challenge is brought on the basis of one of them.

02/05-01/07-1-Corr, para. 24; *The Prosecutor v. Mathieu Ngudjolo Chui*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, 6 July 2007, ICC-01/04-01/07-262, para. 21.

²⁷⁷ *Muthaura et al* case, para 31.

²⁷⁸ *Muthaura et al* case, para 36, 40 & 41.

²⁷⁹ *Muthaura et al* case, para 41.

²⁸⁰ *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Hussein* ICC-01/11-01/11-344-Red Decision of the Pre-Trial Chamber I on the Admissibility of the case against Saif Al-Islam Gaddafi 31 May 2013. <http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf> (*Saif Al-Islam* case).

²⁸¹ *Ibid*, paras 73, 77.

²⁸² *Ibid* paras 204, 205, 206, 215 & 216.

²⁸³ OTP Article 5 Report on Nigeria 2013, para 128.

²⁸⁴ *The Prosecutor v Germain Katanga*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, ICC-01/04-01/07-4.

²⁸⁵ *Katanga* case, para 20.

²⁸⁶ *Katanga* case, para 78.

Three types of unwillingness are mentioned in Article 17(2). First, a state is deemed unwilling when the proceedings were or are being undertaken or the national decision was made for the purpose of ‘shielding’ the person concerned from criminal responsibility.²⁸⁷ Moreover, in the *Katanga* case,²⁸⁸ the Pre-Trial Chamber II (PTCII) held that a state that does not intend to shield a person but rather wants the person to be prosecuted by the ICC is not an unwilling state under the terms of Article 17.²⁸⁹ The rationale behind this decision is hardly comprehensible because it poses the question as to why a state would prefer to have its nationals prosecuted by the ICC when complementarity gives it the primary duty to prosecute. A better argument may be that self-referral constitutes a demonstration of a state’s willingness but also its inability to prosecute.²⁹⁰ In line with the main argument of the thesis, unwillingness could stem from the lack of an appropriate legal framework, lack of institutional capacity or of political will, as demonstrated in the Kenya *Muthaura et al.* case. In this case, the Appeals Chamber observed that Kenya submitted 29 annexes in support of its admissibility challenge, yet none of the annexes related to the suspects before the ICC.²⁹¹ The Appeals Chamber further noted that Kenya’s claim that the Commissioner of Police had confirmed that the suspects were being exhaustively investigated by the CID/DPP team lacked specificity.²⁹² Arguably, these could be interpreted as revealing a goal of shielding the suspects. The Appeals Chamber further noted dissonance not only between the suspects being investigated by the Kenyan authorities and by the ICC but also in the crimes for which the suspects were being investigated, as the crimes against humanity for which the suspects were brought before the ICC were not at that time known to Kenyan domestic law.

The second type of possible unwillingness is where there has been an ‘unjustified delay’ in the proceedings which is deemed inconsistent with an intent to bring the person concerned to justice.²⁹³ However, the Rome Statute does not give a definition of what could constitute an unjustified delay; rather, the decision is left to the ICC. In line with the central argument in this thesis, it is submitted that an unjustifiable delay may be occasioned by the lack of requisite implementing legislation and inadequate institutions to carry out proceedings. Again, in the *Muthaura et al* case, Kenya’s delay in

²⁸⁷ Rome Statute article 17(2) (a).

²⁸⁸ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* Case No ICC-01/04-01/07-123tENG (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case under Art 19) 16 June 2009.

²⁸⁹ Politi M ‘Reflections on Complementarity at the Rome Conference and Beyond’ in Stahn C and El Zeidy M *Complementarity Theory to Practice* (2014)142-149.

²⁹⁰ Politi M ‘Reflections on Complementarity at the Rome Conference and Beyond’ in Stahn C and El Zeidy M *Complementarity Theory to Practice* (2014)142-149.

²⁹¹ *Muthaura et al* case, para 67.

²⁹² *Muthaura et al* case, para 68.

²⁹³ Rome Statute, Article 17(2)(b).

taking investigative steps could arguably be linked to the lack of implementing legislation at the time.²⁹⁴

Unwillingness is further implied in situations where the proceedings were not or are not being conducted ‘independently or impartially’,²⁹⁵ or in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.²⁹⁶ Unwillingness could further be determined with ‘regard to the principles of due process recognized by international law’. These include the presumption of innocence, non-retroactivity of criminal law, the right to a public hearing, the right to obtain free legal assistance, the right to be informed, the right to examine the witnesses and the right to remain silent.²⁹⁷

In line with the due process requirement, Stahn argued that alternative justice mechanisms at the domestic level must meet basic fair trial standards.²⁹⁸ Again the implication of a mutually inclusive construction of complementarity is that states would reflect and uphold the general principles of criminal law and strive to maintain international standards as explicated in the Rome Statute. Furthermore there is the possibility of varying degrees of willingness being exhibited by rival branches of a particular state’s authorities.²⁹⁹

This may arise due to internal differences within a state which are not envisaged in the Rome Statute. For example, the judiciary may be willing whereas the executive is not. Investigators may be willing but an unwilling military may frustrate and hinder investigative efforts.³⁰⁰ Therefore unwillingness in one branch of government may create inability in another branch which is sincerely attempting to investigate or prosecute. There is also a possibility of selective willingness where state authorities may be eager to investigate crimes by rebel groups but may be reticent with respect to the investigation of government forces.³⁰¹ Inability is the second element of

²⁹⁴ *Infra* (Text to notes 84 to 97 in Ch 3).

²⁹⁵ Bassiouni M ‘*Introduction to International Criminal Law* (2003) 518; see Solera O ‘Complementary Jurisdiction and International Criminal Justice’ (2002) 84 *International Review of the Red Cross* 145, 166 (noting ‘...a State is unwilling to prosecute when the competent domestic court is not independent or impartial’).

²⁹⁶ Rome Statute Article 17(2)(c).

²⁹⁷ Part 3 on General Principles of Criminal Law and Art 55 Rome Statute.

²⁹⁸ Stahn C ‘Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court’ (2005) 3 *JICJ* 695-713.

²⁹⁹ Informal Expert Paper: ‘The Principle of Complementarity in Practice’ ICC-01/04-01/07-1008-AnxA 30 March 2009 (‘Informal Expert Paper’) <<http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf>> (Accessed 2 March 2017).

³⁰⁰ *Ibid*, para 45.

³⁰¹ *Ibid*, the self-referral by the Government of Uganda of the Lords Resistance Army (LRA) in Northern Uganda to the ICC. available at <http://www.icc-cpi.int/en_menus/icc/situations/northern%20uganda.aspx> (Assessed 26 February 2013).

complementarity identified under Article 17. In reaching the determination of inability, there are two cumulative sets of considerations.³⁰²

The first is inability as a consequence of the ‘collapse’ or ‘unavailability’ of the national judicial system. The use of the terms ‘inability’, ‘collapse’ and ‘unavailability’ thus imply certain political circumstances that could render holding trials impossible. The words further suggest a lack of expertise in the field of international criminal law including judges, prosecutors, and other court personnel.³⁰³ Clearly, an analysis of a state’s judicial system and political climate is necessary in determining ability to prosecute.

In the admissibility challenge by Libya in the *Saif Al-Islam* case,³⁰⁴ the PTCI noted the efforts deployed by Libya under extremely difficult circumstances to improve security conditions, rebuild institutions and to restore the rule of law.³⁰⁵ In particular, the Chamber observed the specific measures taken by the Libyan government to enhance capacity.³⁰⁶ These were in relation to the proposed strategy to improve the effectiveness of accountability of the police service, the security of the ICCs and of participants in the proceedings.³⁰⁷ It also noted the proposed strategy to reform the detention centers and to bring practices of torture to an end.³⁰⁸ In spite of these measures, the Chamber found that Libya continues to face multiple challenges as it cannot exercise its judicial powers fully across the entire territory. Consequently, Libya’s national system was found unavailable according to the terms of Article 17(3) of the Rome Statute.³⁰⁹

The second aspect of the inability consideration is inability with respect to apprehending the accused, or obtaining evidence or testimony such that proceedings cannot be carried out.³¹⁰ In the admissibility challenge by Libya, the PTCI observed that the Libyan Code of Criminal Procedure contained provisions that could sustain the prosecution of Saif Al-Islam. These include Article 59 of the Libyan Code, which provides for confidentiality of investigations, and Article 106, which guarantees a defendant’s right to a lawyer during investigation.³¹¹ The PTCI observed that

³⁰² Yang L ‘On the Principle of Complementarity in the Rome Statute of the International Criminal Court’ (2005) 4 *JIntlL* 121-132; Kim YS *The International Criminal Court: A Commentary of the Rome Statute* (2003) 258-259.

³⁰³ Informal Expert Paper, (n 116) paras 49 & 50.

³⁰⁴ *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Hussein* ICC-01/11-01/11-344-Red Decision of the Pre-Trial Chamber I on the Admissibility of the case against Saif Al-Islam Gaddafi 31 May 2013. <http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf>

³⁰⁵ *Ibid*, para 200.

³⁰⁶ *Ibid*, para 204.

³⁰⁷ *Ibid*, para 204.

³⁰⁸ *Ibid*, para 204.

³⁰⁹ *Ibid*, para 205.

³¹⁰ Rome Statute, Article 17 (3).

³¹¹ Rome Statute, Article 17 (3).

additional rights of accused persons are guaranteed under other provisions of the Libyan Code.³¹² Nevertheless, the Chamber found that there had been no concrete progress towards transferring Saif Al-Islam from his detention centre in Zintan.³¹³ The Chamber further expressed concerns over the issues raised by the United Nations Support Mission in Libya (UNSMIL) about instances of torture and death arising from torture in detention centres and concluded that Libya was not able to assume full control of the detention facilities.³¹⁴ Also Libya's capacity to obtain the necessary testimony was in doubt, as the Chamber observed 'clear inability of judicial and governmental authorities to ascertain control and provide adequate protection for witnesses'.³¹⁵

Based on the decision of the PTCI in the Libya admissibility challenge in the *Saif Al-Islam* case, it can be deduced that 'inability' may not only refer to situations of armed conflict resulting in the total or substantial collapse of a national judicial system. Rather, inability may include the lack of institutions or lack of judges and prosecutors who are trained in international criminal law. This point is underscored by Libya's submission that it was in the process of 'approaching the Bar Associations of Tunisia and Egypt in order to obtain suitably qualified and experienced counsel...'.³¹⁶ The PTCI rejected this point on the grounds that Libya did not demonstrate that it was taking any concrete steps to overcome the deficiencies.³¹⁷ Closely linked to inability or unwillingness is 'inactivity'.³¹⁸ Inactivity was developed by the office of the Prosecutor based on the theory of 'uncontested admissibility'.³¹⁹ In the *Katanga case*,³²⁰ the PTCII held that inaction on the part of a state having jurisdiction renders a case admissible before the ICC regardless of any question of unwillingness or inability.³²¹ Thus, referral was deemed appropriate on account of inaction by the Ugandan government. The ICC and Uganda, which claimed to be incapacitated by

³¹² Article 435 of the Libyan Code safeguards the accused right to review evidence presented against him and forced confessions are inadmissible in criminal proceedings. Also, under Article 9 of the Code the accused has the right to be informed of his rights and duties and Article 4 of the Libyan Prisons Act requires the defendant to be held in prison prepared for that purpose.

³¹³ *Saif Al-Islam* case paras 206, 207.

³¹⁴ *Ibid*, para 209.

³¹⁵ *Ibid*, paras 209, 211.

³¹⁶ *Ibid*, para 213.

³¹⁷ *Ibid*, para 214.

³¹⁸ Robinson T Mysterious Complementarity 76 (noting that the word 'inactivity' is not used in Article 17 but the Pre-Trial Chamber in the *Lubanga* case erroneously used it in interpreting when a case becomes admissible before the ICC. He agrees however, that a case is admissible where there is inaction on the part of a state in a particular case). See also El-zeidy The Genesis of Complementarity 137.

³¹⁹ Williams S and Schabas W 'Article 17: Issues of Admissibility' in Triffterer O ed *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes Article By Article* (2008) 605-606.

³²⁰ *The Prosecutor v Germain Katanga*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, ICC-01/04-01/07-4.

³²¹ *Ibid*, para 37.

its inability to apprehend members of the LRA agreed that a consensual division of labour is the most logical and effective approach.³²²

In authorizing the issuance of arrest warrants in the case, the PTCII invoked a letter of 28 May 2004 from the government of Uganda stating that it had been ‘unable to arrest...persons who may bear the greatest responsibility for the relevant crimes’ and that ‘the ICC is the most appropriate and effective forum for the investigation and prosecution...’³²³ The letter further noted that the Ugandan government ‘has not conducted and does not intend to conduct national proceedings in relation to the persons’³²⁴

The rationale is that armed groups divided by conflict may oppose prosecutions at each other’s hand and yet agree to a prosecution by the ICC for reasons of neutrality and impartiality.³²⁵

The state, in such a case, waives its right of primacy of jurisdiction to trigger the jurisdiction of the ICC and the case is admissible before the ICC as long as the state with jurisdiction remains inactive. As with complementarity thresholds of unwillingness and inability, there are no parameters in the Rome Statute for determining the third element of ‘genuinely’. In arriving at the term, other words like ‘ineffective’, ‘good faith’, ‘diligently’ and ‘sufficient grounds’ were considered and rejected for being too subjective.³²⁶ The term ‘genuinely’ that was finally adopted, bears close semblance to ‘good faith’; however, the later was deemed to be too constricted.³²⁷

‘Genuinely’, open to interpretation by the ICC, is an adverb that explains what kind of investigation or prosecution a state must be willing and able to conduct in order to make a case inadmissible before the ICC – namely, a genuine one.³²⁸ It could further be argued that requiring states to conduct genuine investigations and prosecutions, as opposed to investigations and prosecutions of any kind indicates that the drafters intended to make due process a criterion of major importance.³²⁹

³²² Williams S & Schabas W ‘Article 17: Issues of Admissibility’ in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes Article By Article* (2008) 605-606.

³²³ Ibid, 616. Scheffer D and Cox A ‘The Constitutionality of the Rome Statute of the International Criminal Court’ (2008) 98 *JCLC* 3.

³²⁴ Ibid; Schabas W ‘Complementarity in Practice: Creative Solutions or a Trap for the ICC?’ in Politi M & Gioia F (eds) *International Criminal Court and National Jurisdictions* (2008) 29; Stahn C & Sluiter G *The Emerging Practice of the International Criminal Court* (2009) 239.

³²⁵ Kress C ‘Self-Referrals and Waivers of Complementarity: Some Considerations in Law and Policy’ (2004) 2 *JICJ* 944-948. See also ‘Paper on Some Policy Issues before the Office of the Prosecutor’ ICC-OTP September 20031-9,5.<http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf> (Assessed 26 February 2017).

³²⁶ Holmes J, *The Principle of Complementarity* 49.

³²⁷ Ibid. See also Holmes J *Complementarity v National Courts* 266.

³²⁸ Jon Heller K ‘The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process’ (2006) 17 *CLF* 255-280.

³²⁹ Jon Heller K ‘The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process’ (2006) 17 *CLF* 255-280.

The phrase ‘unless the state is unwilling or unable genuinely to carry out the investigation or prosecution’ presupposes something real and sincere, having the value claimed without a form of pretence. In the *Muthaura et al* case,³³⁰ the Appeals Chamber observed that the report on the investigations into the post-election violence did not include reference to the suspects.³³¹

The report also did not reveal any investigative steps taken by the Kenyan investigation team.³³² A genuine investigation would thus encompass detailed report of investigative steps taken in a particular case. Therefore, in determining whether the actions of a state are genuine, the ICC looks beyond the domestic laws or implementing legislation and objectively examines whether the motives and broad context of the state’s actions are real and sincere. Another complementarity element is ‘sufficient gravity.’ Two prong components to the determination of admissibility are complementarity and gravity.³³³ Crimes falling within the jurisdiction of the ICC have been designated ‘serious crimes.’³³⁴ yet the Rome Statute provides for the additional admissibility consideration of ‘sufficient gravity.’³³⁵ Thus, even where subject-matter jurisdiction is satisfied, the ICC must determine whether the case is severe enough to justify further action. Factors relevant in assessing gravity include the scale, the nature, the manner of commission, and the impact of the crimes.³³⁶ Therefore isolated instances of criminal activity do not meet the gravity threshold.

One way of assessing gravity for the purpose of determining prosecutorial priorities is to look at absolute numbers. This is exemplified in the actions taken by the Prosecutor with respect to situations in Uganda in one case and the United Kingdom in another.³³⁷ Upon receipt of information regarding the activities of British troops in Iraq, the Prosecutor noted that there were only four to twelve victims, which does not meet the requirement of sufficient gravity.³³⁸ On the other hand, regarding the situation in Uganda, the Prosecutor noted;

‘...we examined information concerning all groups that had committed crimes in the region. We selected our first case based on gravity. Between July 2002 and June 2004, the [Lord’s Resistance

³³⁰ Situation in the Republic of Kenya, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11-274 30-08-2011 1/43 NM PT OA Available at <http://icc-cpi.int/iccdocs/doc/doc1223134.pdf> (Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute). (*Muthaura et al* case’).

³³¹ Ibid, para 53.

³³² Ibid, para 68.

³³³ Schabas W *An Introduction to the International Criminal Court* 3 ed (2007) 175. ‘Article 17: Issues of Admissibility’ in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes Article By Article* (2008) 605-606.

³³⁴ Rome Statute, para 4 of the Preamble.

³³⁵ Rome Statute, Articles 17 (1) (d), 53 (1) (b) and 53 (2) (b).

³³⁶ Luis Moreno-Ocampo OTP, Draft Policy Paper on Selection Criteria.

³³⁷ Schabas W *An Introduction to the International Criminal Court* 3 ed (2007) 621-622.

³³⁸ ‘Letter of Prosecutor dated 9 February 2006’ (Iraq) available at http://www.icc-cpi.int/library/organs/otp_letter_to_senders_re_Iraq_9_February_2006.pdf (assessed 10 February 2017).

Army] was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we start with the Lord's Resistance Army.³³⁹

The analysis of the complementarity thresholds reveals that so far, the case law of the ICC relates to waivers or inaction and the ICC has not had the opportunity to interpret the other constituent elements of unwillingness and genuineness. Although some of these complementarity thresholds may be inferred in the cases as they do overlap, the decisions of the ICC have focused on the 'same person same conduct' test as a result of admissibility challenges by states which claimed to be carrying out investigations domestically. The Pre-Trial Chamber has further interpreted 'inability' in light of the deficiencies of Libya's judicial system, including its inability to procure the suspect, witnesses and evidence.'

It is submitted that the cumulative effect of Article 17 makes it imperative for states to start investigation and prosecution and it would be for the ICC, if it wishes, to assert and prove that the state is unwilling or unable genuinely to carry out the proceedings. Thus far, the reverse has been the case. This underlines the central argument in this thesis that for states to assume their primary role to investigate and prosecute international crimes, appropriate legal framework and institutional capacity in conformity with the Rome Statute is imperative. The complementarity thresholds analysed above are entwined in the admissibility provisions in Article 17. The Article is certainly the focus of complementarity and it is usually the central point of complementarity discussions.³⁴⁰ However, the broader interplay and division of labour between national jurisdictions and the ICC envisaged in the Rome Statute makes complementarity a dominant theme that is woven through many other Articles of the Rome Statute.³⁴¹ The next section evaluates complementarity framework under articles 18-20 of the Rome Statute and the relevant Rules of Procedure and Evidence (RPE).

3. 2 Complementarity

The *ad hoc* tribunals of the ICTY and ICTR, had primacy over national courts, that is, the *ad hoc* tribunals had the right to exercise jurisdiction, without the requirement to establish the national justice system's failure or inadequacy.³⁴² In contrast, under the complementarity regime, the ICC is intended to function as a court of last resort when relevant national courts are unwilling or unable to genuinely investigate and prosecute crimes within the ICC's jurisdiction.³⁴³

³³⁹ 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties' at The Hague 28 November to 3 December 2005. 2.

³⁴⁰ Scheffer D & Cox A 'The Constitutionality of the Rome Statute of the International Criminal Court' (2008) 98 *JCLC* 3.

³⁴¹ Rome Statute Articles 1, 18, 19, 20, 89(4), 90, 93(10), 94.

³⁴² Errol P *Peace and Justice at the International Criminal Court: A Court of Last Resort* (2010) 26.

³⁴³ Christopher D & Tyler N 'Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court' (2008) 98 *JCLC* 1069.

According to Hans-Peter Kaul, the principle of complementarity is the decisive basis of the entire ICC system. The Rome Statute recognises the primary responsibility of national courts to prosecute. Consequently, it ascertains state sovereignty and particularly the fact that States have the sovereign and primary right to exercise criminal jurisdiction. Thus, a new system of international criminal jurisdiction, which consists of two planes complementing each other, has been established by the ICC's founders. The first level consists of states and their national criminal law systems. The second level is constituted by the ICC.³⁴⁴

Lijun Yang asserts that 'the ICC, on the one hand, has jurisdiction over the core crimes of international concern and, on the other, its power is limited by complementarity, i.e. the national jurisdiction comes first and ICC's jurisdiction second'. Thus, complementarity preserves state sovereignty, whereby every state is obliged to exercise its criminal jurisdiction over perpetrators of international crimes, to promote national prosecution of core crimes, and to improve its domestic judicial system to be able to investigate and prosecute individuals for the commission of such core crimes.³⁴⁵

The complementary role of the ICC is enhanced by the fact that the ICC's jurisdiction is not founded on an authoritative act but rather on its specific acceptance by states through an international agreement, that is, the Rome Statute. The ICC does not in fact intend to confiscate sovereign powers of states. It is for states, by ratifying the Rome Statute, to decide freely in the exercise of their sovereign powers. It is on them that the duty of cooperation with the ICC falls, while third states may be requested by the ICC to provide assistance. Moreover, the acceptance by states parties of the complementary jurisdiction of the ICC is subject to the strict precondition of the existence of a territorial link with the criminal conduct or a personal link with the accused. The ICC takes the place of the state's parties who renounce their right to exercise their sovereign power to prosecute.³⁴⁶

The Prosecutor should start proceedings when states fail to execute genuine proceedings due to inability or lack of willingness. Such proceedings are to be independent and impartial, and show that the international community is determined to prosecute international crimes. In his 'Paper on Some Policy Issues before the Office of the Prosecutor,' the former Prosecutor Moreno-Ocampo affirms:

³⁴⁴ Kaul H 'The International Criminal Court: Current Challenges and Perspectives' (2007) 6 *Washington University Global Studies Law Review* 575.

³⁴⁵ Yang L 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court' (2005) 4 *CJIL* 121.

³⁴⁶ Benvenuti P 'Complementarity of the International Criminal Court' in Mark S and Goldstone J (ed), *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century* (2008) 59-60.

The principle of complementarity represents the express will of states parties to create an institution that is global in scope while recognising the primary responsibility of states themselves to exercise criminal jurisdiction. The principle is also based on considerations of efficiency and effectiveness since states will generally have the best access to evidence and witnesses.³⁴⁷ In fact, whenever a situation is referred to the Prosecutor by a state party for him/her to investigate (Article 13(a), or whenever the Prosecutor initiates an investigation *proprio motu* on account of information received (Article 13(b), the ICC may exercise its complementary jurisdiction only when the supposed crime has been committed on a state party's territory, or on board a vessel or aircraft registered in a state party (Article 12(2) (a), or when the accused person is a state party's national (Article 12(2)(b). In other words, a case may be brought before the ICC only if characterised by these elements of the states having ratified the Rome Statute. As, Cassese remarked, the idea that the Rome Statute impinges on the rights of third states must be considered unfounded. Obviously, whenever the ICC does not acquire jurisdiction for lack of these preconditions, the states parties maintain, by virtue of customary and conventional international law, their discretionary or mandatory domestic competence in repressing crimes of international concern according to alternative bases of jurisdiction.³⁴⁸

When a situation is referred by the UNSC, acting under Chapter VII of the UN (Article 13(b), to the Prosecutor, the UNSC gives the ICC a competence which is complementary to the jurisdiction of states, independently of their acceptance of the Rome Statute and the presence of preconditions. The ICC may operate even if the crime has not been committed on the territory (or on board a vessel or aircraft) of a state party, and if the alleged perpetrator is not a state party's national. In such situations some duties of cooperation may also arise for non-party states, being founded not in the Rome Statute but rather on the UNSC's decision. Thus, even upon referral by the UNSC, the fundamental feature of the ICC remains its complementarity to national criminal jurisdictions. In other words, the UNSC may refer a situation to the Prosecutor and the ICC may retain jurisdiction with regard to a specific case and declare the admissibility of the case, but only if the general requirements for exercising the complementarity jurisdiction when the Prosecutor proceeds upon referral of a state or the Prosecutor proceeds *proprio motu* are met.³⁴⁹

During its first few years, the ICC did not apply a simple, single-layer procedure but chose a three-layered analysis of complementarity:

³⁴⁷ Jurdi NN 'The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?' (2010) 10 *ICLR* 73.

³⁴⁸ Benvenuti P 'The complementarity Regime of the International Criminal Court' (2008) 61.

³⁴⁹ *Ibid.*

(i) first, situations and cases are admissible if the state in question remains inactive (admissibility due to inaction);

(ii) second, if the state in question displays some kind of activity, the exceptions contained in Articles 17(1)(a)-(c), and 20(3) must be examined, which might render a situation or case inadmissible (inadmissibility due to state action); and,

(iii) third, these exceptions can be rebutted in case this action testifies to the unwillingness and inability of the relevant state authorities.³⁵⁰

In the latter case, admissibility of the situation or case is then carried out according to Articles 17(2) and (3).³⁵¹

3.2.1 Complementarity and inactivity

When inactivity is affirmed, the case is automatically admissible, but it is argued that another assessment of *ne bis in idem* and gravity is needed. Thus, further determination of unwillingness and inability is not required. Meaning, inactivity has been questionable as a legal element because Article 17(1) does not refer to it. Notwithstanding, the Prosecutor relies upon it majorly and the ICC judges have allowed it in practice. In the situation in the DRC, Pre-Trial Chamber I specifically considered an '[i]nterpretation *a contrario* of article 17 paras. (1)(a) to (c)' and invoked inactivity in determining admissibility when it held that, 'such case would be admissible only if those states with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable'.³⁵² Then, it concluded that 'no state with jurisdiction over the case against Thomas Lubanga Dyilo is acting, or has acted, in relation to this case. Accordingly, in the absence of any acting state, the Chamber need not make any analysis of unwillingness or inability.'³⁵³

The ICC Pre-Trial Chamber II clarified that the determination of complementarity is continuous and can be assessed even by the same Chamber and on its own motion more than once. It also held that a change in circumstances permits the ICC to assess admissibility a new.³⁵⁴ However, it then concluded that since there was complete inactivity by the state, there was no requirement to enter into the merits of assessing admissibility.³⁵⁵ Moreover, national prosecutions are held to be active if they match exactly the Prosecutor's case, that is, they must involve the same person and the same

³⁵⁰ Muller AT & Stegmiller I 'Self-Referrals on Trial' (2010) 8 (5) *JICJ* 1267.

³⁵¹ Muller AT & Stegmiller I 'Self-Referrals on Trial' (2010) 8 (5) *JICJ* 1267.

³⁵² Cayley TA 'Recent steps of the ICC prosecutor in the Darfur situation: Prosecutor v President the Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al-Bashir on Charges of Genocide' (2008) 6 *Journal of International Criminal Justice* 829-840

³⁵³ Muller AT & Stegmiller I 'Self-Referrals on Trial' (2010) 8 (5) *JICJ* 1267.

³⁵⁴ Gérard P *Darfur: The Ambiguous Genocide* (2010) 18.

³⁵⁵ Kirgis FL 'UN Commission's Report on Violations of International Humanitarian Law in Darfur: Security Council Referral to the International Criminal Court' (2005) *American Society of International Law* 42.

conduct ('specificity test').³⁵⁶ In the case of Ali Kushayb, the leader of the Janjaweed militia in West Darfur,³⁵⁷ the Prosecutor asserted that the ICC was following different charges for different crimes, against Kushayb, from those in the Sudanese Special Court for Darfur; therefore, the case was admissible before the ICC.³⁵⁸ It is claimed that, legally, the inactivity criterion, or the same conduct test, rests 'on a systematic interpretation of the Rome Statute'.³⁵⁹

It is stated that state referrals can give rise to complex issues when Article 17 is applied and a more difficult challenge to regard the referring state as unwilling or unable. In fact, if the state does not conduct any minimum investigation whatsoever, it is held to be inactive before it is even considered to be unwilling or unable. Hence, in *Katanga and Chui*, the Appeals Chamber affirmed the inactivity concept. Nevertheless, the inactivity concept involves certain risks on the policy level. Through positive complementarity, the Prosecutor is to promote national prosecutions and not take up situations from inactive states without further qualification. Moreover, self-referrals raise legal uncertainty as to the complementarity regime, especially as regards waivers of complementarity or withdrawals of referrals but simultaneously, it is claimed that the complementarity regime is sufficiently flexible and adaptable to solve such uncertainty.³⁶⁰ All in all, it is hereby submitted that the inactivity criterion is a plausible solution for a case referred to the ICC by a state to be admissible before it because it does away with the other criteria.

3.2.2 Complementarity and activity

Article 17(1) states that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute.

The 'genuineness' criterion, which conditions the words 'unwilling or unable', permits the ICC to take up cases where national proceedings involve flaws with regard to 'the sincerity of the justice process (for example, 'an intent to bring the person concerned to justice') or capacity (for example,

³⁵⁶Muller AT & Stegmiller I 'Self-Referrals on Trial' (2010) 8 *JICJ* 1267.

³⁵⁷ Report of the International Commission of Inquiry on Darfur para 3.

³⁵⁸ Totten CD & Tyler N 'Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court' (2008) 98 (3) *JCLC* 1069-1097.

³⁵⁹ Stahn C 'Libya, the International Criminal Court and Complementarity' (2012) 10 *JICJ* 325.

³⁶⁰Muller AT & Stegmiller I 'Self-Referrals on Trial' (2010) 8 *JICJ* 1267.

shortcomings in the national judicial system)’. It does not need to match exactly with international human rights standards but permits the ICC to consider human rights related elements.³⁶¹

3.2.3 Unwillingness

In order to determine unwillingness, three factors are enumerated in paragraph 17(2): The proceedings or the decision not to prosecute were made to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC; unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; 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.³⁶²

The ICC cannot prohibit a national case from proceeding due to due process concerns but the ICC is entitled to consider them while assessing the admissibility of a case (the Rome Statute permits the ICC to follow its proceedings (Article 19(1). In *Lubanga*, the Appeals Chamber construed narrowly admissibility challenges pursuant to Article 17, observing that ‘abuse of process is not listed as a ground for relinquishing jurisdiction in Article 17 of the Rome Statute’.³⁶³

The ICC’s admissibility system does not serve to remedy human rights violations in national prosecutions but mainly to settle jurisdictional issues and circumstances where alleged violations (such as lack of independence or impartiality) have prevented such prosecutions. Simultaneously, the ICC is obliged to promote fair trial principles and human rights guarantees under Article 21(3). This gives rise to certain issues examined by the ICC, namely those standards that national proceedings are required to have and other relevant factors.³⁶⁴

3.2.4 Inability

In accordance with Article 17(3), inability is assessed with reference to ‘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’.

Article 17(3) permits the ICC to consider structural deficiencies with regard to due process and fairness when assessing inability. Inadequate due process guarantees which relate to the security and protection of individuals in proceedings may make a domestic judicial system unavailable when

³⁶¹ Stahn C ‘Libya, the International Criminal Court and Complementarity’ (2012) 10 *JICJ* 325.

³⁶² Schabas W *An Introduction to the International Criminal Court* 3 ed (2007) 345.

³⁶³ *Lubanga* (ICC-01/04-01/06(OA4)), Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the ICC pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, para 34.

³⁶⁴ Stahn C ‘Libya, the International Criminal Court and Complementarity’ (2012) 10 *JICJ* 325

they render the state ‘otherwise unable to carry out its proceedings’. Concerns which relate to fairness of the process are considered only when they entail a factual or legal bar to proceedings, or when the proceedings are so inappropriate as to be held in genuine.³⁶⁵

It is noted that although Article 17(3) is reasonable in principle, it is self-contradictory. Hearing a case in the absence of the accused, which is forbidden by the Rome Statute, is a violation of the basic principles of criminal trials. Thus, if the accused person or the necessary evidence cannot be acquired, the proceedings cannot be performed in a national court or in any international tribunal.³⁶⁶ The Rome Statute presupposes that nations will implement the conduct that comprises the core crimes. In fact, after the first Review Conference of the Rome Statute in 2010, the balance was tilted more towards the national level by the notion of ‘positive complementarity’. Enacting legislation adequately, that is, incorporating the Rome Statute crimes into national legislation has therefore increased in significance.³⁶⁷

It has also been claimed that ‘genuine but non-judicial efforts at accountability that fall short of criminal prosecution, such as a truth and reconciliation commission process’, might adequately respond to the complementarity requirement and would practically convince the Prosecutor to establish priorities elsewhere.³⁶⁸

Moreover, it has been claimed that Article 17 could allow inadmissibility of cases where a domestic or international court is investigating the crimes or where criminal proceedings are carried out but sanctioned by symbolic or minimal punishment, such as in the case of pardons or quasi-pardons. Article 17 could be interpreted so as to permit truth commission processes and other procedures of justice to be deferred in two ways: a temporary prohibition of the ICC’s proceedings in ongoing judicial or quasi-judicial investigations (Article 17(1) (a), or an inadmissibility of the ICC’s proceedings where alternative methods are complementary to national prosecutions and may subsequently be criminally sanctioned (Article 17(1)(b). Hopefully, the ICC’s future jurisprudence will clarify these interpretational choices.³⁶⁹

It is also suggested that the ICC should allow amnesties and pardons, if at all, only under exceptional circumstances. The Rome Statute seems to emphasise that amnesties and pardons rarely affect admissibility, but may exceptionally be a criterion for non-prosecution before the ICC in two situations, where particular instances so necessitate: Article 16 the UNSC request and Article 53 (interests of justice). Both Articles may suspend (Article 16) or forbid (Article 53) ICC proceedings.

³⁶⁵ Stahn C ‘Libya, the International Criminal Court and Complementarity’ (2012) 10 *JICJ* 325

³⁶⁶ Yang L ‘Some Critical Remarks on the Rome Statute of the International Criminal Court’ (2003) 2 *CJIL* 599.

³⁶⁷ Bekou O ‘Crimes at Crossroads’ (2012) 10 *JICJ* 677.

³⁶⁸ Schabas W *An Introduction to the International Criminal Court* 3 ed (2007) 347.

³⁶⁹ Stahn C ‘Articles – Complementarity, Amnesties and Alternative Forms of Justice’ (2005) 3 *JICJ* 695.

However, both options are politically sensitive and are very difficult to defend on account of an international rule of law at the multilateral plane, specifically either the UNSC concluding that criminal prosecutions are contrary to peace and security, or the Prosecutor stating that national prosecutions are against the ‘interests of justice’.³⁷⁰

Akhavan argues that the complementarity system is ‘inadequate and incomplete’ because states have no ‘express and enforceable obligation’ to prosecute international crimes in their courts. In *Katanga*, the Appeals Chamber justified self-referrals on the basis of the recognised lack, in the Rome Statute, of an enforceable obligation to exercise national criminal jurisdiction. The Chamber recognised that ‘under the Rome Statute, the ICC does not have the power to order states to open investigations or prosecutions domestically’. It is vital to address this lacuna to ensure a lasting international criminal justice system based on complementarity. An express and enforceable obligation would consolidate the partnership between the ICC and domestic courts by promoting the exercise of jurisdiction at the national plane.³⁷¹

It is hereby supported that such a means of enforcement is indeed necessary for an effective and efficient way of ending impunity and attaining justice by the ICC.³⁷² Having appropriate law enforcement in place is the most effective means to ensure national prosecution and punishment of international crimes, when the state is politically willing to do so. After all, national institutions are the *forum conveniens*,³⁷³ where both the evidence and suspect are to be found and therefore are in the best position to do justice’.³⁷⁴

The collective struggle to balance state sovereignty on one side and human rights and international justice on the other was indeed achieved through the principle of complementarity.³⁷⁵ However, the arguments given by the various academics and jurists confirm that such a concept is very complex, delicate and marked by legal uncertainty.³⁷⁶ There are various interpretational issues which give rise to dilemmas and conflicts which need to be solved.³⁷⁷

³⁷⁰Stahn C ‘Articles – Complementarity, Amnesties and Alternative Forms of Justice’ (2005) 3 *JICJ* 695.

³⁷¹Akhavan P ‘Whither National Courts? The Rome Statute’s Missing Half’ (2010) 8 *JICJ* 1245.

³⁷²Article 17(3) Rome Statute.

³⁷³Yang L ‘On the Principle of Complementarity in the Rome Statute of the International Criminal Court’ (2005) 4 *CJIL* 121.

³⁷⁴Cassese A ‘The Statute of the International Criminal Court: Some Preliminary Reflections’ (1999) *EJIL* 144.

³⁷⁵Yang L ‘On the Principle of Complementarity in the Rome Statute of the International Criminal Court’ 166.

³⁷⁶Wacks R *Understanding Jurisprudence nn Introduction to Legal Theory* 3rd ed (2012) 212- 230.

³⁷⁷Franck T *The Power of Legitimacy Among Nations* (1990) 24.

3.2.5 Double jeopardy/*Ne bis in idem*

When a case has already been judged by a national justice system, Article 17 refers to the prohibition of double jeopardy or *ne bis in idem*.³⁷⁸ Specifically, Article 17 refers to investigations or prosecutions executed by a state *in idem*, prior to the ICC intervening; it invokes Article 20(3) where the accused person has already been prosecuted.³⁷⁹ When a domestic case has already been judged, then the case cannot be prosecuted by the ICC unless the proceedings are regarded as sham proceedings. The latter are defined as trial shield to ‘shield an offender from criminal responsibility, or that were otherwise not conducted independently or impartially’ and were held in such a way that ‘in the circumstances, was inconsistent with an intent to bring the person concerned to justice’. When an accused person has been properly prosecuted and pardoned, the ICC may potentially be permanently prohibited from interfering.³⁸⁰

Article 20 of the Rome Statute contemplates three types of situations: (i) where an individual has been prosecuted by the ICC is subsequently put on trial again before the ICC; (ii) where an individual has been prosecuted by the ICC, and who is subsequently put on trial again before another court (iii); and where an individual has been prosecuted by another court, and who is subsequently put on trial before the ICC. Article 20(3) concerns the situation where the Prosecutor intends to proceed against someone who has already been tried by another court, but where the trial was deemed to be unsatisfactory. The issue is closely related to one of the prongs of the admissibility test established in Article 17(1) (c).³⁸¹

The *ne bis in idem* rule was initially aimed at remedying sham trials of convenience. It must be noted that trials of convenience can be easily used by states that intend to protect their senior state officials from an international court. Such trials could be aimed to arrive at an acquittal, thereby preventing any other court from attempting to retry the accused on the same set of facts. In terms of the amendment, the only thing that can be salvaged from a sham trial is the penalty. Any penalty imposed by another court,³⁸² even if it was the consequence of trial staged for the purposes of shielding the accused, shall be considered by the ACC in its sentencing proceedings. This provision reflects a similar enactments in the Statutes of the ICTY and ICTR which also provide that the penalty given by a court in a prior trial is deemed to have been undertaken in order to protect the accused.³⁸³ The Malabo Protocol thus prevents cases of double jeopardy by ensuring that an

³⁷⁸Schabas, *An Introduction to the International Criminal Court* (2007) 87-88.

³⁷⁹Bernard D ‘*Ne bis in idem* – Protector of Defendants’ Rights or Jurisdictional Pointsman?’ (2011) 9 (4) *JICJ* 863.

³⁸⁰ Schabas W *An Introduction to the International Criminal Court* 3 ed (2007) 621-622.

³⁸¹Schabas W *An Introduction to the International Criminal Court* 3 ed (2007) 376.

³⁸² Article 46I(3) of the Statute to the Malabo Protocol.

³⁸³ Article 10(3) of the Statute of the ICTY which is similarly worded.

accused does not suffer twice for the same conduct,³⁸⁴ by allowing the ACC to consider any penalty issued by another court, even if that penalty resulted from the conditions listed in Article 46I(2)(a) and (b).³⁸⁵

According to Bernard, the rule of *ne bis in idem* has two primary functions in international criminal law. One function is the traditional purpose of the rule, that is, the accused person is protected from being placed in jeopardy twice. The other function is that the principle assists to uphold the structure of emergent international criminal law. The latter function seems to be accomplished through the internationalisation of the rule and hence aids in the fight against impunity.³⁸⁶

In *Katanga and Ngudjolo Chui*, Trial Chamber II held that the rule of *ne bis in idem* was not envisaged to be incorporated in Article 17 mainly because its purpose is to protect the accused; the rule was subsequently added to Article 17.³⁸⁷ Consequently, Article 20(3) serves complementarity in that it provides an interpretative aid for judgment delivered at the national plane and also provides for the application of the principle of *ne bis in idem* to actions for which a judgment was already rendered by the ICC and, at that moment, protects the individual.³⁸⁸

3.2.6 Insufficient gravity

For a case to be admissible, it must also be of sufficient gravity. In its policy papers the Prosecutor affirmed that ‘gravity is at the very heart of its selection process.’³⁸⁹ There is no definition of gravity in the Rome Statute. Therefore, aids for the assessment of the gravity threshold must be sought in the policy for prosecution and the decisions of the ICC.³⁹⁰ OTP Regulation 29(2) provides that the following criteria are considered: scale, nature, manner of commission and impact. The Pre-Trial Chambers upheld such elements and also endorsed a mixed qualitative-quantitative approach, such as in the situation in Kenya. Thus, factors taken into account by the Prosecutor involve the position or rank of the leaders or the individuals mostly responsible for the crime, the level of participation in the crime’s commission; the amount of victims, the effect of the crime, the scale of

³⁸⁴ Article 9(3) of the Statute of the ICTR which is couched in similar terms

³⁸⁵ Compare Article 20 of the Rome Statute which does not make any provision for the penalty emanating from a trial of convenience. It only empowers the ICC to continue with the trial of an accused person who would otherwise be able to plead *autrefois* convict or *autrefois* acquit in circumstances that render the earlier trial a sham trial.

³⁸⁶ Bernard D ‘*Ne bis in idem* – Protector of Defendants’ Rights or Jurisdictional Pointsman?’ (2011) 9 *JICJ* 863.

³⁸⁷ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07) Reasons for the oral decision on the Motion challenging the admissibility of the Case, 16 June 2009, para 48, cited by Bernard.

³⁸⁸ Bernard D ‘*Ne bis in idem* – Protector of Defendants’ Rights or Jurisdictional Pointsman?’ (2011) 9 *JICJ* 863.

³⁸⁹ Ambos K & Stegmiller I ‘Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy?’ (2013) 59 *CLSC* 415.

³⁹⁰ O’Brien M ‘Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court’ (2012) 10 *JICJ* 525.

the crime, the way in which the crime was committed, and the nature of the crime. Yet the rank of an individual and the amount of victims seem to be the most important.³⁹¹

The situation prevailing as at the time writing of the thesis, was the gravity concept remains unclear, particularly where the gravity assessment in the Rome Statute can be normatively grounded. As regards case selection, gravity may be considered under Articles 53(2) (b), 17(1) (d) and or Article 53(2) (c). Taking into consideration OTP Regulation 29 and the Pre-Trial Chamber II decision in the Situation in Kenya, it may be concluded that the Prosecutor and the Pre-Trial Chamber contend gravity only as the second prong of the admissibility test and that the statutory basis may be sought in Articles 53(2) (b) and 17(1) (d). Nevertheless, in its policy papers, the Prosecutor suggests a wider gravity concept, implying a certain degree of discretion.³⁹²

This invokes a relative determination, comparing cases and allowing some discretion. Ambos and Stegmiller claims that this discretionary approach is different from the legal (non-discretionary) assessment of gravity as articulated in Article 17(1) (d).³⁹³ It is held that this discretionary approach is not forbidden by the Rome Statute but its statutory basis is Article 53(2) (c) and not Article 17(1) (d).³⁹⁴ Consequently, if the Prosecutor intends to use gravity as a case selection and prioritisation element, he must label it accordingly, that is, he must explain whether gravity is used as a legal minimum standard with respect to Article 17(1) (d) or as a factor for case selection involving a certain degree of discretion. From the procedure and policy papers,³⁹⁵ it seems that the Prosecutor utilises gravity as a case selection factor involving some discretion and thus invokes Article 53(2) (c),³⁹⁶ thereby permitting judicial control pursuant to Article 53(3). This implies that the Pre-Trial Chamber may review any decision, on the basis of discretionary assessment of gravity,³⁹⁷ by the Prosecutor not to prosecute persons, the trigger mechanism being irrelevant.³⁹⁸ However, the Pre-

³⁹¹ O'Brien M 'Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court' (2012) 10 *JICJ* 525.

³⁹² Bray A 'The International Criminal Court Confronting Challenges on the path to justice' (2013) *Jackson School of International Studies Task Force Report*; 'Annex to the 'Paper on Some Policy Issues before the Office of the Prosecutor': Referrals and Communications', September 2003.

³⁹³ Arsanjani M 'Jurisdiction and Trigger Mechanisms of the ICC' in Lammers H (Eds) *Reflections on the International Criminal Court* (1999) 73.

³⁹⁴ Sameh M *The Role of the International Court of Justice as the Principle Judicial Organ of the United Nations* (2003) 103.

³⁹⁵ Phillips RB 'The International Criminal Court Statute: Jurisdiction and Admissibility' (1999) 10 *Criminal Law Forum* 61.

³⁹⁶ Robinson D 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *EJIL* 481.

³⁹⁷ Gavron J 'Amnesties in the Light of Development in International Law and the Establishment of the International Criminal Court' (2002) 51 *ICLQ* 91

³⁹⁸ Mazjub D 'Peace or Justice? Amnesties and the International Criminal Court' (2002) 3 *Melb JIL* 248.

Trial Chamber may only ask the Prosecutor to reconsider his decision, that is the Prosecutor takes the final decision.³⁹⁹

3.2.7 Preliminary Rulings

The highly controversial character of the concepts of unwillingness and inability explains why a Pre-Trial Chamber procedure, described in Article 18, was adopted, in order to obtain a preliminary ruling regarding admissibility. Thus, the complementarity role of the ICC in relation to national jurisdictions is strengthened by the creation of a specific control aimed at evaluating, at a very early stage, even before a ‘case’ has been identified and when the matter is still at the ‘situation’ stage, the issue of admissibility when the Prosecutor decides to commence an investigation. Such a control precedes the procedure described in Article 19 relating to ‘challenges to the jurisdiction of the ICC or the admissibility of a case’.⁴⁰⁰

Notwithstanding that the grounds for admissibility challenges are the same in every case, the way in which a case is referred to the ICC and who triggers the admissibility challenge will affect the process by which an admissibility challenge occurs and its consequences. Thus, a state may make an admissibility challenge of a situation immediately after the Prosecutor determines to start an investigation, only where a state has referred the situation or where the Prosecutor has started an investigation on its own motion.⁴⁰¹

An admissibility challenge may not be made when the UNSC has referred a situation.⁴⁰² Furthermore, individuals may not make an admissibility challenge of a situation and only accused persons in a specific case may make an admissibility challenge. The consequences of an admissibility challenge performed by a state are different from those of one done by an accused person. In the case of the former, the Prosecutor should suspend the investigation, whereas in the case of the latter, there is no need for the Prosecutor to suspend the investigation.⁴⁰³ This implies that admissibility challenges by states have a stronger effect than those instituted by persons or by the ICC on its own motion. It is claimed that this confirms that the complementarity principle is incorporated in the Rome Statute essentially to safeguard the primary jurisdiction of states over

³⁹⁹Ambos K & Stegmiller I ‘Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy?’ (2013) 59 *CLSC* 415.

⁴⁰⁰Schabas C *An Introduction to the International Criminal Court* 2nd ed (2004) 25.

⁴⁰¹Phillips RB ‘The International Criminal Court Statute: Jurisdiction and Admissibility’(1999) 10 *Criminal Law Forum* 61.

⁴⁰² Rome Statute of the International Criminal Court. (2012). *Issues of Admissibility* available at http://www.iccpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7_9CDC7CF02886/283503/RomeStatutEng1.pdf 12 June 2012. (accessed on 19 June 2017).

⁴⁰³ Arieff A, Margesson R & Browne MA ‘International Criminal Court Cases in Africa. Status and Policy Issues’ (2010) *CRS Report for Congress. Washington DC, Congressional Research Service.*

crimes within the ICC's jurisdiction.⁴⁰⁴ The fact that this procedural mechanism does not exist in the case of a UNSC referral implies that in such a case, there is a presumption of admissibility.⁴⁰⁵ This distinction may be considered reasonable, because there is no need for a specific filter aimed at protecting state sovereignty when the Prosecutor proceeds as a result of a referral of a situation by the UNSC acting under Chapter VII of the Charter: in this case the principle of domestic jurisdiction is not supposed to work in favour of states.⁴⁰⁶

3.2.8 Challenges

In *Lubanga*, the Appeals Chamber sustained that 'Article 19 of the Rome Statute regulates the context within which challenges to jurisdiction and admissibility may be raised by a party having an interest in the matter'.⁴⁰⁷ In contrast with Article 18 of the Rome Statute, which deals with admissibility of a situation, Article 19 only applies once a 'case' has been identified. It governs challenges based upon jurisdiction and admissibility. The two concepts bear many similarities, but this is the first point in the Rome Statute at which they are treated together. The ICC rules on challenges to jurisdiction first and then on admissibility.⁴⁰⁸

There is a distinction between the admissibility of a 'case' and jurisdiction of the 'ICC'. Admissibility can be challenged even before a 'case' has been identified, pursuant to Article 18. However, jurisdiction of the 'ICC', whether pertaining to the specific case or some broader issue, can only be challenged once there is a 'case'. Thus, a Rome Statute that considered the ICC was without jurisdiction to entertain a referral by the UNSC, for example,⁴⁰⁹ would need to wait until an arrest warrant had been issued before launching its contestation. Article 19 sets out certain procedural rights with respect to challenges to jurisdiction and admissibility, but it leaves the actual procedure to be determined by a Chamber that receives a request, or when it acts on its own motion pursuant to paragraph 1.⁴¹⁰ Issues of admissibility may exist at different instances of the

⁴⁰⁴Akande D 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10 *JICJ* 299.

⁴⁰⁵Schabas W *An Introduction to the International Criminal Court* 3 ed (2007) 365.

⁴⁰⁶Lüder SR 'The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice' (2002) 84 *IRRC* 79.

⁴⁰⁷*Lubanga* (ICC-01/04-01/06 (OA4)), Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the ICC pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, para 24, cited by Schabas W *An Introduction to the International Criminal Court* 3 ed (2007) 621-622.

⁴⁰⁸*Ibid.*

⁴⁰⁹Murithi T *Sequencing the Administration of Justice to Enable the Pursuit of Peace. Can the ICC Play a Role in Complementing Restorative Justice?* (2010) 73.

⁴¹⁰Akande D 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 19 *JICJ* 75.

proceedings, such as at the initiation of an investigation by the Prosecutor, at the pre-trial stage, at the start of the trial, or exceptionally at the end of the trial.⁴¹¹

In *Kony et al*, the Pre-Trial Chamber explained that Article 19 ‘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’. In other words, ‘the Rome Statute as a whole enshrines the idea that a change in circumstances allows (or even, in some scenarios, compels) the ICC to determine admissibility anew’.⁴¹²

It is hereby submitted by Benvenuti, that if all the elements triggering jurisdiction and admissibility are met and the Prosecutor is allowed to start the investigation, ‘a difficult game will be played’.⁴¹³ The ICC starts the game at a terrible disadvantage.⁴¹⁴ It acquires complementary jurisdiction when states having primary jurisdiction are unwilling or unable genuinely to execute the investigation or prosecution.⁴¹⁵ These states are usually the most connected with the crime and hence they are specifically the ones who essentially should cooperate with the ICC for effective prosecution. The paradox is that these are the very same states that are genuinely unwilling or unable to perform the investigation or prosecution.⁴¹⁶

As a legal procedure, the principle of complementarity needs non-legal elements to be present in order for the ICC to be able to exercise its jurisdiction efficiently. It is hereby concluded that all this again leads to the fact that, due to such a weak enforcement system, the ICC requires states to cooperate with it in order for it to function effectively.⁴¹⁷ As a result of cooperation,⁴¹⁸ the

⁴¹¹ Akande D ‘The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC’ (2012) 19 *JICJ* 75.

⁴¹² *Kony et al* (ICC-02/04-01/05), Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, para 28, cited by Schabas W *An Introduction to the International Criminal Court* 3 ed (2007) 621-622

⁴¹³ Jurdi NN ‘The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?’ (2010) 10 *ICLR* 73.

⁴¹⁴ Nidal Nabil Jurdi, ‘The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?’ (2010) 10 *ICLR* 73.

⁴¹⁵ Calvo-Guller KN *The Trial Proceedings of the International Criminal Court* (2006) 17.

⁴¹⁶ Article 17 (2) Rome Statute *supra* note 1 reads:

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(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 referred to in article 5;

(b) There has been an unjustified delay in the proceedings in which the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

⁴¹⁷ Mégret F ‘Why would states want to join the ICC? A theoretical exploration based on the legal nature of complementarity.’ in Kleffner JK & Kor G (eds) *Complementary views on Complementarity: Proceedings of the international roundtable on the complementary nature of the International Criminal Court* (2004) 2.

⁴¹⁸ Application under Article 19 of the Rome Statute.

Prosecutor would have the assistance of the national authorities in his investigations and prosecutions,⁴¹⁹ in collecting evidence and in protecting investigators and witnesses.⁴²⁰ Furthermore, division of labour between the ICC and national judicial systems may be reached whereby cases of those most responsible are tried by the ICC whereas those of lower-level perpetrators are tried by national judicial systems, thereby contributing in the reduction of the impunity gap.⁴²¹

3.3 National implementation of the Rome Statute of the ICC: obligations and challenges for states Parties.

Besides the extensive mentioning of issues relating to the administration of justice and cooperation,⁴²² the Rome Statute does not specifically stipulate any requirement on how states should implement it. Therefore states are not specifically obliged to incorporate international crimes into their domestic criminal law.⁴²³ For this reason some scholars have argued that states do not have to integrate the Rome Statute crimes into their domestic criminal law.⁴²⁴ Nevertheless, it is worth noting that the distinctive regime of the Rome Statute rests on two pillars,⁴²⁵ namely; cooperation and complementarity. Consequently it could be inferred that cooperation and complementarity legislation (implementing legislation) are necessary for states to implement the Rome Statute regime.⁴²⁶ Complementarity should be perceived and applied as a mutually inclusive concept. Implementing legislation is required for states to realize complementarity.

The premise of this argument is that ratification of the Rome Statute by states constitutes consent to complementarity as a concept designed by states, to be operated by states and for the benefit of states,⁴²⁷ and that it is for individual states to devise its implementation mechanism.⁴²⁸ In order to realize the benefit of complementarity, states need to engage actively in the investigation and

⁴¹⁹ Victim representation in the situation in Libya is on-going at the Court although the suspects *Saif Al- Islam* and *Mohammed Al-Senussi* are under arrest in Libyan government custody

⁴²⁰ Article 67 (1) (g) Rome Statute.

⁴²¹ Jurdi NN 'The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?' (2010) 10 *ICLR* 73.

⁴²² Articles 70(4) (a) and 86-92 relating to the adoption of legislation penalizing offences against the administration of justice and the obligation to cooperate fully with the ICC respectively.

⁴²³ Musila G *Rethinking International Criminal Justice: Restorative justice and the rights of victims at the International Criminal Court* (2011) 153.

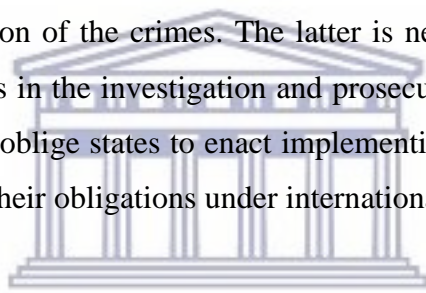
⁴²⁵ Mekjian GJ & Varughese MC 'Hearing the Victims' Voice: Analysis of victims' advocate participation in the trial proceeding of the International Criminal Court' (2005) 19 *University School of Law Journal* 1-49.

⁴²⁶ Bekou O 'In the Hands of the State: Implementing Legislation and Complementarity' in Stahn C & El Zeidy M *Complementarity Theory to Practice* (2011) 830-852.

⁴²⁷ Broomhall B '*International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*' (2003) 84; Ryngaert C 'Horizontal Complementarity' in Scheffer D and Cox A 'The Constitutionality of the Rome Statute of the International Criminal Court' (2008) 70. See also Pre-Trial Chamber II decision in *Joseph Kony et al* and Trial Chamber I decision in *Lubanga*.

⁴²⁸ UNHRC General Comment No. 31, para. 15.

prosecution of international crimes domestically.⁴²⁹ To demonstrate their willingness and genuine ability to carry out this duty, it can be argued that it is necessary for states to incorporate the crimes in the Rome Statute into their domestic criminal law. This is because international crimes and ordinary domestic crimes are not the same.⁴³⁰ This point is further strengthened by the jurisprudence of the Pre-Trial and Appeals Chambers of the ICC in which they have repeatedly rejected admissibility challenges brought by states with jurisdiction to try the same cases.⁴³¹ The basis for rejection has been that the states' assertions that they were investigating the suspects for the crimes they allegedly committed did not establish that the states' investigations actually covered the same persons and substantially the same conduct for which they were on trial before the ICC.⁴³² How a treaty is implemented that is, how it is given force under domestic law, or what legal changes are made to allow the state to act in accordance with its international obligations often varies from state to state, legal system to legal system and from treaty to treaty.⁴³³ In the case of the Rome Statute, issues of domestic implementation arise for both complementarity and cooperation.⁴³⁴ The former relates to the integration of Rome Statute crimes into domestic criminal law to enable domestic prosecution of the crimes. The latter is necessary to support and facilitate the ICC and national jurisdictions in the investigation and prosecution of alleged perpetrators. The Rome Statute does not expressly oblige states to enact implementing legislation.⁴³⁵ However, since states determine how to observe their obligations under international law and particularly in view of



⁴²⁹ Van den Wyngaert 'Victims Before International Criminal Courts: Some views and concerns of an ICC Trial Judge' (2011) 44 *Case Western Reserve Journal of International Law* 475-493.

⁴³⁰ As of 2013 the following African countries have implementing legislation at either draft stage or enacted laws (domesticating) with cooperation and complementarity provisions: Benin, Botswana, Burundi, Congo (Republic of), Central African Republic, Democratic Republic of Congo, Gabon, Ghana, Kenya, Lesotho, Mali, Niger, Nigeria, Senegal and South Africa. See 'Amnesty International: The ICC Summary of draft and enacted complementing legislation as at April 2006' available at http://www.iccnw.org/documents/AI_Implementation_factsheet06Nov14.pdf (accessed on 5 October 2017).

⁴³¹ Pre-Trial Chamber I in the *Saif Al-Islam* case; Pre-Trial Chamber II in the *Joseph Kony et al* case, Trial Chamber II in the *Germain Katanga* case and the Appeals Chamber in the *Muthaura et al* (Kenya Appeals Decision) case.

⁴³² 'same person same conduct' test formulated in the *Lubanga* case and applied in the cases analysed in Chapter One'. *The Prosecutor v. Thomas Lubanga Dyilo*, Decision concerning Pre-Trial Chamber I Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06-8-Corr.

⁴³³ International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR); Rights and Democracy, 'International Criminal Court Manual for the Ratification and Implementation of the Rome Statute' (hereinafter 'Ratification Manual') 11. Available <http://iccnw.org/documents/RightsDem&ICCLR_Manual_Eng.pdf> Accessed 10 July 2017

⁴³⁴ International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR); Rights and Democracy, 'International Criminal Court Manual for the Ratification and Implementation of the Rome Statute' (hereinafter 'Ratification Manual') 11. available at <http://iccnw.org/documents/RightsDem&ICCLR_Manual_Eng.pdf> (accessed on 10 July 2017).

⁴³⁵ Shelton D 'Righting Wrongs: Reparations in the Articles of State Responsibility' 96 *American Journal of International Law* (2002) 833-856 See also the Darfur Commission of Inquiry Report, paras. 596-597, which states the universal recognition of the right to an effective remedy, has a bearing on State responsibility. Thus, an offending State now has an international responsibility to make reparations towards the victims of an internationally wrongful act (which includes international crimes such as genocide, crimes against humanity and war crimes).

the distinctive complementarity regime, it is necessary for states to reflect on how to ensure its domestic implementation.⁴³⁶

Besides, for a state to successfully challenge the admissibility of a case before the ICC, the state has to prove that its domestic investigation encompasses both the same person and substantially the same conduct for which the suspect is standing trial before the ICC.⁴³⁷ It is argued that to pass the 'same person same conduct' test, states would need to have incorporated the Rome Statute crimes into their domestic criminal law. This means that states may use pre-existing cooperation mechanisms. In this section, it is argued that existing cooperation mechanisms like extradition rules cannot be relied on by states because the cooperation regime under the Rome Statute is different from extradition procedures that exist between states. Therefore, cooperation legislation is important, not least for the sole purpose of cooperating fully with the ICC, but also for states to benefit from the 'reverse' cooperation regime introduced in Article 93(10).

3.3.1 The Rationale for Implementing Legislation

It might seem out of place to consider the implementation of the Rome Statute in the national legal systems of states. This is because the Rome Statute places no specific obligation upon states to implement the Rome Statute's provisions *per se*.⁴³⁸ While it does contain various requirements for states' cooperation with the ICC,⁴³⁹ these relate exclusively to matters of investigatory, executory and trial procedures.⁴⁴⁰ Consequently, these have been the subject of little or no controversy,⁴⁴¹ although the practical application of cooperation between the ICC and states remains a challenge. With respect to complementarity legislation, it may further be argued that some of the crimes defined by the Rome Statute, as well as the general principles and the jurisdictional regimes applicable to them, had been recognized by international law prior to the adoption of the Rome Statute.⁴⁴² According to some, the obligation on states to adopt the crimes into their domestic laws

⁴³⁶ Bekou O 'Regionalising ICC Implementing Legislation: A Viable Solution for the Asia-Pacific Region?' in Boister N & Costi A (eds) *Regionalising International Criminal Law in the Pacific* (2006) 117-144.

⁴³⁷ *Saif Al-Islam* case para 74.

⁴³⁸ Turns D 'Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds) *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 337- 338.

⁴³⁹ Part 9 of the Rome Statute which imposes a general obligation on states parties to cooperate with the ICC in investigating and prosecuting the crimes within the ICC's jurisdiction.

⁴⁴⁰ Bekou O 'The Complementarity Regime' of the ICC' (2001). posted on the website of the German Council of Foreign Relations, Berlin, available at <http://www.weltpolitik.net/sachgebiete/zukunft/article/418.html>.

⁴⁴¹ Turns D 'Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds) *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 337- 338.

⁴⁴² The Convention for the Prevention and Punishment of Genocide (1948) proscribed the crime of genocide, the Four Geneva Conventions of (1949) and the Additional Protocols I and II of 1977 (AP I & II) proscribed war crimes and crimes against humanity.

is derived from treaties.⁴⁴³ Thus, a strong point may be made that since the crimes have been recognized by international law, it is superfluous to require states to incorporate them into their domestic criminal law. However, in this thesis, it is maintained that for the distinctive regime of the Rome Statute, complementarity legislation is necessary for states, particularly those taking a dualist approach to international law.

3.3.2 The Pre-Trial Chamber I decision on the admissibility challenge by Libya in the *Saif Al-Islam Gaddafi* case

Article 1 of the Rome Statute does not require national implementation. However, its formulation of complementarity, reiterates that primary jurisdiction over the crimes delineated in the Rome Statute is given to individual states.⁴⁴⁴ Implicitly, this implies a need for implementation. States must ensure that they are able to prosecute the crimes enumerated in Articles 6-8 of the Rome Statute, not only theoretically, for example, by having the legal capability to assert jurisdiction to prosecute, but also in reality, by having the crimes listed in the Rome Statute in their national criminal law. Logically, implementing legislation safeguards the primary right of states to investigate and prosecute crimes which could potentially come under the jurisdiction of the ICC and more specifically to avoid being declared 'unable'.⁴⁴⁵ This is because inability does not only apply to situations of failed states in which armed conflict has resulted in the substantial or total collapse of the national judicial system; but it equally applies to the inability to carry out proceedings due to the substantial or total unavailability of a state's judicial system.

This form of inability may result from the absence or inadequacy of substantive legislation at the domestic level.⁴⁴⁶ Thus, defects in domestic law, which might render the national judicial system substantially or totally unavailable, can make a case admissible before the ICC.⁴⁴⁷ For example the Swaziland constitution in section 11 outlines that the King and Ingwenyama shall be immune from,⁴⁴⁸ (a) suit or legal process in any case in respect of all things done or omitted to be done by

⁴⁴³ Article V of the Genocide Convention, Articles 49, 50, 129 and 146 of the First, Second, Third and Fourth Geneva Conventions respectively; Articles 85-87 AP I; Article 6 of the Torture Convention (1984) where states undertook to enact necessary legislation to give effect to the provisions of the Conventions.

⁴⁴⁴ Article 1 of the Rome Statute provides that the ICC shall be complementary to national criminal jurisdictions; other formulations of complementarity are to be found in paras 6 & 10 of the Preamble to the Statute.

⁴⁴⁵ Kleffner J 'The Impact of Complementarity on National Implementation of the Substantive International Criminal Law' (2003) 1 *JICJ* 86-113.

⁴⁴⁶ Gaeta P 'Official Capacity and Immunities' in Antonio Cassese, John Jones (eds) *The Rome Statute of the International Criminal Court* (2002) 975-1002.

⁴⁴⁷ Kleffner J 'The Impact of Complementarity on National Implementation of the Substantive International Criminal Law' (2003) 1 *JICJ* 86-113.

⁴⁴⁸ Section 11 of the Swaziland Constitution of 2005.

him; and (b) being summoned to appear as a witness in any civil or criminal proceeding thus this makes the Swaziland case admissible before the ICC.⁴⁴⁹ Contrary to the assertion that implementing legislation is necessary for national implementation of the Rome Statute, the Rome Statute does not expressly say that it is. In fact, the Rome Statute's silence on the point has been read to mean that states may depend on ordinary domestic criminal law to prosecute international crimes. Surprisingly, this position was upheld by the Pre-Trial Chamber I (PTCI) in its decision of 31 May 2013 regarding the admissibility challenge by Libya in the *Saif Al-Islam Gaddafi* case.⁴⁵⁰ The PTCI noted that 'a domestic investigation or prosecution for 'ordinary crimes' to the extent that the case covers the same conduct shall be considered sufficient'.⁴⁵¹ It was the Chamber's view that the absence of legislation Libya criminalizing crimes against humanity did not render the case admissible before the ICC.⁴⁵²

Nevertheless, the Chamber assessed Libya's ability in relation to the Libyan Code of Criminal Procedure, amongst others, and found that Libya was unable to investigate Gaddafi. The PTCI decision was founded on Libya's failure to provide the Chamber with 'enough evidence with a sufficient degree of specificity and probative value to demonstrate that Libya's investigations covered the same conduct as those with the ICC'.⁴⁵³ In rejecting the admissibility challenge, the PTCI made reference to the Appeals Chamber's previous decisions in the two Kenyan cases,⁴⁵⁴ in which the Chamber upheld the validity of the 'same person same conduct' test. The defining elements of a concrete case before the ICC are the individual and the alleged conduct. It follows that for such a case to be inadmissible under Article 17(1) (a) of the Rome Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the ICC.⁴⁵⁵

The 'case' as referred to in Article 17 of the Rome Statute is characterized by two components: the person and the conduct. The PTCI further observed that while it is uncontested that national

⁴⁴⁹ Dube A & Nhlabatsi 'The King can do no wrong: The impact of the Law Society of Swaziland v Simelane no & others on constitutionalism' (2016)16 *African Human Rights Law Journal* 10.

⁴⁵⁰ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Hussein* ICC-01/11-01/11-344-Red Decision of the Pre-Trial Chamber I on the Admissibility of the case against Saif Al-Islam Gaddafi 27 August 2017. <http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf> (*Saif Al-Islam* case).

⁴⁵¹ *Ibid*, paras 88, 108, 133, 200, 201

⁴⁵² *Ibid*, para 88

⁴⁵³ *Ibid*, paras 134, 135, 219

⁴⁵⁴ Appeals Chamber, *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* Judgement on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the case Pursuant to Article 19(2)(b) of the Statute' 20 August 2011 ICC-01/09-01/11-307 para 40; Appeals Chamber, *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya challenging the Admissibility of the case Pursuant to Article 19(2)(b) of the Statute' 30 August 2011 ICC-01/09-02/11-274, (hereinafter '*Muthaura et al* case') para 39.

⁴⁵⁵ *Muthaura et al case* paras 39, 40, 41, 42 & 61.

investigations must cover the 'same person',⁴⁵⁶ the 'conduct' part of the test raises issues of interpretation and needs further clarification.⁴⁵⁷

Admittedly, the determination of what constitutes 'substantially the same conduct' as alleged in the proceedings before the ICC will vary according to the concrete facts and circumstances of the case and therefore requires a case-by-case analysis.⁴⁵⁸ However, it is argued that 'substantially the same conduct' cannot be interpreted in a manner that would allow variation in the underlying facts and incidents, as such a flexible interpretation would undermine the very purpose of complementarity.⁴⁵⁹

The ordinary crimes for which Saif Al-Islam Gaddafi was being investigated were murder, torture, incitement to civil war, indiscriminate killings, misuse of authority against individuals, arresting people without just cause and unjustified deprivation of personal liberty pursuant to articles 368, 435, 293, 296, 431, 433 and 434 of the Libyan Criminal Code.⁴⁶⁰ On the other hand, the ICC arrest warrant for Saif Al-Islam was for the commission of murder and persecution as crimes against humanity under Article 7(1)(a) and (h) of the Rome Statute.⁴⁶¹

It is maintained that the ordinary crimes for which Libya proposed to prosecute Saif Al-Islam are not the same as the crimes against humanity of murder and persecution, for which was indicted before the ICC. Although not expressly stated by the PTCI, it is submitted that it is for this reason that the PTCI found Libya unable to investigate and prosecute and rejected the admissibility challenge. This argument finds support in the PTCI assertion that 'a domestic investigation or prosecution for ordinary crimes is sufficient *provided that it covers the same conduct*'.⁴⁶²

In other words, to pass the 'same conduct' limb of the test, the domestic investigation of an ordinary crime must cover the same acts as stipulated in the Rome Statute and the ICC arrest warrant. It is argued that this is possible only when the domestic law incorporates the Rome Statute crimes because international crimes are not usually known to domestic criminal law. In addition, the PTCI raised specific concerns regarding the ordinary crimes for which Saif Al-Islam was being investigated.⁴⁶³ Two concerns noted by the Chamber were; first, that the crimes potentially applicable to Saif Al-Islam apply only to 'public officers' under Libyan legislation, which could

⁴⁵⁶ Ibid, paras 1, 40-43.

⁴⁵⁷ *Saif Al-Islam* case, para 61.

⁴⁵⁸ Ibid, para 77.

⁴⁵⁹ Ibid, para 68.

⁴⁶⁰ *Saif Al-Islam* case paras 28 & 112.

⁴⁶¹ Article 7(1)(a) and (h) of the Rome Statute.

⁴⁶² Ibid, paras 85, 86, 108, 133, 200, 201

⁴⁶³ Ibid, para 108, 109.

raise problems, as Saif Al-Islam did not occupy a formal official position in Libya.⁴⁶⁴ Second, since the crime of persecution was not known in Libyan law, the Chamber was not satisfied with Libya's claim that though discriminatory intent was absent, it was an aggravating factor which would be taken into account in sentencing under Articles 27 and 28 of the Libyan Criminal Code.⁴⁶⁵

Furthermore, the PTCI determined that the crimes which Libya proposed charging Saif Al-Islam with under Libyan legislation do not cover all aspects of the offences under the Rome Statute.⁴⁶⁶ Consequently, the Chamber established that Libya failed to 'provide evidence with a sufficient degree of specificity and probative value to demonstrate that Libya's investigations covered the same conduct as those with the ICC'.⁴⁶⁷

The PTCI's argument inevitably leads to the inference that if Libya had adopted implementing legislation and begun its investigation based on the same conduct as contained in the Rome Statute and the ICC arrest warrant, Libya would have been able to show the 'sufficient degree of specificity and probative value' required by the PTCI. Ultimately a state that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible.⁴⁶⁸ The central argument in this thesis as reflected in the PTCI decision in the *Saif Al-Islam* case, is that the lack of substantive and procedural penal legislation in conformity with the Rome Statute rendered Libya's judicial system unavailable.⁴⁶⁹

It is submitted that the PTCI's assertion that states do not have to integrate the Rome Statute crimes into their domestic criminal law is supported by the Rome Statute only to the extent that the Rome Statute is silent on it. In the *Lotus* case,⁴⁷⁰ the Permanent Court of International Justice (PCIJ) noted that as long as international law does not expressly prohibit something, it may be applied.⁴⁷¹ It is argued further that although not explicitly stated, such an obligation is implied and could be read into the Rome Statute, as it is not possible to 'put something on nothing and expect it to [stand], it will collapse'.⁴⁷² Complementarity can only stand on the effective criminal justice systems of states and the starting point for that effectiveness is incorporating the Rome Statute crimes domestically.

⁴⁶⁴ Ibid, para 109.

⁴⁶⁵ Ibid, para 111.

⁴⁶⁶ Ibid, para 113.

⁴⁶⁷ Ibid, paras 134, 135.

⁴⁶⁸ Bekou O & Antoniadis A 'The EU and the International Criminal Court: An Uneasy Symbiosis in Interesting Times' (2007) 7 *International Criminal Law Review* 621-655.

⁴⁶⁹ *Saif Al-Islam* case, para 52; *Muthaura et al* case, para 62; Pre-Trial Chamber I Decision in *Saif Al-Islam* case 7 December 2012 para 9; Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012 ICC-01/11-01/11-T-3-Red-ENG, 64-65.

⁴⁷⁰ *Lotus SS* 'Publication of the Permanent Court of International Justice' (1927) 10.

⁴⁷¹ Ibid, 19.

⁴⁷² *Per* Lord Denning in *Macfoy v UAC Ltd* (1961) 3 WLR (PC) 1405, 1409.

Nevertheless, the argument that states can prosecute the crimes in the Rome Statute on the basis of ordinary domestic crimes.

The Rome Statute's only provision referring to a duty to prosecute is the sixth preamble paragraph, which states that it is the duty of every state to exercise criminal jurisdiction over those responsible for international crimes.⁴⁷³ Accordingly, she argues that there is no obligation on states to proscribe the Rome Statute crimes in their domestic criminal law.⁴⁷⁴ Moreover, the Rome Statute does not oblige states to make use of their primary right to investigate and prosecute war crimes, crimes against humanity or genocide.⁴⁷⁵ It is with noting that rigorous legal reform in national criminal law is not strictly required under the Rome Statute and the provision of preamble is not binding.⁴⁷⁶

3.3.3 The lack of an explicit obligation on states to enact implementing legislation

The main argument of this thesis is that adopting such legislation is nonetheless necessary for the application of complementarity. The inferences derived from the PTCI's decision in the *Saif Al-Islam* case described above, such a position finds support in a number of arguments. First, paragraph six of the preamble recalls the duty to 'exercise [their] criminal jurisdiction...'⁴⁷⁷ such a duty presupposes an obligation to ensure that the crimes in the Rome Statute are incorporated into national criminal law.

Second, the Rome Statute affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished' and expresses the view that 'their effective prosecution must be ensured by taking measures at the national level...'⁴⁷⁸ This underpins the realistic assertion that not all international crimes committed in a particular situation can be prosecuted before the ICC.⁴⁷⁹ In line with this position, it has been noted that the ICC only prosecutes those who bear the greatest responsibility for the gravest crimes.⁴⁸⁰ By implication, an

⁴⁷³ Nouwen S 'Complementarity in Uganda: Domestic Diversity or International Imposition?' in Stahn C and ElZeidy M (eds) *Complementarity from Theory to Practice* (2005) 1127.

⁴⁷⁴ Ibid.

⁴⁷⁵ Nouwen S 'Complementarity in Uganda: Domestic Diversity or International Imposition?' in Stahn C and ElZeidy M (eds) *Complementarity from Theory to Practice Vol II* (2011) 1127.

⁴⁷⁶ Mégret F 'Too Much of a Good thing? Implementation and the Uses of Complementarity' in Stahn C and (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (2011) 361-390, 367-374 (noting that requiring states to adopt comprehensive implementing legislations goes beyond what is required under the Rome Statute).

⁴⁷⁷ Rome Statute, para 6 of the Preamble.

⁴⁷⁸ Rome Statute, para 4 of the Preamble.

⁴⁷⁹ Williams S and Schabas W 'Article 17: Issues of Admissibility' in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes Article By Article* (2008) 605-625.

⁴⁸⁰ The PTCI decision of 10 February 2006 in the *Lubanga* and *Ntaganda* cases ICC-01/04-01/07; The ICC, 'Understanding the International Criminal Court' Available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> paras 37 & 38; Xabier Aranburu, 'Prosecuting the Most Responsible for the International crimes: Dilemmas of Definition and Prosecutorial Discretion'. available at http://s3.amazonaws.com/academia.edu.documents/30582797/100106_Xabier_AGIRRE_ARANBUR (accessed on 20 August 2017).

appropriate starting point for effective prosecution by states would be to either adjust domestic laws or make new laws to incorporate the crimes. Without the crimes being reflected in national criminal laws, implementation of complementarity as envisaged in the Rome Statute lacks its principal pillar, namely, ‘measures at the national level’.⁴⁸¹ Third, effective prosecution at the national level is to fulfill the goal; of putting ‘an end to impunity for the perpetrators...and thus contributing to the prevention of such crimes’.⁴⁸² This implies that the complementary jurisdiction of the ICC denotes a system of international law enforcement that allocates primary responsibility to national criminal jurisdictions.⁴⁸³ In such a system, the object of prosecuting with the effect of deterrence for the ultimate purpose of putting an end to impunity is undermined by states not having implementing legislation.

In agreement with this argument, the Informal Expert Group noted with regard to the principle of complementarity that, consistent with its mandate to help ensure that serious international crimes do not go unpunished, it should be a high priority for the Office of the Prosecutor to actively remind states of their responsibility to adopt and implement effective legislation.⁴⁸⁴

This implies that proof of a state’s ability or willingness to investigate and prosecute international crimes and to cooperate with the ICC could be ascertained by its implementing legislation.⁴⁸⁵ According to the former Registrar of the ICC, implementing legislation underpins the Rome Statute structure, such that the whole system becomes ineffective without it.⁴⁸⁶ She affirms that effective cooperation with the ICC is dependent upon the existence of implementing legislation at national levels. Accordingly, to guarantee cooperation, legislative and sometimes constitutional amendments are needed, although their exact scope and legal form may vary from one state to another.

As an international institution without direct enforcement mechanisms, the ICC heavily relies on cooperation from states the Rome Statute is a two pillar system: a judicial pillar represented by the ICC, and an enforcement pillar represented by the states, which undertook a legal obligation to cooperate with the ICC through the Rome Statute. Cooperation is the inter-play between these two

⁴⁸¹ Kleffner J ‘The Impact of Complementarity on National Implementation of the Substantive International Criminal Law’ (2003) 1 *JICJ* 86-113.

⁴⁸² Rome Statute, para 5 of the Preamble.

⁴⁸³ Kleffner J ‘The Impact of Complementarity on National Implementation of the Substantive International Criminal Law’ (2003) 1 *JICJ* 86-113.

⁴⁸⁴ The Commonwealth Expert Group on Review of the Implementing Legislation for the Rome Statute’ 23-25 February 2011 (Proposing a model law on the implementation of the Rome Statute by Commonwealth member states). available at <[http://www.thecommonwealth.org/files/238381/FileName/LMM\(11\)17PICCStatuteandImplementationoftheGenevaConventions.pdf](http://www.thecommonwealth.org/files/238381/FileName/LMM(11)17PICCStatuteandImplementationoftheGenevaConventions.pdf)> (assessed 8 July 2017).

⁴⁸⁵ Triponel A & Pearson S ‘African States and the International Criminal Court: A Silent Revolution in International Criminal Law’ (2010) 12 *JLS* 65-106.

⁴⁸⁶ Arbia S and Bassy G, ‘Proactive Complementarity: A Registrar’s Perspective and Plans’ in Stahn and ElZeidy, *Complementarity from Theory to Practice* (2011) 65.

pillars, shown clearly by the fact that the ICC requires the states to play their part in order for the system created by the Rome Statute to work.⁴⁸⁷

The foregoing argument reveals that the ICC can only be an effective complement if states adopt the Rome Statute's substantive law for the purpose of domestic prosecution. Where states fail to enact implementing legislation, gaps are left that would ultimately prevent perpetrators from being brought to justice at the domestic level. It may also culminate in a large number of cases being admissible before the ICC. Thus, in order for the ICC to effectively perform its complementary function, comprehensive implementing legislation is indispensable.⁴⁸⁸

The view expressed by the German Government in the course of implementing the Rome Statute by adopting the Code of Crimes against International Law (CCAIL) in 2002 further exemplifies this understanding.⁴⁸⁹ The Government of Germany noted that adoption of the law was necessary in order to ensure, in light of the complementary prosecutorial competence of the ICC, that Germany is always able to prosecute crimes within the jurisdiction of the ICC.⁴⁹⁰ Furthermore, the Dutch Minister for Foreign Affairs J.D. de Hoop Scheffer in his statement to the First Assembly of states Parties, explained that complementarity requires states 'to ensure ratification is followed by swift action to bring national legislation into line, because the Rome Statute will be incomplete without implementation and enforcement...'⁴⁹¹ As noted by Garapon;

'Complementarity is not just a mechanism for the ICC Prosecutor to bypass cases: it carries with it the hope for a more harmonious world in which we are all engaged, starting with the Third states. If this institution is not supported by respected states prepared to lend their weight in the service of justice in a coordinated development policy, complementarity will become purely cosmetic.'⁴⁹² The debate in this section has thus far focused on justification for the adoption of implementing legislation by states. It is believed that it is first and foremost to the benefit of states to take on the investigation and prosecution of crimes in the Rome statute and second for the sustainability of the ICC. Once domestic criminal laws reflect the international crimes that come under the jurisdiction of the ICC, then it would be easy for them to investigate and prosecute with the international legal

⁴⁸⁷ Arbia S 'Justice for all'.

⁴⁸⁸ Robinson D 'The Rome Statute and its Impact on National Law' in Politi M and Gioia F (eds) *The international Criminal Court and National Jurisdictions* (2008) 69.

⁴⁸⁹ Turns D 'Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds) *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 337- 338.

⁴⁹⁰ Ibid.

⁴⁹¹ Statement by the Dutch Minister for Foreign Affairs J.D. de Hoop Scheffer to the First Assembly of States Parties 9 September 2002 New York. Available at <<http://www.iccnw.org/html/NetherlandsASP9Sept02.doc>> (Assessed 30 August 2017).

⁴⁹² Garapon A 'What does Complementarity Commit us to?' in *Tenth Anniversary of the International Criminal Court: The Challenges of Complementarity* (2012) 54-71.

characterisation of the crimes. It is argued that it is only on this basis that primary jurisdiction has been given to states, as it is only then that states would be able to pass the 'same conduct' limb of the 'same person same conduct' test. Issues of implementing legislation relate principally to complementarity and cooperation.

3.3.4 Cooperation Legislation

There appears to be no debate on the need for cooperation legislation, as it is expressly declared in the Rome Statute that states are expected to cooperate fully with the ICC. However, it may be argued that duty of states to cooperate with the ICC does not necessarily demand an extensive cooperation regime as individual states may rely on pre-existing cooperation mechanisms available to them.⁴⁹³ The purpose of the analysis in this section is to argue that under the complementarity regime, distinct cooperation legislation is required for a number of reasons.⁴⁹⁴ First, the general cooperation that the ICC may request from states parties are set out in Parts 9 and 10 of the Rome Statute.⁴⁹⁵ As described there, the cooperation envisaged could be broadly categorised into three areas: (1) the arrest and surrender of persons at the request of the ICC; (2) other practical assistance with the ICC's investigations and prosecutions and (3) general enforcement.⁴⁹⁶ Of these, the arrest and surrender of persons at the request of the ICC is arguably the most important because under the Rome Statute, trials *in absentia* are not permitted.⁴⁹⁷ Thus, the effective functioning of the ICC is wholly dependent upon national procedures which can comply with a request for arrest, and facilitate the surrender of suspects in order to ensure the appearance in court of accused persons.⁴⁹⁸

Article 89(1) of the Rome Statute imposes a general duty on states to comply with a request for the arrest and surrender of an individual to the ICC.⁴⁹⁹ However, the manner in which the arrest is to be executed and that of the surrender of the suspect to the ICC is left entirely to states to determine.⁵⁰⁰ This is understandably so since it would have been impossible for the drafters of the Rome Statute

⁴⁹³ Chapter I on International Cooperation with the International Criminal Court.

⁴⁹⁴ Kress C & Sluiter G Preliminary Remarks' in the Rome Statute of the International Criminal Court: A Commentary Volume II (2002) 43.

⁴⁹⁵ Burke-White W 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Law' (2008) *Harvard International Law Journal* 53-108

⁴⁹⁶ Parts 9 & 10 (Arts 86-111) of the Rome Statute. The forms of cooperation include general compliance with the ICC requests for cooperation (Art 87); Surrender of persons to the ICC (Art 89); Provisional arrests pursuant to ICC requests (Art 92); identification or location of persons or items, taking and production of evidence, service of documents, facilitating witnesses' and experts' attendance before the ICC, temporary transfer of persons, examination of sites (e.g. mass graves), execution of search and seizure Orders, protection of witnesses, freezing of sequestration of property and assets (Art 93); and enforcement of sentences (Arts 103-107), fines and forfeiture orders (Art 109).

⁴⁹⁷ Rome Statute, article 63.

⁴⁹⁸ Bekou O and Shah S 'Realising the Potential of the International Criminal Court: The African Experience' (2006) 6 *HRLR* 499-544, 523; Katz A 'An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National Law in South Africa' (2003) 12 *African Security Review* 25-30

⁴⁹⁹ Rome Statute, Article 89(1).

⁵⁰⁰ Mirjan D 'What is the point of international criminal justice?' (2008) 83 *Chicago-Kent Law Review* 329-364.

to provide a generic approach which could be followed by all states parties.⁵⁰¹ It would also have amounted to infringing too much on the sovereignty of states, as the intrusiveness of the ICC has already been cited as a major concern by states.⁵⁰²

In order to secure the presence of accused persons at proceedings before the ICC, the question of whether the cooperation regime under the Rome Statute could depend on existing extradition laws between states needs to be answered.⁵⁰³ Extradition is the traditional method of securing the presence of alleged perpetrators of crimes to stand trial or serve a sentence, and it is usually a consequence of a bilateral agreement between states.⁵⁰⁴ The national legislation of some states contains provisions on extradition but the content varies from one state to another.⁵⁰⁵

A cornerstone of extradition law is the requirement of double criminality.⁵⁰⁶ The rule of double criminality requires that the conduct with regard to which extradition is requested constitutes a crime according to the law of both the requesting and the requested state at the time of its commission.⁵⁰⁷ This requirement is a means of ensuring reciprocity as well as protecting the individual requested against punishment for conduct that has not been criminalized by the requested state.⁵⁰⁸ Another requirement is the principle of specialty or specialty whereby the requesting state can only prosecute the surrendered person for the crime for which extradition was granted.⁵⁰⁹ Other procedural impediments to extradition include statutes of limitation and immunities.⁵¹⁰ These considerations are irrelevant under the Rome Statute because the Rome Statute uses the word 'surrender'⁵¹¹ and not extradition and inhibitions such as immunities and statutes of limitations have been conspicuously removed.⁵¹²

Article 59 of the Rome Statute provides for arrest and surrender proceedings in the custodial state.⁵¹³ The travaux préparatoires indicate that during the negotiations in Rome, three different terms were considered to achieve the handing over of an alleged perpetrator to the ICC. These were

⁵⁰¹ Bekou O and Shah S 'Realising the Potential of the International Criminal Court: The African Experience' (2006) 6 *HRLR* 525.

⁵⁰² Du Plessis M 'South Africa's Implementation of the ICC Statute – An African Example' (2007) 5 *Journal of International Criminal Justice* 460-479.

⁵⁰³ Katz A 'An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National Law in South Africa' (2003) 12 *African Security Review* 43.

⁵⁰⁴ Du Plessis M 'The Pinochet cases and South African extradition law' (2000) *South African Journal of Human Rights* 669-689.

⁵⁰⁵ Bassiouni C 'Introduction to International Criminal Law' (2013) 500-502.

⁵⁰⁶ Swart B 'Arrest and Surrender' in Cassese *et al* (2011) 1652-1654

⁵⁰⁷ *Ibid*, 1653.

⁵⁰⁸ *Ibid*.

⁵⁰⁹ Bassiouni C 'Intro to ICL' *Ibid*, 501.

⁵¹⁰ Swart B 'Arrest and Surrender' in Cassese *et al* (2011) 1653.

⁵¹¹ Murdoch W 'A South African perspective on mutual legal assistance and extradition in a globalized world' (2012) *Potchefstroom Electronic Law Journal* 24-53.

⁵¹² Rome Statute, Articles 27 & 29.

⁵¹³ Rome Statute, article 59(2).

extradition, transfer or surrender. However, 'extradition' was rejected by some states during the Rome Conference because of constitutional restrictions on the extradition of nationals.⁵¹⁴ Similarly, the concept of 'transfer',⁵¹⁵ where a person sought is merely arrested and sent to the ICC, was rejected because the usual safeguards contained in the extradition process concerning the curtailment of liberty were absent.⁵¹⁶

As a compromise, the term 'surrender' was adopted.⁵¹⁷ For the purposes of the Rome Statute, Article 102 defines surrender as the delivering up of a person by a state to the ICC pursuant to the Rome Statute.⁵¹⁸ Extradition means the handing over of a person by one state to another as provided by treaty, convention or national legislation.⁵¹⁹ Thus, the surrender of a person to the ICC is fundamentally different from the handing over of a person within the framework of extradition between states,⁵²⁰ because it does not rest on reciprocity. Although this may not be fundamentally different in practice,⁵²¹ it is recommended that for the full cooperation required, states should not rely on their extradition laws for the purposes of arrest and surrender of alleged perpetrators to the ICC.

Second, similar to the *ad hoc* tribunals, the ICC cannot enforce its own decisions; it cannot execute arrest warrants in the territory of states and does not have its own police force.⁵²² As noted by the Appeals Chamber of the ICTY in the *Blaskic* case,⁵²³ 'enforcement powers must be expressly provided and cannot be regarded as inherent in an international tribunal'.⁵²⁴ From this perspective, there is no direct enforcement of international criminal law because the organs in charge of implementation depend on indirect enforcement in order to function properly.⁵²⁵

⁵¹⁴ States with civil law tradition (such as Germany, France, Spain and Italy) as opposed to a common law tradition do not as a rule extradite their own citizens.

⁵¹⁵ 'Transfer' was the expression used by the ILC in its 1994 Draft Statute. In Part 10 of the Rome Statute, the term 'transfer' is now used in relation to persons serving a sentence of imprisonment imposed by the ICC.

⁵¹⁶ Robinson D 'The Mysterious Mysteriousness of Complementarity' (2010) 67-102.

⁵¹⁷ 'Surrender and Transfer under the Statutes of the *Ad Hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda' in Cassese A, Gaeta P & Jones J (eds) *The Rome Statute of the International Criminal Court* (2002) 1639-1654.

⁵¹⁸ Rome Statute, article 102(a).

⁵¹⁹ Rome Statute, article 102(b).

⁵²⁰ Cassese A *et al*, 1678.

⁵²¹ Dugard J *International Law A South African Perspective* (2005) 308-309.

⁵²² Ambos K 'Prosecuting International Crimes at the National and International Level: Between Justice and Real politik' (2008) 19 CLF 181-198. (Noting that as a rule international tribunals depend on the cooperation with national jurisdictions not only for the arrest, investigation and prosecution of core international crimes but also for the execution of sentences).

⁵²³ *Prosecutor v Tihomir Blaskic* ICTY Case No. IT-95-14-AR108bis Appeals Chamber decision of 29 October 1997 (*Blaskic* case).

⁵²⁴ *Ibid* para. 25.

⁵²⁵ Harmon M and Gaynor F 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings' (2004) 2 *JICJ* 403; Gamarra Y and Vicente A 'United Nations' Member States' Obligations Towards the ICTY: Arresting and Transferring Lukic, Gotovina and Zelemenovic' (2008) 8 *ICLR* 627.

The cooperation regime of the *ad hoc* tribunals and states could be described as vertical, which is distinct from horizontal cooperation between states.⁵²⁶ With the latter, there is no legal obligation to cooperate. Rather such cooperation depends on the sovereign decision of the state concerned.⁵²⁷ The only precondition which may act as an impediment is the requirement of the principle of reciprocity.⁵²⁸ On the other hand, vertical cooperation is not inhibited by such an obstacle because the state's cooperation is not theoretically dependent on the sovereign decision of the state, but rather on a general obligation to cooperate.⁵²⁹

Consequently, the cooperation regime set out in the ICTY and ICTR Statutes was binding on all member states of the United Nations by virtue of Chapter VII of the United Nations Charter and it contained no qualifications and no exceptions.⁵³⁰ This is what made the relationship it truly vertical, as the cooperation regimes were construed in a one-sided fashion; namely, entailing assistance and support from states to the tribunals.⁵³¹ National rules and other international obligations which were opposed to obligations towards the tribunals could, in principle, be raised as grounds for refusal to cooperate. Therefore, noncompliance with the duty to cooperate could be met with Security Council sanctions on the violating state.

On the contrary, the Rome Statute favours a cooperation regime based on the traditional horizontal law of mutual assistance. At the same time, the 'like-minded'⁵³² states proposed a new form of cooperation which takes into account the *sui generis* nature of the ICC.⁵³³ As a result, the Rome Statute contains a mixed regime of cooperation that is, on the one hand, less vertical than the one of the *ad hoc* Tribunals but on the other hand, goes beyond merely horizontal cooperation.⁵³⁴ This is because the ICC cooperation regime is treaty-based, and must therefore reconcile conflicting interests. In principle, the duty to cooperate presupposes the full cooperation of state parties upon

⁵²⁶ *Blaskic* case, paras 47 & 54.

⁵²⁷ Bassiouni M 'Introduction to International Criminal Law' (2003) 518.

⁵²⁸ Sluiter G 'International Criminal Adjudication and the Collection of Evidence: Obligations of States' (2002) 82-88.

⁵²⁹ Cryer R & Bekou O 'International Crimes and ICC Cooperation in England and Wales' (2007) *JICJ* 441-459.

⁵³⁰ Articles 28 and 29 ICTY and ICTR Statutes respectively, which derive their authority from Security Council Resolutions 927 (1993) and 955 (1994). According to the provisions, the tribunals may issue an 'order' or 'request' both being equally binding on states. See Sluiter G 147-150.

⁵³¹ Stahn C 'Complementarity: A Tale of Two Notions' (2008) 19 *CLR* 87-113.

⁵³² The 'like-minded' states were a group of states who shared the objective of establishing a strong ICC. They included Canada, Australia, and most African and European states with the exception of France, Argentina and Costa Rica. See Barbara Bedont and David Matas, 'Negotiating for an International Criminal Court' *Peace Magazine* Sept-Oct 1998, 21. Available at <<http://peacemagazine.org/archive/v14n5p21.htm>> (Accessed 11 April 2013).

⁵³³ Mochochoko P 'International Cooperation and Judicial Assistance' in Roy S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute. Issues. Negotiations. Results* (1999) *Kluwer International Law* 305.

⁵³⁴ Ambos K 'Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik' (2008) 19 *CLF* 181-198

ratification of the Rome Statute,⁵³⁵ and at least a conclusion of an *ad hoc* agreement with non-state parties in accordance with Article 87(5).⁵³⁶ Therefore, there is a distinction between the general duty of state parties and the limited one of non-party states to cooperate.⁵³⁷

Third, in addition to the mixed cooperation regime of the ICC, the Rome Statute's formulation of cooperation foresees the option of 'reverse' cooperation.⁵³⁸ This means that the ICC is expected to provide assistance and support to domestic jurisdictions for the purposes of investigating and carrying out prosecutions under Article 93(10).⁵³⁹

The proactive complementarity model proposed in the preceding chapter implies that where cooperation legislation is in place, states would be able to request assistance from the ICC in their domestic efforts. This distinctive provision in the Rome Statute is not only an advantage to states and the ICC, it is also a basis for a mutually inclusive interpretation and application of complementarity. Moving from the theoretical framework to the practical questions involved, the first imperative is for the Prosecutor to know with whom to cooperate. This question should, among others, be dealt with in the national cooperation laws of states parties.⁵⁴⁰

The importance of determining whom to cooperate with in national legislation is underscored by the withdrawal of the charges against Mr Muthaura in the *Muthaura et al* case.⁵⁴¹ The Prosecutor noted that a major challenge in the case and one of the reasons for the withdrawal was 'the disappointing fact that the Government of Kenya failed to provide [the] office with important evidence and failed to facilitate its access to critical witnesses...'⁵⁴² This is irrespective of the decision on the confirmation of charges on the basis of a 'thorough review'⁵⁴³ by the Pre-Trial Chamber in January 2012.⁵⁴⁴ Cooperation legislation therefore, could have the effect of eliminating confusion and

⁵³⁵ Rome Statute, Article 86.

⁵³⁶ Article 87(5) allows the ICC to request non-party state to the Statute to provide assistance on the basis of an *ad hoc* arrangement, an agreement with such state or any other appropriate basis.

⁵³⁷ Rastan R 'Testing Co-operation: The International Criminal Court and National Authorities' (2008) 21 *LJIL* 431-456.

⁵³⁸ Gioia F 'Complementarity and Reverse Cooperation' in Stahn and ElZeidy (eds) *Complementarity Theory to Practice* (2008) 807-828.

⁵³⁹ *Ibid.*

⁵⁴⁰ Bekou O and Shah S 'Realising the Potential of the International Criminal Court: The African Experience' (2006) 6 *HRLR* 499-544.

⁵⁴¹ *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* Case No ICC-01/09-02/11 (Prosecution notification of withdrawal of Charges against Francis Kirimi Muthaura). Available at <<http://www.icc-cpi.int/iccdocs/doc/ICC-01-09-02-11-687.pdf>> (Assessed 11 August 2017).

⁵⁴² 'Statement by ICC Prosecutor on the Notice to Withdraw Charges against Mr Muthaura' 11 March 2013. Available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx> (Accessed 11 October 2017).

⁵⁴³ Summary of decision in the two Kenya Cases, 23 January 2012. Available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/summary%20of%20decision%20in%20the%20two%20kenya%20cases.aspx> (Assessed 22 October 2017).

⁵⁴⁴ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* Case No: ICC-01/09-02/11 <<http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>> (Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute). The Prosecutor charged Muthaura and others with crimes against

streamlining the state's action by indicating which authority is empowered to provide the cooperation required by the ICC.⁵⁴⁵ In practical terms, cooperation legislation has been enacted by a few states and, only by states where, frankly, the commission of international crimes is very unlikely.⁵⁴⁶ This accounts for the inability of the Prosecutor in the cases currently before the ICC to obtain suspects, necessary witnesses and evidence, particularly concerning the indictments of alleged perpetrators in Sudan and Uganda.

The reasons advanced above in favour of states adopting cooperation legislation are by no means exhaustive. However, they do demonstrate the distinctive cooperation regime under the Rome Statute. Without cooperation legislation at the domestic level, the ICC would not be effective. As noted, the Rome Statute is explicit on the need for states to cooperate fully with the ICC. However, the mechanisms of ensuring full cooperation are left entirely in the hands of individual states. Therefore it is imperative for states not to rely on existing cooperation or extradition rules, but to adopt cooperation legislation in line with the Rome Statute. There is yet further debate, particularly regarding complementarity legislation, because the Rome Statute does not specifically mandate the adoption of such legislation.

3.3.5 Complementarity legislation

Complementarity legislation is that law required at the domestic level to incorporate the substantive crimes of the Rome Statute's, their definitions, elements and the penalties attached thereto. It is anticipated that this would provide a legal basis for states to prosecute international crimes.⁵⁴⁷ This is important because intentions to prosecute international crimes on the basis of ordinary crimes such as murder, rape and theft without the international classification, could imply that the state is not equipped to prosecute international crimes.⁵⁴⁸ In order to ensure that states are willing and genuinely able to prosecute international crimes as such, it is argued in this section that

humanity of murder, deportation or forcible transfer, rape and other forms of sexual violence, other inhumane acts and persecution. Muthaura and Kenyatta were charged as indirect co-perpetrators pursuant to Article 25(3) (a) of the Rome Statute while Ali was charged as having contributed to the alleged crimes.

⁵⁴⁵ Bekou O and Shah S 'Realising the Potential of the International Criminal Court: The African Experience' (2006) 6 HRLR 499-544.

⁵⁴⁶ Amnesty International, 'International Criminal Court: The Failure of States to Enact Effective Implementing Legislation' Available at <<http://www.amnesty.org/en/library/info/IOR40/019/2004>>; 'International Criminal Court: Rome Statute Implementation Report Card Part One' <http://www.amnesty.org/fr/library/asset/IOR53/011/2010/fr/22fab440-cf1e-4ac2-a1ff-2a4ad9527b87/ior530112010en.pdf> (Assessed 8 October 2017)

(Noting that of the 111 state parties to the Rome Statute in 2010 only 33 states have enacted both complementarity and cooperation legislations); National Implementing Legislation Database University of Nottingham Human Rights Law Centre. Available at <<http://www.nottingham.ac.uk/hrlc/newsholding/news2009/nationalimplementinglegislationdatabaselunchedoniccweb site.aspx>> (Assessed 5 October 2017).

⁵⁴⁷ Du Toit E 'Commentary on the Criminal Procedure Act' (2013) 24.

⁵⁴⁸ Arguments on the *Saif Al-Islam* case

complementarity legislation is imperative.⁵⁴⁹ The section further contains an examination of the different methods by which the Rome Statute crimes may be reflected in domestic criminal law.⁵⁵⁰ The justification for complementarity legislation has been discussed in the first part of this chapter. In addition, it is submitted that the argument is founded on the principle that criminal law must be written prospectively.⁵⁵¹ The principle of legality promotes a legal system's legitimacy by limiting the interventions of its criminal process to those clearly prescribed in advance by law.⁵⁵² Therefore, complementarity legislation gives states the opportunity to proscribe in advance the crimes in the Rome Statute within their domestic criminal laws.⁵⁵³ This would avoid a potential challenge to the exercise of jurisdiction on the grounds that the crimes were not known to domestic law.⁵⁵⁴ The Rome Statute does not allow retroactivity of criminal law,⁵⁵⁵ and it is argued that states should conform to the same standard in view of the nature and gravity of the crimes concerned. Furthermore, the crimes listed in the Rome Statute have been recognised as having attained the status of *jus cogens*.⁵⁵⁶ The *jus cogens* nature of the crimes imposes a duty on all states, irrespective of their ratification, to ensure that they are proscribed under domestic law.⁵⁵⁷ Thus, the principle *aut dedere aut judicare* (duty to extradite or prosecute),⁵⁵⁸ is considered not just as a rule of customary international law,⁵⁵⁹ but also of *jus cogens* means that states are obliged to either extradite or prosecute perpetrators of international crimes.⁵⁶⁰ The focus of complementarity is, however, on the latter.

The duty to prosecute international crimes under the Rome Statute entails a two-fold requirement of national preparedness. First, states are expected to develop the legislative competence to prosecute core international crimes in their courts. This includes ensuring that there are provisions in the

⁵⁴⁹ Kleffner JK *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008) 33.

⁵⁵⁰ May L & Hoskins Z *International Criminal Law and Philosophy* (2010) 59.

⁵⁵¹ Macedo S *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2004) 42.

⁵⁵² Broomhall B *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2010) 26. (*The nullum crimen sine lege* principle is recognised under Article 22 of the Rome Statute).

⁵⁵³ Ibid.

⁵⁵⁴ Stigen J *The Relationship between the International Criminal Court and National Jurisdictions, The Principle of Complementarity* (2008) 23.

⁵⁵⁵ Rome Statute; art 11 on the temporal jurisdiction of the ICC (Stating that the ICC has jurisdiction only with respect to crimes committed after the coming into force of the Rome Statute).

⁵⁵⁶ *Jus cogens* is the body of 'peremptory norm of general international law... from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character' (See art 53 Vienna Convention on the Law of Treaties 23 May 1969 1155 UNTS 331).

⁵⁵⁷ Bassiouni M *Introduction to International Criminal Law* (2003) 518. The Trial Chamber of the ICTY in *Prosecutor v. Anto Furundzija* Case No: IT-95-17/1-T Judgment of 10 December 1998 paras 153-157 (Noting for example that torture is derived from the force of *jus cogens*).

⁵⁵⁸ Politi M & Gioia F *The International Criminal Court and National Jurisdictions* (2008) 18.

⁵⁵⁹ Radosavljevic D 'An Overview of the ICC Complementarity Regime' (2007) 3(10) *Review of International Law and Politics* 96-114.

⁵⁶⁰ Broomhall B *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2010) 26. (*The nullum crimen sine lege* principle is recognised under Article 22 of the Rome Statute).

national criminal law explicitly criminalising genocide, crimes against humanity and war crimes.⁵⁶¹ Without such crimes in national criminal law,⁵⁶² it may not be possible to bring cases with the proper international legal classification.⁵⁶³ This may force prosecutors and judges to fall back on ordinary crimes which may not be adequate for the severity of international crimes.⁵⁶⁴ Second, states should have the institutional capacity to investigate and prosecute international crimes domestically.⁵⁶⁵ Thus, states are expected to ensure that some members of the criminal justice system develop expertise in this area through suitable capacity building measures, including training and access to specialised electronic resources.⁵⁶⁶

Complementarity legislation is achieved through the process of incorporating core international crimes into national criminal law, thereby ensuring that crimes of such magnitude are proscribed by domestic law. To this end, there are different methods a state can adopt.

3.3.6 Procedures for South Africa's implementing legislation

South Africa enacted its International Criminal Court Act 27 of 2002. In July 2002.⁵⁶⁷ The Act came into force in August 2002, barely a month after the entering into force of the Rome Statute itself. This reflected an understanding of South Africa's obligations under the complementarity regime of the Rome Statute and signaled a deep commitment to its implementation domestically. South Africa signed the Rome Statute on 17 July 1998 and deposited its instrument of ratification on 27 November 2000. The South African Parliament passed its implementing legislation on 18 July 2002.⁵⁶⁸ In contrast, Kenya's International Crimes Act was passed in 2008 even though it had ratified the Rome Statute in 2005.⁵⁶⁹ Kenya's ICC Act entered into force on 1 January 2009, approximately two years after the Chief Prosecutor's investigations into its 2007 post-election violence had resulted in six of its nationals standing trial before the ICC. Similarly, Uganda's ICC Act came into force in June 2010,⁵⁷⁰ over five years after Uganda referred situations in its territory to the ICC and irrespective of the fact that Uganda had signed and ratified the Rome Statute in 1999 and 2002, respectively. Arguably, adopting implementing legislation eight years after its ratification

⁵⁶¹ Bergsmo M, Harlem M and Hayashi N 'Importing Core International Crimes into National Criminal Law' (2007) Forum for International Criminal Justice and Conflict (FICJC) International Peace Research Institute, Oslo (PRIO) <<http://www.prio.no/ficjc>> (Accessed 17 October 2017) (hereinafter Bergsmo *et al* 'Importing Core International Crimes').

⁵⁶² Strydom H & Gevers *C International Law* (2015) 42.

⁵⁶³ Submission in the *Saif Al-Islam* case (section on 'Rationale for Implementing Legislation').

⁵⁶⁴ *Ibid.*

⁵⁶⁵ Strydom H & Gevers *C International Law* (2015) 42.

⁵⁶⁶ Bergsmo M Harlem M and Hayashi N 'Importing Core International Crimes into National Criminal Law' (2007) Forum for International Criminal Justice and Conflict (FICJC) International Peace Research Institute.

⁵⁶⁸ South Africa ICC Act.

⁵⁶⁹ Kenya signed and ratified the Rome Statute on 11 August 1999 and 15 March 2005 respectively. See CICC at <<http://www.iccnw.org/?mod=country&iduct=89>> (Accessed 30 June 2017).

⁵⁷⁰ The Ugandan ICC Act 2010.

was only in a bid to secure the hosting of the First Review Conference of the Rome Statute, which was held in Kampala, Uganda in May and June of the same year.⁵⁷¹ It is for these reasons that the implementing legislation adopted by both Kenya and Uganda is regarded as late; i.e. coming only after cases involving their nationals were already before the ICC.

Chapter 1 of the South African ICC Act states that the general objectives are to create a framework to ensure that the Rome Statute is effectively implemented in South Africa, to ensure that the Act conforms with the obligations of South Africa under the Rome Statute, to proscribe the crimes in the Rome Statute in South Africa and to enable South African courts to assume jurisdiction to investigate and prosecute the crimes.⁵⁷² Other aims include ensuring that South Africa cooperates with the ICC. The passing of the South African ICC Act has been described as momentous as it was the first implementing legislation by an African state.⁵⁷³

Prior to the adoption of the South African ICC Act, South Africa had no legislation on war crimes or crimes against humanity. Therefore no domestic prosecution of international crimes was contemplated in South Africa. Although customary international law forms part of South African law,⁵⁷⁴ South African courts could not prosecute international crimes because of the principle of *nullum crimen sine lege* (no law no crime).⁵⁷⁵ Similarly, South Africa had not incorporated the Geneva Conventions of 1949 into its domestic criminal law and so it could not prosecute or punish grave breaches.⁵⁷⁶

The gap in South African law also exists in most states in Africa, as international crimes are not generally known to domestic legal codes. Clearly, it is important to examine how South Africa adopted its implementing legislation and to recommend that all African states, should follow the example with regards to the ACC and the Malabo protocol. This is because the proactive complementarity model proposed in the previous chapter obliges states to engage in national

⁵⁷¹ The First Review Conference of the Rome Statute of the International Criminal Court was held in Kampala Uganda 31 May to 11 June 2010. (Arguably, it was important that the host country for such a review should not only have been the first state to activate the jurisdiction of the ICC but must demonstrate its willingness and ability to investigate and prosecute international crimes and cooperate with the ICC by adopting its implementing legislation).

⁵⁷² South African ICC Act, Chapter 1 sections 1-3.

⁵⁷³ Du Plessis M 'An African Example: South Africa's Implementation of the Rome Statute of the International Criminal Court' available at <http://www.issafrica.org/anicj/uploads/Du_Plessis_An_African_example.pdf> (accessed 28 June 2017).

⁵⁷⁴ Section 232 of the Constitution of the Republic of South Africa 1996 (Act No 108 1996) adopted 8 May 1996 as amended by Notice No 78 in Government Gazette No 33899 of 24 December 2010. available at <<http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>> ('customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'). (Accessed

⁵⁷⁵ Dugard J '*International Law: A South African Perspective*' 4th (2011) 95.

⁵⁷⁶ Swanepoel CF '*The Emergence of a Modern International Criminal Justice Order* (Thesis submitted in accordance with the requirements for the degree of *Doctor Legum*, Faculty of Law, Department of Procedural Law and Law of Evidence. University of the Free State, 2006) 65.

construction and capacity building in preparation to assume primary jurisdiction if and when the need arises.

3.3.7 South Africa's complementarity legislation

South Africa has employed the static criminalization method, meaning that the Rome Statute crimes have been adopted into its law. Recognizing its complementarity obligations, the South African ICC Act provides a framework to ensure the effective implementation of the Rome Statute in South Africa and to ensure that South African courts are able to prosecute persons accused of having committed those crimes.⁵⁷⁷ The South African ICC Act incorporates the Rome Statute definitions of the crimes of genocide, war crimes and crimes against humanity directly into South African law according to a schedule appended to the Act.⁵⁷⁸ In this regard, Part 1 of Schedule 1 took the exact wording of Article 6 of the Rome Statute in relation to genocide, Part 2 of the Schedule mirrors Article 7 of the Rome Statute with respect to crimes against humanity and Part 3 does the same for war crimes, as set out in Article 8 of the Rome Statute.⁵⁷⁹

Clearly the objective of criminalizing the Rome Statute crimes domestically was met by the South African ICC Act, particularly as Section 4(1) of the Act provides that, notwithstanding anything to the contrary in any other law in South Africa, any person who allegedly commits these crimes shall be prosecuted.⁵⁸⁰ Conversely, the Kenyan and Ugandan ICC Acts merely made references to the Rome Statute's definitions of the crimes in their implementing legislation, without expressly using the exact wording of the Rome Statute.⁵⁸¹

The South African ICC Act not only imported the exact wording of the Rome Statute in the definition of crimes, it also made some amendments to its existing laws to bring them into conformity with other provisions of the Rome Statute.⁵⁸² In this regard, section 18 of the Criminal Procedure Act of 1977 was amended by adding a paragraph (g) to include international crimes as defined in the Act.⁵⁸³ Similarly, section 3 of the Military Disciplinary Supplementary Measures Act of 1999 was amended by adding a subsection (3) to expand the scope of jurisdiction to include

⁵⁷⁷ South African ICC Act, para 1 of the preamble.

⁵⁷⁸ Stone L 'Implementation of the Rome Statute of the International criminal Court in South Africa' in Murungu C and Biegon J (eds) *Prosecuting International Crimes in Africa* (2011) 305-330, 310. See also Du Plessis M 'Complementarity and Africa: The Promises and Problems of International Criminal Justice' (2008) 17 *African Security Review* 157.

⁵⁷⁹ Du Plessis M 'An African Example: South Africa's Implementation of the Rome Statute of the International Criminal Court' available at <http://www.issafrica.org/anicj/uploads/Du_Plessis_An_African_example.pdf> (accessed 28 June 2017).

⁵⁸⁰ South African ICC Act, section 4(1).

⁵⁸¹ Section 6 of the Kenya International Crimes Act and sections 7, 8 and 9 of the Ugandan ICC Act which made references to genocide, crimes against humanity and war crimes as defined in the Rome Statute.

⁵⁸² South African ICC Act, Schedule 2 relating to South African Laws Amended as a consequence of the Act.

⁵⁸³ Criminal Procedure Act of the Republic of South Africa, Act 51 of 1977, section 18(g) as amended.

military officials who may be perpetrators of international crimes.⁵⁸⁴ By expressly criminalizing the Rome Statute crimes domestically and amending existing laws, South Africa is not likely to fall into the dilemma of being found unable or unwilling to carry out domestic prosecution of such crimes should the situation arise. Arguably, the likelihood of being denied an admissibility challenge before the ICC as Libya was, as analyzed above, would be almost none. The reason is not far-fetched. The international categorization of the crimes would allow South Africa to pass the ‘same person same conduct’ test, as its investigation would further meet the ‘specificity and probative value’ requirement of the PTCI in the *Saif Al-Islam* case.

In addition, the South African ICC Act expressly provides procedures for the institution of domestic prosecutions in South African courts.⁵⁸⁵ First, the Act requires that the consent of the National Director of Public Prosecution (NDPP) be obtained before any prosecution may be initiated against any person accused of the crimes.⁵⁸⁶ In reaching a decision whether to authorize a prosecution or not, the NDPP is guided by South Africa’s primary obligation under complementarity to institute prosecution domestically.⁵⁸⁷ South Africa’s responsibility to prosecute is further emphasized by the fact that the NDPP is allowed to decline to authorize a prosecution only if the crimes were committed before the ICC Act entered into force.⁵⁸⁸ The South African implementing legislation also provides for the designation of ‘an appropriate High Court in which to conduct prosecution’ of alleged perpetrators.⁵⁸⁹

Theoretically, the obligation and power to prosecute given under the South African ICC Act is not hindered by any considerations of immunity. In this regard, section 4(2) (a) of the South African ICC Act provides that, notwithstanding any other law to the contrary, including customary and conventional international law, the fact that a person is or was a head of state or government, a member of a government or parliament, an elected representative or a government official is neither (i) a defense for a crime, nor (ii) a ground for any possible sentence reduction once the person has been convicted of a crime.⁵⁹⁰ Consequently, Du Plessis asserts that in terms of the Act, South African courts acting under complementarity are thus accorded the same power to ‘trump’ the immunity afforded to government officials in the same way as the ICC is by virtue of Article 27 of

⁵⁸⁴ Military Discipline Supplementary Measures Act of the Republic of South Africa, Act 16 of 1999, section 3(3) as amended.

⁵⁸⁵ South African ICC Act, section 5.

⁵⁸⁶ *Ibid*, section 5(1)

⁵⁸⁷ *Ibid*, section 5(3).

⁵⁸⁸ *Ibid*, section 5(2).

⁵⁸⁹ *Ibid*, sections 5(4) and 5(5).

⁵⁹⁰ *Ibid* Section 4(2) (a) (i) & (ii).

the Rome Statute.⁵⁹¹ In agreement, Dugard and Abraham noted that ‘section 4(2) (a) of the South African ICC Act represents a wise choice by the South African legislature...’⁵⁹²

Similarly, section 27 of Kenya’s Act appears to have removed immunity but made the provisions subject to sections 62 and 115.⁵⁹³ Sections 62 and 115 of the Kenyan Act relate to Article 98 of the Rome Statute, which provides for respect for bilateral immunity agreements between states. Consequently, the exact extent of the removal of immunity stipulated in section 27 in the Kenya International Crimes Act is not clear. However, Article 143(4) of Kenya’s Constitution removes immunity for the President regarding international crimes.⁵⁹⁴ By virtue of section 2(4), the Constitution is the supreme law of the land and it prevails over any other law that is inconsistent with its provisions.⁵⁹⁵ Therefore like South Africa, immunity is not a hindrance to Kenya’s implementing legislation. Unlike the legislation of Kenya and South Africa, which explicitly remove immunity in line with the Rome Statute, the Uganda ICC Act seems to retain immunity.⁵⁹⁶ Although section 25 of the Uganda ICC Act provides that the existence of any immunity is not a bar,⁵⁹⁷ Article 98(4) of the Constitution provides for immunity for the President.⁵⁹⁸ This position remains unchanged even though the Ugandan Constitution has undergone several amendments.⁵⁹⁹ By virtue of the supremacy of the Ugandan Constitution over any other law,⁶⁰⁰ the purported removal of immunity in its implementing legislation appears cosmetic.

3.3.8 South Africa’s cooperation legislation

As noted, the ICC lacks mechanisms to gain custody of suspects and ensure their attendance at proceedings taking place in The Hague. Since this is crucial, as the ICC cannot prosecute in *absentia*, the South African implementing legislation includes a broad cooperation regime by which certain governmental officials are empowered to facilitate cooperation between South Africa and

⁵⁹¹ Du Plessis M ‘SA: African Example, 474.

⁵⁹² Dugard J and Abraham G ‘Public International Law’ (2002) *Annual Survey of South African Law* 140, 166 cited in Du Plessis M Ibid.

⁵⁹³ Section 27(1) & (2) Kenya International Crimes Act. See also Ford J ‘Country Study III: Kenya’ in Du Plessis M and Jolyon (eds) *Unable or Unwilling?* (n 142) 70-71 (Noting that there is a strong reluctance among the MPs in Kenya to implement a law removing immunities from state officials).

⁵⁹⁴ Section 143(4) Constitution of the Federal Republic of Kenya 2010 Available at <<http://kenyahighcommission.ca/wp-content/uploads/2013/04/constitution-of-kenya-2010.pdf>> (the subsection provides that the immunity of the President shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity).

⁵⁹⁵ Constitution of Kenya 2010, section 2(4).

⁵⁹⁶ Section 19 Ugandan ICC Act which provides for the general principles of criminal law but omits provisions relating to immunity).

⁵⁹⁷ Section 25 Ugandan ICC Act 2010.

⁵⁹⁸ Article 98(4) of the Constitution of the Republic of Uganda 1995. Available at <http://www.ugandalawlibrary.com/ull/files/constitution/constitution_1995.pdf> (Accessed 30 October 2017). See also Barney Afako, ‘Country Study V: Uganda’ in Du Plessis and Ford (eds) *Unable or Unwilling?* 93, 112.

⁵⁹⁹ Uganda Constitution Amendment Act 2005 and Constitution Amendment (No 2) Act 2005.

⁶⁰⁰ Constitution of Uganda 1995, Article 2(2).

the ICC.⁶⁰¹ The Act stipulates how the South African Government is to execute arrest warrants issued by the ICC under existing South African law.⁶⁰² However, the South African ICC Act does not rely on its existing law alone to ensure the execution of arrest warrants and surrender but further details a procedure which specifies the particular office and department which carry the responsibility of ensuring cooperation with the ICC.

Consequently, the office of the Director-General of Justice and Constitutional Development is tasked with dealing with such issues as regards the arrest and surrender of suspects to the ICC. The Director General is responsible for forwarding the warrant to a magistrate who must endorse the ICC's arrest warrant for execution in any part of the Republic. When an arrest has been executed pursuant to an ICC arrest warrant, the suspect is taken to the magistrate in whose jurisdiction the suspect has been arrested or detained.⁶⁰³

In line with due process guarantees and safeguards of the rights of the suspect, the South African Act provides that such a suspect must be brought before the magistrate within 48 hours of their arrest.⁶⁰⁴ Further safeguards of the rights of the suspect are provided for in section 10 of the ICC Act. This section mandates that the presiding magistrate ensures that the warrant relates to the suspect,⁶⁰⁵ that the suspect has been arrested in accordance with the procedures outlined in the ICC Act and that the rights of the suspect have been respected.⁶⁰⁶ It is argued that with these procedures properly outlined in the South African ICC Act, cooperation between South Africa and the ICC will be enhanced.

In addition, when the South African authorities have taken a suspect into custody, the country is then in a position to surrender the suspect to the ICC. The procedure for the surrender of a suspect, which includes a committal order, is outlined in the ICC Act.⁶⁰⁷ The magistrate is mandated to ensure that the suspect is the same as named in the warrant and that the process is carried out in accordance with the provisions in the Act.

The procedure makes clear that surrender to the ICC is different from extradition proceedings. First, there is no condition of double criminality and second, there is no requirement that a *prima facie* case be made against the suspect.⁶⁰⁸ The Act further provides that the magistrate must be satisfied

⁶⁰¹ South Africa ICC Act, section 8

⁶⁰² South African ICC Act, section 9(3)

⁶⁰³ Ibid, section 10.

⁶⁰⁴ Ibid, section 10(1).

⁶⁰⁵ Ibid, section 10(1) (a).

⁶⁰⁶ Ibid, section 10(1) (c).

⁶⁰⁷ Ibid, sections 10-13.

⁶⁰⁸ Du Plessis M 'South Africa's Implementation of the ICC Statute: An African Example' (2007) 5 JICJ 460-479.

that the three requirements in section 10(1) (a), (b) and (c) are met before the issuance of an order committing the suspect to prison pending their surrender to the ICC.⁶⁰⁹

It is important to note however, that the South African ICC Act is not a perfect example of implementing legislation because it does not contain provisions relating to Article 9 of the Rome Statute on the Elements of Crimes.⁶¹⁰ In this regard, however, Du Plessis argues that there is nothing which prevents a South African court from referring to the Elements of Crimes when involved in a domestic prosecution.⁶¹¹ This argument appears valid because ratification of the Rome Statute by a state constitutes acceptance of the Rules of Procedure and Evidence (RPE) together with the Elements of Crimes.⁶¹²

The South African Act does not also reflect Part 3 (Articles 22-33) of the Rome Statute which specifies the general principles of criminal law.⁶¹³ Du Plessis further maintains that the general principles of criminal law will find application in any domestic trial under the ICC Act.⁶¹⁴ While this may be true, it is submitted that the absence of these provisions may be prejudicial to South Africa's domestic prosecution based on complementarity, as due process considerations are necessary for determining the admissibility of cases before the ICC under Article 17 of the Rome Statute. Notwithstanding this apparent omission, the South African ICC Act remains an example for African States. Not only did the Act incorporate the Rome Statute crimes expressly, it also grants jurisdiction to South African courts on the basis of the crimes. Further contains an elaborate cooperation regime which would ensure the effective functioning of the ICC. Arguably, with its implementing legislation adopted in advance, South Africa's willingness and genuine ability to exercise jurisdiction is not in doubt. This contrasts sharply with the implementing legislation of Kenya and Uganda, which were adopted only after cases involving their nationals were brought before the ICC.

3.3.9 South Africa on withdrawal from the ICC

Since joining the ICC, South Africa has been a staunch supporter not only of the ICC itself, but also of the pursuit of international criminal justice in general. However, the events of June 2015 surrounding the arrival of President Omar Al Bashir of Sudan in South Africa appears to have

⁶⁰⁹ South Africa ICC Act, section 10(5)

⁶¹⁰ Elements of Crimes, adopted by the Assembly of States Parties in New York, on 9 September 2002 and entered into force on the same date (ICC-ASP/1/3) (the Elements of Crimes were adopted in order to assist the ICC in interpreting and applying Articles 6, 7 and 8 of the Rome Statute; Available at http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf)

⁶¹¹ Du Plessis M, 464.

⁶¹² Rome Statute, Article 51.

⁶¹³ Van der Merwe H J *The Transformative Value of International Criminal Law* (Thesis submitted in fulfilment of the requirements for the degree of *Legum Doctor* (LLD) in the Faculty of Law at Stellenbosch University, 2012).

⁶¹⁴ Du Plessis M, *Ibid.*

engendered a shift in South Africa's posture, leading many observers to call into question the country's commitment to international justice.⁶¹⁵ The failure by South African authorities to arrest and surrender Al Bashir to the ICC, although he had been indicted by the ICC for war crimes, crimes against humanity and genocide,⁶¹⁶ led to the Southern Africa Litigation Centre (SALC) taking the government to court to compel it to fulfill its obligations both under the Rome Statute and the Implementation of the Implementation Act.⁶¹⁷ SALC's position was that South Africa had committed itself to the fight against impunity by assuming international obligations that involved the arrest and surrender of the visiting Sudanese President, and that his arrest and surrender were required by the Implementation Act.⁶¹⁸ Both the High Court and the Supreme Court of Appeal held that government had breached its obligations under the Implementation Act by failing to arrest and surrender President al Bashir. The government's appeal against the Supreme Court decision to the Constitutional Court was withdrawn before the hearing. The Pre-Trial Chamber of the ICC ruled on the 6 of July that South Africa had obligations to arrest Sudan's President Al Bashir and failed to do so. The ICC found unanimously that South Africa failed to comply with its obligations, contrary to the provisions of the Rome Statute. They did not however make any referral to either the Assembly of State parties to the Rome Statute or to the UNSC. The court went on to acknowledge that the Supreme Court of South Africa made strong findings against South Africa but did not take a massively unsympathetic position in line with the principal of complementarity.

On 19 October 2016, the Minister of International Relations and Co-operation gave notice of South Africa's intention to withdraw from the Rome Statute. Subsequently, the Minister of Justice and Correctional Services indicated that Cabinet had decided to withdraw from the Rome Statute because, among other reasons,⁶¹⁹ it considered that the Implementation Act and the Rome Statute

⁶¹⁵ Katz A 'An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National Law in South Africa' (2003) 12 *African Security Review* 25.

⁶¹⁶ On 4 March 2009, the ICC Pre-Trial Chamber I issued a warrant of arrest for Omar Hassan Al-Bashir for crimes against humanity: Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09, 4 March 2009. On 12 July 2010, the ICC issued a second warrant of arrest for genocide: Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09, 12 July 2010.

⁶¹⁷ *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others*, Case Number: 27740/2015, 23 June 2015. The matter is far from over at the time of writing this article. The Respondents have expressed an intention to appeal the judgment; at the time of writing an investigation that could lead to a contempt of court process was underway; there will be hearing before an ICC Pre-Trial Chamber on the non-cooperation of South Africa, which itself is subject to appeal; and South African authorities have been publicly talking about withdrawal from the Rome Statute in consequence of the judgment.

⁶¹⁸ Article 87 of the Rome Statute.

⁶¹⁹ See for example South African Statement, at the General Assembly Sixty-Seventh Session, on Agenda Item 73 'The Report of the International Criminal Court', 1 November 2012, in which South Africa said: 'we do wish to express our concern at the manner in which the decision on Palestine was made [the decision of the previous Prosecutor not open up investigations on the basis of uncertainty surrounding the status of Palestine].. Given the passage of time, the developments within the United Nations system, including the admission of Palestine as a member to UNESCO and the sheer number of states, including States Parties, that recognise Palestine, we were disappointed by the unwillingness of the Office of the Prosecutor to make a firm decision.' Similarly, in its statement on the same agenda item, during the sixty-fifth session of the General Assembly, South Africa made the following remarks concerning the investigations in

were interfering with the South African government's 'important role in resolving conflicts on the African continent and in encouraging the peaceful resolution of conflicts wherever they occur.'⁶²⁰ The Minister also indicated that both the Rome Statute and the Implementation Act compel the government 'to arrest persons who may enjoy diplomatic immunity under customary international law.'⁶²¹ The decision to withdraw was made to enable the government to give 'effect to the rule of customary international law'.⁶²² The High Court has now ruled that the government must revoke that decision as it was made without the authority of Parliament. As it stands therefore there is no lawful decision or valid notice to withdraw.

3.4 Conclusion

The provisions that have been analysed in the chapter are those dealing with jurisdiction, admissibility and cooperation regime of the ICC because these are the three factors which determine whether or not a case will come before the ICC, whether or not a perpetrator of a crime within the ICC's jurisdiction will be prosecuted, punished and thereby whether or not the aim of ending impunity and achieving justice will be accomplished. As demonstrated, the ICC does not have universal jurisdiction. It has jurisdiction only in cases where a crime is committed by a state party's national or where the crime is committed on a state party's territory or where a non-party state makes a declaration that it accepts the ICC's jurisdiction with respect to the crime in question.⁶²³ Also, situations both in states parties and non-party states can be referred to the ICC by the UNSC acting under Chapter VII of the United Nations Charter.⁶²⁴ The ICC acts as a court of last resort.

The territorial state has the primary responsibility to carry out investigations and prosecutions. Only if the state is unwilling or unable genuinely to carry out such investigations and prosecutions, or has investigated but decided not to prosecute because it is unwilling or unable genuinely to do so, move the case admissible before the ICC and hence it can exercise jurisdiction. Additionally, positive complementarity, which means that the Court promotes cooperation with and prosecution by national jurisdictions, is encouraged. The principle of complementarity may result in an obstacle to prosecution by the ICC. However, it is hereby stated that this can be overcome by the Prosecutor as

Libya and the apparent decision to prosecute only one side, 'If, however, the Court is seen as a "victor's court", this will have a negative perception on the image, credibility and integrity of the Court as an independent dispenser of justice'

⁶²⁰ The Minister of Justice and Correctional Services' Announcement to Parliament, dated 20 October 2016

⁶²¹ Ibid.

⁶²² Ibid.

⁶²³ The author's views on the application of Article 27 to officials of non-states parties are reflected more fully in Tladi D 'The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff' (2015) 13 *Journal of International Criminal Justice* 3, especially at 14 *et seq.* See also Tladi D 'Immunity in the Era of 'Criminalisation': The African Union, the ICC and International Law' (2015) *Japanese Yearbook of International Law*

⁶²⁴ Akande D 'The Legal Nature of the Security Council Referrals to the ICC and its Impact on Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333. P Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315.

has happened in *Lubanga*. Mr. Lubanga was being prosecuted domestically in the DRC for certain crimes such as genocide. The principle of complementarity disallows simultaneous prosecution by the ICC for the same person and the same conduct. Therefore, the Court issued an arrest warrant for Mr. Lubanga for a different crime that is, enlisting and conscripting children and using them to participate actively in hostilities.⁶²⁵ Hence, the ICC Prosecutor cleverly and craftily found a way to overcome the hurdle created by the system of complementarity.

In addition the chapter also focused on the legislative implications for states parties to the Rome Statute. Although not required by the Rome Statute, several arguments have been advanced in favour of the need for states to adopt implementing legislation. First, embedded in complementarity is the notion that measures must be taken by individual states to prosecute international crimes domestically on behalf of the international community. Second, there must be mechanisms in place at the national level to arrest and surrender to the ICC suspects that it seeks to prosecute and who happen to be in a particular state's jurisdiction. These procedures are critical to the effective functioning of the ICC and to the implementation of complementarity. Furthermore, the critical analysis of the PTCI Decision of 31 May 2013 regarding the Libyan admissibility challenge in the *Saif Al-Islam Gaddafi* case reveals that implementing legislation is imperative for states to assert their criminal jurisdiction. Although the PTCI admitted that Libya could investigate and prosecute *Saif Al-Islam* based on its domestic criminal law, the conclusion reached by the Chamber was different.

Thus, implicit in the Chamber's reasoning was the underlying inability based on the failure of Libya to pass the 'same conduct' limb of the 'same person same conduct' test, which Libya could have passed had it applied the international categorization of the crimes. However, Libya, not being a party to the Rome Statute, did not have any implementing legislation and the crimes against humanity of murder and persecution were not known to its domestic Law. Based on the premise that complementarity commits states to investigate and prosecute international crimes domestically, it was further argued that although not expressly stated in the Rome Statute, it could be implied that adopting implementing legislation is a necessary step for states to fulfil their obligations.

The combined effect of the dominant themes, complementarity and cooperation, which run through the Rome Statute, means that states parties are meant to do much more than mere ratification. Consequently, in order for the ICC to truly function as a 'complement', it is submitted that African states should adopt the two components of the complementarity regime, namely; cooperation and complementarity legislation. As observed, the rapid ratification of the Rome Statute by African

⁶²⁵ International Criminal Court, Decision on the Prosecutor's Application for a Warrant of Arrest. Article 58, *Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06-8-US-Corr), Pre-Trial Chamber 1 (10 February 2006).

states has not been matched with corresponding legislative action. Whilst the absence of complementarity and cooperation legislation may not be the only reasons for the inability of African states to investigate and prosecute international crimes domestically, adopting the legislation is an appropriate starting point which would demonstrate both willingness and the ability to act. As a mechanism designed by states and to be operated by states, complementarity can benefit African states when states of the continent integrate the Rome Statute crimes into their domestic criminal law.



Chapter Four- The relationship between the African Union and the International Criminal Court

4.1 Introduction

The previous chapter discussed issues of admissibility of a case by the ICC. It went on to discuss various points for admissibility, namely complementarity, double jeopardy (*ne bis in idem*) and gravity. The chapter went on to highlight preliminary rulings regarding admissibility and challenges to jurisdiction and admissibility were considered. The chapter concluded by analysing the rationale for implementing legislation and how specifically South Africa adopted its implementing legislation. This chapter intends to examine the relationship between the AU and the ICC, it will further scrutinize the root causes of the animosity between the two institutions. In addition the chapter will also analyse matters of state referrals,⁶²⁶ Africa's Numerical Legacy within the ICC and the connection between Africa and the Rome Statute.⁶²⁷ The chapter will also set out to evaluate the magnitude of the situation and judicial inaccuracy of the ICC regarding cases within the African continent. In addition the chapter will analyse the 2010 setbacks and offer reflections on the road ahead. It discusses key concerns with the July 2010 AU decision on the ICC and visits by President Al Bashir to the territory of ICC states parties, and assesses the significance of these setbacks given the broader landscape in which they occurred.

4.2 Legal legitimacy

Legal legitimacy is generally treated as the narrowest of the three disciplinary concepts of legitimacy. It may thus be defined as a property of an action, rule, actor, or system which signifies a legal obligation to submit to or support that action, rule, actor or system. Legal legitimacy is similar to moral legitimacy in that both assess given objects against particular normative framework; as such they are both sometimes grouped together as forms of 'normative legitimacy'.⁶²⁸ To writers outside of legal scholarship, legal legitimacy is often directly equated with *legal validity*, to the exclusion of questions of moral justifiability.⁶²⁹ Legal validity in itself is then treated as a relatively straightforward concept.⁶³⁰ It is nonetheless recognised that legal legitimacy is particularly important because of the strength of its self-justification in a functioning legal system; once something has become legally legitimate, this provides an exclusionary reason for compliance even

⁶²⁶Akande D 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333-352.

⁶²⁷Grono N 'Briefing - Darfur: The International Community's Failure to Protect' (2006)105 *African Affairs -London-Royal African Society* 621-632.

⁶²⁸JHH Weiler *The Constitution of Europe* (1999) 80.

⁶²⁹David Beetham distinguishes between legal validity (legitimacy for lawyers), moral justifiability (legitimacy for philosophers), and belief in legitimacy (legitimacy for social scientists): Beetham D *The Legitimation of Power* (1991) 4-7.

⁶³⁰Fallon R 'Legitimacy and the Constitution' (2005) 118 *Harvard Law Review* 1787

in the face of opposing moral considerations. Questions of legal validity thus have a direct impact on broader understandings of morality and order.⁶³¹ Legitimacy, can be viewed as a representing a third basis of compliance. An individual or state might comply with a directive, not because of the fear of sanctions or because it is rationally persuaded that the decision is correct, but rather because it accepts the decision-making process as legitimate. In contrast to rational persuasion, legitimacy involves the idea of deference. If an institution has the right to rule, then people should defer to its decisions even when they disagree with the substance of those decisions.

Legitimacy thus formed the cardinal to the ICC's success as it represents the collective acceptance of an authority that is deemed lawful and justified in their decisions over its sphere of influence.⁶³² This attribute was essential in maintaining the ICC's prominence in the global community as an objective and believable institution. Credibility is public recognition of the ICC's integrity and reliability; this credibility must first radiate from within the ICC operations, structures, approaches and decisions a sum total of what can be said to be the behavior of the CICC which will manifest into external motivations towards the ICC. Courts are inherently different from ordinary political institutions because they depend upon their unique makeup to fulfil the judicial commitments for which constituents hold them accountable. The processes and results of a court often contribute heavily to the framing of this opinion, and their capacity to 'do justice and otherwise contribute to better the human condition' relies heavily on democratic accountability and transparency.⁶³³ Nienke Grossman states that: 'the extent to which an international court implements the objectives it was created for may also affect its legitimacy.'⁶³⁴ Thus, a court's legitimacy is fundamentally dependent on the public perception that it is operating to the fullest and best of its ability toward upholding the rule of law. The ICC is no exception. It is imperative that the Assembly of States Parties and other interested actors perceive the Court as fulfilling the goals laid out for it in the Rome Statute.

⁶³¹ In international law scholarship: 'Legal legitimacy takes what might be called an internal perspective: particular directives are justified in terms of a regime's secondary rules about who can exercise authority, according to what procedures, and subject to what restrictions': Bodansky D 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 *American Journal of International Law* 596, 608

⁶³² Wells M 'What Will the ICC's Legacy Be in Côte d'Ivoire?' available at Human Rights Watch www.hrw.org accessed 4 July 2018.

⁶³³ Article 126 (1) entry into force, 'This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations'.

⁶³⁴ Regulation 55(1) of the Regulations of the Court 'Regulations', the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, however, it shall not exceed the facts and circumstances described in the charges and any amendments to the charges.

4.3 The cases preceding Sudan's referral

As a new international legal institution, the ICC had to work resiliently to establish its legitimacy

. Although the ICC was dependent on the support of states for its formation it needed to put in more effort than national courts to gain legitimacy. In the conduct of each of its early cases, it was not just the suspect but also the ICC itself that was on trial.⁶³⁵ As a result, the political circumstances that surrounded the ICC in its initial actions were of amazing importance to its prominence and legitimacy.⁶³⁶ When the ICC issued a warrant against Al Bashir,⁶³⁷ there were three cases before the ICC. All three of the ICC's first 'situations'⁶³⁸ were situated on the African continent: the Democratic Republic of the Congo (DRC), Uganda and the Central African Republic (CAR) all by self-referral,⁶³⁹ and Sudan by UNSC referral.⁶⁴⁰ As such, 'one can barely exaggerate the significance of Africa to the ICC,'⁶⁴¹ for any profound understanding with regards to the circumstances concerning the Al Bashir's indictment. It is vital that the three cases, and the reactions to the ICC's involvement in these countries,⁶⁴² be analysed to understand the essential differences between them, and the Sudan case. Since the situations involving the DRC,⁶⁴³ Uganda and CAR were all referred to the ICC by these countries themselves between 2003 and 2005 these governments were all state parties to the Rome Statute and because of the inability of their national courts to prosecute grave crimes therefore they invited the ICC to launch investigations in line with the complementarity principle of the Rome Statute.⁶⁴⁴ To shed light and clarity on what drove to the referrals a brief summary of the cases will be analysed below.

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⁶³⁵ Glasius M 'Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic' (2008) 4 414.

⁶³⁶ Megret F 'The politics of international criminal justice' (2002) 13 *European Journal of International Law* 1262

⁶³⁷ Tutu D 'Will Africa Let Sudan Off the Hook?' *The New York Times* 2 March 2009.

⁶³⁸ The term 'situation' is used (see e.g. Article 13 of the Rome Statute as cited below on page 16) rather than words such as 'case' because the matters before the ICC are not restricted to a single case. Furthermore, 'situations,' not 'cases', are referred to the court by states parties and the UNSC, i.e. Bashir's case was not referred to the OTP, rather it was the situation unfolding in Sudan. 'Case' will be used when referring to the individual case of a defendant.

⁶³⁹ Gaeta P 'Is the Practice of 'Self-Referrals' a Sound Start for the ICC?' (2004) 4 *Journal of International Criminal Justice*.

⁶⁴⁰ Gaeta P 'Is the practice of 'self-referrals' a sound start for the ICC?' (2004) 2 *Journal of International Criminal Justice* 951

⁶⁴¹ Du Plessis M 'The International Criminal Court and its Work in Africa: Confronting the Myths' (2008) 13 *Institute for Security Studies* 19-41.

⁶⁴² Grono N 'Briefing - Darfur: The International Community's Failure to Protect' (2006) 10 *African Affairs -London-Royal African Society* 621-632.

⁶⁴³ Slaughter A 'Not the court of first resort' *The Washington Post*. 21 December 2003.

⁶⁴⁴ Complementarity was also designed to try and strengthen national judicial systems. Several provisions in the Statute require that the prosecutor inform state parties about the decision to open an investigation, at which point 'it is open to both states parties and non-states Parties to insist that they will investigate allegations against their own nationals themselves: the ICC would then be obliged to suspend its investigation'

4.3.1 Uganda and the Lord's Resistance Army Insurgency

After several failed attempts by the Ugandan Government to crush the insurgency in the northern part of the country led by the Lord's Resistance Army (LRA), the Government of Uganda saw it befitting to refer this situation to the OTP in December 2003. A few months after the ICC had resumed its first investigation into the situation in Northern Uganda the OTP stated that there was satisfactory basis for opening a formal investigation into the matter.⁶⁴⁵ Then in July 2005, the OTP issued arrest warrants for five of the most senior leaders in the LRA, which included its leader, Joseph Kony.⁶⁴⁶ It cannot be denied that the atrocities and brutal murders, rapes, abductions, and destruction of life and freedoms in northern Uganda fell within the ambit of the ICC.⁶⁴⁷ At this point under the authority of Kony's, the LRA had killed thousands of residents in Uganda,⁶⁴⁸ abducted over 30,000 children to use as child soldiers, and enslaved young women to use as concubines for his rebel soldiers.⁶⁴⁹ Over two million people were displaced by the civil unrest and violence committed by the LRA, most of those people remain in internally displaced persons (IDP) camps despite the fact that the LRA has been largely driven out of Uganda.⁶⁵⁰

The support for the ICC by many Ugandans can be best defined as varied and there are various reasons for this support. Firstly,⁶⁵¹ placement of footnote criticisers of the referral cited the timing of the investigation by the OTP and the warrant by the ICC to arrest five of the most senior leaders in the LRA,⁶⁵² which included its leader, Joseph Kony as a hindrance on peace efforts.⁶⁵³ When the LRA and the GoU were engaged in peace talks there was anxiety that the ICC indictments could hinder a peace agreement and thereby prolong 20 years of suffering for the Acholi people of

⁶⁴⁵ Hovil L & Lomo Z 'Whose Justice? Perceptions of Uganda's Amnesty Act 2000: the potential for conflict resolution and long-term reconciliation' 2005 *Refugee Law Project Working Paper*.

⁶⁴⁶ Office of the Prosecutor. 2004. 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC.' ICC-20040129-44. Situation: Uganda.

⁶⁴⁷ Afako B 'Country Study Uganda' in Du Plessis M & Ford J eds in *Unable or Unwilling?* (2008) *Institute for Security Studies* 70-85.

⁶⁴⁸ Greenawalt A 'Complementarity in crisis: Uganda, alternative justice, and the International Criminal Court' (2009) 50 *Virginia Journal of International Law* 108.

⁶⁴⁹ Many reports and organizations have previously put the number of abductees between 20,000 and 30,000, but a recent report prepared for several humanitarian and human rights organizations such as UNICEF, Human Rights Centre (HRC) and the MacArthur Foundation, 'The State of Youth and Youth Protection in the Northern Uganda: Findings from the Survey for War Affected Youth,' published in September 2006, put the number at an astounding 66,000.

⁶⁵⁰ It should be noted that it was actually a policy directive by the GoU that led to the encampment of most northern Ugandans as the government sought a way to choke off supplies and support to the rebels. This fact partially explains the reason there is so much anger that no government officials have been accused of crimes by the ICC.

⁶⁵¹ Hoening P 'The dilemma of peace and justice in Northern Uganda' (2008) 14 *East African Journal of Peace and Human Rights* 338.

⁶⁵² Lomo Z 'Why the International Criminal Court Must Withdraw Indictments against the Top LRA Leaders: A Legal Perspective' *Refugee Law Project*, August 2006.

⁶⁵³ Kimani M 'Pursuit of Justice or Western Plot: International Indictments stir angry debate in Africa' (October 2009) at Page 12 mentions that the warrants for Joseph Kony and other leaders of the LRA were seen as impeding a peaceful end to the conflict in Northern Uganda. available at www.un.org/en/africarenewal/Volume23no/233-icc.html (accessed on 10 February 2016).

northern Uganda.⁶⁵⁴ The same criticism was levelled to at least three of the four situations before the ICC at the time, excluding the DRC.⁶⁵⁵ Secondly many in Uganda were doubtful about the genuineness of the referral from Ugandan President Yoweri Museveni.⁶⁵⁶ Critics differ as to the exact reason behind the referral but most agree that it was for political reasons rather than the inability to deal with the situation internally. International organisations such as the Refugee Law Project (RLP) explained,⁶⁵⁷ that the referral of the LRA to the ICC by Museveni did not reflect an honest desire to meet international obligations under the Roman Statute,⁶⁵⁸ but was a trump card to re-assert democratic credentials at the international level, ones which had been damaged by the failure of several military campaigns in the north.⁶⁵⁹ Payam Akhavan comes with a slightly contradictory view that for Uganda,⁶⁶⁰ 'the referral was an attempt to engage an otherwise detached international community by transforming the prosecution of LRA leaders into a litmus test for the much celebrated promise of global justice.⁶⁶¹ The referral to the ICC,⁶⁶² was a means of thrusting this long forgotten African war back onto the international stage.'⁶⁶³

There is a view point held by many Ugandans,⁶⁶⁴ predominantly those based in the north, that minimal focus was placed on crimes committed by government troops during the insurgency. Even though violations committed by the GoU do not fall under the jurisdiction of the ICC,⁶⁶⁵ the deficiency of indictments against government personnel and the perceived comfortable association between the government and the ICC elevated critical concerns by the public. In response to this

⁶⁵⁴ The Acholi tribe makes up the majority of people affected by the war, with up to 90% of the entire population displaced at peak times of violence. 'Acholiland' consists of the northern districts Gulu, Kitgum and Pader.

⁶⁵⁵ Ku J and Nzelibe J 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' (2007) 84 *Washington University Law Quarterly*.

⁶⁵⁶ Rodman KA and Booth P 'Manipulated Commitments: The International Criminal Court in Uganda' (2013) 35 *Human Rights Quarterly* 271-303.

⁶⁵⁷ Condorelli L 'Comments on the Security Council Referral of the Situation in Darfur to the ICC' (2005) 3 *Journal of International Criminal Justice* 590- 599.

⁶⁵⁸ Livada PD 'The Principle of Complementarity and Security Council Referrals', in M Politi & F Gioia (ed) *The International Criminal Court and National Jurisdiction Ashgate* (2008) 7 57-62.

⁶⁵⁹ Refugee Law Project. 'Refugee Law Project Position paper on the Announcement of formal investigations of the Lord's Resistance Army by the Chief Prosecutor of the International Criminal Court and its implications on the search for peaceful solutions to the war in Northern Uganda.' Refugee Law Project Position Paper. 28 July 2004.

⁶⁶⁰ Tim A 'Trial justice: The International Criminal Court and the Lord's Resistance Army' (2009).

⁶⁶¹ Keller L 'Achieving peace with justice: The International Criminal Court and Ugandan alternative justice mechanisms' (2008) 23 *Connecticut Journal of International Law* 209

⁶⁶² Murphy R 'Establishing a Precedent in Uganda: The legitimacy of national amnesties under the ICC Eyes on the ICC' (2006) (33).

⁶⁶³ Payam A 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court.' (2005) *The American Journal of International Law* 99.

⁶⁶⁴ Traylor A 'Uganda and the ICC: Difficulties in Bringing the Lord's Resistance Army leadership before the ICC, Eyes on the ICC (2009) (23).

⁶⁶⁵ According to Marlies Glasius, 'It is generally accepted that the army has killed or tortured civilians more sporadically [than the LRA]. But it has been responsible for implementing the policy of forcing nearly two million people in the region to live in displacement camps, indirectly causing thousands of deaths through lack of hygiene, health services or adequate nutrition. The army has generally failed to do anything to protect the people in the camps from the LRA and has contributed to the level of brutality in the camps.' Marlies G 'What is Global Justice and Who decides? Civil Society Responses to the ICC's First Investigations.' (2008) *Human Rights Quarterly* 31.

criticism the Prosecutor responded and stated that, ‘the investigation concerns all actors in the Northern Uganda situation, and that his office operates with a threshold of gravity of crimes,⁶⁶⁶ on the basis of which it gave priority to the LRA leadership.’⁶⁶⁷ While such a response was not inappropriate, the impression left upon many Ugandans was that the ICC was biased and not interested in pursuing crimes by the GoU.

Finally, there were concerns that the ICC represented a ‘foreign’ form of justice to the people of northern Uganda. This appraisal was not only being held in Uganda, but other situations before the ICC and such as the situation in Darfur.⁶⁶⁸ Extraordinarily, while the uproar from civil society was instant and flamboyant in Uganda, other African heads of states were largely silent and muted on this situation.⁶⁶⁹ Again why would African leaders not enjoy the ICC intervention in Uganda? The Ugandan Government had requested the ICC to prosecute rebel leaders while ignoring atrocities committed by GoU troops and the president did not have to account.⁶⁷⁰ It can be said that the Ugandan Government was inability to actively prosecute rebel leaders due to the volatile situation in the country at the time hence the referral to the ICC for assistance in the form of activating the principle of complementarity.

4.3.2 The ICC in the Democratic Republic of Congo

On 19 April 2004, the Democratic Republic of the Congo (DRC) referred the situation within its borders to the ICC, making it the second state party to do so in many years. The OTP released a statement that explained how the Prosecutor had ‘received a letter signed by the President of the DRC referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute on 1

⁶⁶⁶Okello M ‘False Polarization of Peace and Justice in Uganda’ Building a Future on Peace and Justice, conference in Nuremberg, Germany, 25- 27 June 2007; Otim M ‘Traditional justice, the role of the ICC, the Juba peace process, and the humanitarian situation: perspectives from the ground’ Building a Future on Peace and Justice, conference in Nuremberg, Germany, 25-27 June 2007; O’Brien A ‘The Impact of International Justice in local peace initiatives: the Case of Northern Uganda’ Building a Future on Peace and Justice, conference in Nuremberg, Germany, 25-27 June 2007. All available at www.peace-justice-conference.info/documents.asp. See also Refugee Law Project ‘Peace First, Justice Later: Traditional Justice in Northern Uganda’ Working Paper No. 17, July 2005.

⁶⁶⁷Glasius M ‘What is Global Justice and who decides? Civil Society Responses to the ICC’s First Investigations.’ (2008) 31 *Human Rights Quarterly*.

⁶⁶⁸ available at http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html. In respect of the Ugandan referral: ‘In December 2003 the President Yoweri Museveni took the decision to refer the situation concerning the Lord’s Resistance Army to the Prosecutor of the International Criminal Court. President Museveni met with the Prosecutor in London to establish the basis for future co-operation between Uganda and the International Criminal Court.’ available at http://www.icccpi.int/pressrelease_details&id=16&l=en.html (accessed on 22 October 2015).

⁶⁶⁹ These sectors of society also often are those most impacted by the crimes within the Court’s jurisdiction, but they lack representation and power in the elite social and political structures, making them especially vulnerable to exploitation and violence.

⁶⁷⁰ It should be noted that it was actually a policy directive by the GoU that led to the encampment of most northern Ugandans as the government sought a way to choke off supplies and support to the rebels. This fact partially explains the reason there is so much anger that no government officials have been accused of crimes by the ICC.

July 2002.⁶⁷¹ As a result of this letter,⁶⁷² the DRC invited the OTP to investigate crimes committed within its territory,⁶⁷³ and pledged its support and cooperation in pursuit of that goal.⁶⁷⁴

The formal investigation was opened by the OTP in June 2004, and the Prosecutor decided to focus the initial investigations in the Ituri district of the DRC,⁶⁷⁵ one of the locales that had experienced the most intense conflict. At this point there were four individual cases open in the ICC with regards to the DRC.⁶⁷⁶ The first arrest warrant was for Thomas Lubanga in February 2006. Lubanga, the president of the rebel group Union of Congolese Patriots (UPC),⁶⁷⁷ was accused of several offences involving the use of child soldiers. The DRC arrested and handed him over to the ICC in March 2006.⁶⁷⁸ Lubanga was found guilty on 14 March 2012, of the war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities.⁶⁷⁹ On 10 July 2012 he was sentenced to a total of 14 years of imprisonment. The verdict and sentence were confirmed by Appeals Chamber on 1 December 2014.⁶⁸⁰ Lubanga was then transferred on 19 December 2015 to a prison facility in the DRC to serve his sentence of imprisonment.⁶⁸¹

Then in July 2007, the ICC issued an arrest warrant for Germain Katanga, a former commander of the Patriotic Forces of Resistance (FRPI).⁶⁸² On 7 March 2014, Trial Chamber II found Germain

⁶⁷¹ Office of the Prosecutor. 2004. 'Prosecutor receives referral of the situation in the Democratic Republic of Congo.' ICC-OTP-20040419-50. Situation: Democratic Republic of the Congo.

⁶⁷² Burke-White W 'Complementarity in practice: The International Criminal Court as part of a system of multilevel global governance in the Democratic Republic of Congo' (2005) 18 *Leiden Journal of International Law* 557.

⁶⁷³ Newton M 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Court' (2001) 167 *Military Law Review* 20.

⁶⁷⁴ The Prosecutor had already been monitoring the situation in the DRC due to multiple communications transmitted to him by NGOs and other community-based groups. Indeed, 'in September 2003, the Prosecutor informed the Assembly of states parties that he would be prepared to seek authorisation from a Pre-trial Chamber to start an investigation under his proprio motu powers, but that a referral and active support from the DRC would facilitate the work of the Office of the Prosecutor' (Office of the Prosecutor, ICC-OTP). In the end, this invocation of Prosecutorial power was not necessary.

⁶⁷⁵ Smith D 'Thomas Lubanga sentenced to 14 years for Congo war crimes' available at <http://www.guardian.co.uk/> (accessed 13 April 2016).

⁶⁷⁶ Human Rights Watch 'Democratic Republic Of Congo. Ituri: 'Covered in Blood' Ethnically Targeted Violence In North-eastern DR Congo' (2003) (15) available at <http://www.hrw.org/reports/2003/ituri0703/DRC0703full> (accessed on 10 January 2017).

⁶⁷⁷ Agence France Press 'Peace before justice, Congo minister tells ICC' (2009) available at <http://www.google.com/hostednews/afp/article/ALeqM5hbGnGCzEtEJHzIf5HMghzI> (accessed on 24 March 2016).

⁶⁷⁸ Du Plessis M 'The International Criminal Court and its Work in Africa: Confronting the Myths' (2008) (173) *Institute for Security Studies*.

⁶⁷⁹ Trial Chamber I. International Criminal Court, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Thomas Lubanga Dyilo. ICC-01/04-01/06-2904 (2012) 88

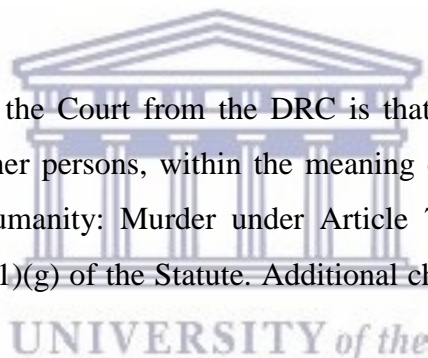
⁶⁸⁰ Prosecutor v Katanga and Chui ICC-01/04-01/07-1497

⁶⁸¹ Smith D 'Thomas Lubanga sentenced to 14 years for Congo war crimes' available at <http://www.guardian.co.uk/> (accessed on 13 April 2016).

⁶⁸² Germain Katanga also known as Simba, a former leader of the Patriotic Resistance Force in Ituri (FRPI) on 17 October 2007, the Congolese authorities surrendered him to the ICC to stand trial on six counts of war crimes and three counts of CAH. The charges include murder, sexual slavery and using children under the age of 15 to participate actively in hostilities. On 7 March 2014 Katanga was convicted by the ICC on five counts of war crimes and crimes against humanity, as an accessory to the February 2003 massacre in the village of Bogoro in the Democratic Republic

Katanga guilty, as an accessory, within the meaning of Article 25(3) (d) of the Rome Statute, of one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during an attack on the village of Bogoro, in the Ituri district of the DRC.⁶⁸³ The Chamber acquitted Katanga of the other charges that he was facing. On 25 June 2014, the Defence for Katanga and the Office of the Prosecutor discontinued their appeals against the judgment in the Katanga case. The judgment is now final. On 23 May 2014, Trial Chamber II, ruling in the majority, sentenced Katanga to a total of 12 years' imprisonment. The Chamber also ordered that the time spent in detention at the ICC between 18 September 2007 and 23 May 2014 be deducted from his sentence. On 13 November 2015, a panel of three judges of the Appeals Chamber, specifically appointed by the Appeals Chamber, reviewed Mr Katanga's sentence and decided to reduce it. Accordingly, the date for the completion of his sentence was set to 18 January 2016.⁶⁸⁴ On 19 December 2015, Katanga was transferred to a prison facility in the Democratic Republic of the Congo (DRC) to serve his sentence of imprisonment. Decisions on possible victim reparations will be rendered later.⁶⁸⁵

The third case that came before the Court from the DRC is that of Mathieu Ngudjolo Chui, he allegedly committed, through other persons, within the meaning of Article 25(3)(a) of the Rome Statute: Three crimes against humanity: Murder under Article 7(1)(a) of the Statute,⁶⁸⁶ sexual slavery and rape under Article 7(1)(g) of the Statute. Additional charges: Seven war crimes: Using



of the Congo, convicted of being an accessory to war crimes and crimes against humanity, the accused was acquitted of the most serious charges, and was only convicted because of a mid-course correction charging him with being an accessory to the crimes. The verdict was the second-ever conviction in the 12 years of operation of the International Criminal Court, following the 2012 conviction of Thomas Lubanga Dyilo.

⁶⁸³ Human Rights Watch 'Democratic Republic Of Congo. Ituri: Covered in Blood Ethnically Targeted Violence In North-eastern DR Congo' (2003) (15) available at <http://www.hrw.org/reports/2003/ituri0703/DRC0703full.pdf> (accessed on 20 April 2016).

⁶⁸⁴ Germain Katanga convicted by the ICC on five counts of war crimes and crimes against humanity, as an accessory to the February 2003 massacre in the village of Bogoro in the Democratic Republic of the Congo. The verdict (on 7 March 2014) was the second-ever conviction in the 12 years of operation of the International Criminal Court, following the 2012 conviction of Thomas Lubanga Dyilo; two of the three judges of the court's Trial Chamber II found Germain Katanga guilty as an accomplice in murders and an attack on civilians in the village of Bogoro, Ituri, on February 24, 2003. He was found not guilty of rape, sexual slavery, and the use of child soldiers. Katanga is the former chief of staff of the Patriotic Force of Resistance in Ituri (Front de Résistance Patriotique en Ituri – FRPI). The Judges unanimously ruled that the evidence presented at trial did not establish beyond reasonable doubt that Katanga was criminally responsible for rapes, sexual slavery, and the use of child soldiers committed by FRPI troops. One of the judges disagreed with the judgment and said that changing Katanga's responsibility for the crimes violated his right to a fair trial, as he was not able to properly prepare against this accusation. The majority found that Katanga's rights to a fair and speedy trial had been upheld despite the modified accusation against him. Katanga's case is the third to reach judgment at the ICC. Three other trials are under way, relating to crimes in the Central African Republic and Kenya. Decisions on the confirmation of charges against another Congolese rebel leader, Bosco Ntaganda, and the former Ivory Coast president Laurent Gbagbo are pending.

⁶⁸⁵ Human Rights Watch. 2006. DRC: ICC arrest – First step to justice. New York: Human Rights Watch; available at <http://www.hrw.org/en/category/topic/international-justice/international-criminal-court> (accessed on 20 March 2016).

⁶⁸⁶ Frulli M 'Are Crimes Against Humanity more serious than War Crimes?' (2001) 12 *European Journal of International Law* 329-350.

children under the age of 15 to take active part in hostilities under Article 8 (2)(b)(xxvi) of the Statute; deliberately directing an attack on a civilian population as such or against individual civilians or against individual civilians not taking direct part in hostilities under Article 8(2)(b)(i); wilful killing under Article 8(2)(a)(i) of the Statute; destruction of property under Article 8(2)(b)(xiii) of the Statute; pillaging under Article 8(2)(b)(xvi) of the Statute; sexual slavery and rape under Article 8(2)(b)(xxii) of the Statute.⁶⁸⁷ On 18 December 2012, the trial Chamber II acquitted Mathieu Ngudjolo Chui of the charges of war crimes and crimes against humanity and ordered his immediate release. On 21 December 2012, Mathieu Ngudjolo Chui was released from custody. The Office of the Prosecutor has appealed the verdict. Later on 27 February 2015, the Appeals Chamber confirmed, by majority, the trial Chamber II decision of 18 December 2012 acquitting Mathieu Ngudjolo Chui of charges of crimes against humanity.⁶⁸⁸

The fourth case from the DRC was that of Bosco Ntaganda.⁶⁸⁹ Ntaganda was the alleged Deputy Chief of Staff and commander of operations of the Patriotic Forces for the Liberation of Congo (FPLC).⁶⁹⁰ The prosecution's application for his first warrant of arrest was on 12 January 2006 issued by Pre-Trial Chamber I and this was followed by the second warrant of arrest on 14 May 2012. Until March of 2013, Ntaganda was wanted by the ICC for the war crimes of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities. Prior to his surrender he had been allegedly involved in the rebel group March 23 Movement.⁶⁹¹ On 18 March 2013 he voluntarily handed himself into the USA Embassy in Rwanda asking to be transferred to the ICC. On 9 June 2014, Pre-Trial Chamber II unanimously confirmed charges consisting in 13 counts of war crimes (murder and attempted murder; attacking civilians; rape;

⁶⁸⁷ Waddell N & Clark P *Courting Conflict: Justice Peace and the ICC in Africa* (2008) 43.

⁶⁸⁸ *The Prosecutor v Mathieu Ngudjolo Chui*, ICC Trial Chamber II acquits Mathieu Ngudjolo Chui on 18th December 2012, Trial Chamber II (ICC) acquitted of the charges of war crimes and crimes against humanity ICC-CPI-20121218-PR865; Situation in the Democratic Republic of Congo, The decision was taken unanimously by the Chamber.

⁶⁸⁹ Chui was a colonel in the Congolese army and 'alleged former leader of the National Integrationist Front.' The cases of Chui and Katanga have since been joined together and will proceed accordingly. Ntaganda, a leader in the Patriotic Force for Congo Liberation (FPLC), originally had his arrest warrant issued in August of 2006 but it was not unsealed by a pre-trial chamber until April of 2008 (International Criminal Court. 2006. 'Warrant of Arrest for Bosco Ntaganda.' (22 August 2006).

⁶⁹⁰ ICC-01/04-02/06-2(13 July 2012 second arrest warrant) *The Prosecutor v Bosco Ntaganda*. The ICC issued two warrants of arrest for Bosco Ntaganda, as the former alleged Deputy Chief of the General Staff of the Forces Patriotiques pour la Libération du Congo [Patriotic Forces for the Liberation of Congo] (FPLC), Mr Ntaganda is suspected of thirteen counts of war crimes (murder and attempted murder of civilians, attacks against a civilian population, rape of civilians, rape of UPC/FPLC child soldiers, sexual slavery of civilians, sexual slavery [contained in the 2nd charge only] of UPC/FPLC child soldiers, pillaging, displacement of civilians, conscription of children under the age of 15, enlistment of children under the age of 15, use of children under the age of 15 to participate actively in hostilities, attacks against protected objects, and destruction of property) and five counts of crimes against humanity (murder and attempted murder of civilians, rape of civilians, sexual slavery of civilians, persecution on ethnic grounds, and forcible transfer of population) allegedly committed in Ituri, Democratic Republic of the Congo (DRC) between 1 September 2002 and the end of September 2003.

⁶⁹¹ ICC press release, 27 March 2009: 'Situation: Democratic Republic of the Congo (DRC), Case: *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*', ICC-CPI-20090327-PR402.

sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects;⁶⁹² destroying the enemy's property; and rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities).⁶⁹³ Furthermore five counts of crimes against humanity (murder and attempted murder; rape; sexual slavery; persecution; forcible transfer of population) against Ntaganda allegedly committed between 2002-2003 in the Ituri Province, DRC.⁶⁹⁴

There are several key differences between the situation in the DRC and in Uganda. Firstly, while some hostilities were ongoing at the time the Congolese warrants were issued, the nature of the conflict was substantively different from that which took place in Uganda. Secondly, a number of the DRC suspects were already in Congolese custody.⁶⁹⁵ This fact, combined with the former, is important in that it meant that few people were critical of the ICC's interventions in the DRC because it was potentially perpetuating a conflict, as had been the case in Uganda. Thirdly, the Prosecutor pursued suspects from multiple groups in the DRC, unlike in Uganda, while the nature of the conflict is also clearly different. As in Uganda, however, the OTP has yet to go after any government or army official despite widespread allegations of violence and rape on the part of government soldiers. These differences go a long way in explaining the different reaction experienced in Uganda and the DRC to the Court's involvement.⁶⁹⁶

In Lubanga's case, the reaction from around the country was largely positive.⁶⁹⁷ This optimism and excitement about the Court's involvement, however, did not last for very long. While the criticism from within the DRC has never been as enthusiastic or unified as in Uganda, the public and civil society began to display increasing signs of discontent with the ICC operation.⁶⁹⁸ One concern was that there were many other warlords and army officials in the DRC who were still free and had not yet been charged, and additional arrest warrants did not come quickly enough for those who knew the extent of the atrocities taking place in the DRC.⁶⁹⁹ While subsequent arrest warrants were eventually issued, there are still those who criticise the OTP for not going high enough in the chain

⁶⁹² Amnesty International, 'Ituri: a need for protection, a thirst for justice' (2003).

⁶⁹³ Human Rights Watch 'Democratic Republic Of Congo. Ituri: Covered in Blood Ethnically Targeted Violence In North-eastern DR Congo' (2003) (15) available at <http://www.hrw.org/reports/2003/ituri0703/DRC0703full.pdf> (accessed 20 April 2016).

⁶⁹⁴ Burke-White, W 'Proactive complementarity: The International Criminal Court and national courts in the Rome system of international justice' (2008) 49 *Harvard International Law Journal* 53

⁶⁹⁵ Declan W 'UN cuts details of Western profiteers from Congo report' *The Independent* 27 October 2003.

⁶⁹⁶ Futamura M *War Crimes Tribunals and Transitional Justice the Tokyo Trial and the Nuremberg Legacy* (2008) 27-48.

⁶⁹⁷ Glasius M 'Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic' (2008) 33. 4.

⁶⁹⁹ Glasius M 'Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic' (2008) 33. 5.

of command.⁷⁰⁰ As violence continues to plague areas of the DRC, many Congolese are left to wonder why the OTP has not bothered to prosecute those guilty of gross violations. The OTP maintains that it can only proceed with a case and begin legal prosecution when there is sufficient evidence against an individual to merit the issuance of arrest warrants.⁷⁰¹

After the intervention of the ICC in the DRC it can be said that the commitment by the ICC yielded some results. The Congolese judicial system lacked the capacity to prosecute grave international crimes.⁷⁰² Both the military and the civilian judicial systems were starved of resources and competent personnel. Magistrates were poorly paid and poorly trained. Political interference and corruption often determined the outcome of cases.⁷⁰³ The UN Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, after a visit to the DRC in April 2007, concluded that interference by the executive and the army in judicial proceedings was 'very common' and that the DRC's judicial system was 'rarely effective with human rights violations generally going unpunished.' Recently, however, we have seen some encouraging developments in the DRC.⁷⁰⁴ The Congolese military courts have conducted a handful of prosecutions of low-level or mid-level offenders for war crimes,⁷⁰⁵ crimes against humanity and sexual violence.⁷⁰⁶ These prosecutions suggest the possibility of a degree of 'burden sharing' between the ICC which would prosecute those who are untouchable by the national judicial system and national courts, which would contribute to closing the impunity gap. Congolese authorities and judicial officials were also reasonably cooperative with the ICC during this time, suggesting potential for closer cooperation on domestic war crimes prosecutions.⁷⁰⁷

Even if the ICC was to be more proactive in terms of positive complementarity, it would face the deficiencies in the functioning of the Congolese national judicial system. These deficiencies raise the question of the extent to which the ICC can appropriately cooperate with national courts without

⁷⁰⁰Glasius M 'Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic' (2008) 33. 4.

⁷⁰¹Glasius M 'Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic' (2008) 33 77-85.

⁷⁰² According to Rule 85(a) of the ICC's Rules of Procedure and Evidence, victims are defined as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.

⁷⁰³ Various attempts of the Prosecutor to appeal the precedent set by the Pre-Trial Chamber: 'Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation', filed 23 January 2006, Case No. ICC-01/04 and the 'Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal', Case No. ICC-01/04.

⁷⁰⁴ Goetz M 'Victims Perpetrators or Heroes? Child Soldiers before the International Criminal Court' (2006) 67.

⁷⁰⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Case ICC-01/04-01/06.

⁷⁰⁶ Article 8, sub article 2(e) (vii), of the Rome Statute, defines the crime as 'conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities'. For a broad analysis of child soldiers and the International Criminal Court.

⁷⁰⁷ Chitiyo K and Devlin L 'The International Criminal Court and Africa' (2008) 28 *The Royal United Services Institute News brief* 69.

compromising its integrity.⁷⁰⁸ For example, it is unlikely that the OTP could have shared with national courts, witnesses or confidential information that could expose vulnerable sources. Assuming the sensitive nature of trials for serious crimes, witnesses in such trials face serious risks. The DRC had no domestic laws that impose sanctions for interfering with witnesses and no comprehensive witness protection programme.⁷⁰⁹ It was also problematic for the ICC to contribute to proceedings where the accused were not assured a fair and impartial trial. The Congolese record in that regard raises serious concerns not least because military rather than civilian courts currently have jurisdiction over serious human rights violations.⁷¹⁰ This is problematic for several reasons, including a record of interference by political and military authorities in sensitive cases.⁷¹¹ Finally, the DRC has not yet abolished the death penalty. It would be inappropriate for the ICC to contribute direct evidence against an accused who faces the risk of being sentenced to death.⁷¹²

Jean-Pierre Bemba Gombo. Even though he was a Congolese national, he was prosecuted by the crimes he allegedly committed in the territory of the CAR. As a military commander, he was criminally responsible for the crimes two crimes against humanity (murder, rape) and three war crimes (murder, rape, and pillaging) (ICC, Situations and Cases). Bemba Gombo was the “leader of the Movement for the Liberation of Congo (MLC), a Congolese political party that emerged from a militia group of the same name” He was responsible for the atrocities MLC committed under his leadership in neighboring Central African Republic after CAR’s President Ange-Félix Patassé invited Bemba’s rebel movement to the country to help him put down a coup attempt against his government. The *Bemba* case is the first case in the ICC which in practice has dealt with command responsibility under Article 28 (a) of the Statute.⁷¹³ *Bemba* was a civilian superior; the Pre-Trial Chamber has provided that the ‘notion of a military commander under this provision also captures

⁷⁰⁸ The extent of cooperation required of states party is evident from the fact that the Office of the Prosecutor (OTP) has a very wide mandate to ‘extend the investigation to cover all facts’ and investigate circumstances generally ‘in order to discover the truth’: Article 54(1) (a) of the Rome Statute.

⁷⁰⁹ This situation would be corrected if the draft ICC implementing legislation were to be adopted, since it gives jurisdiction over ICC crimes to the civilian courts.

⁷¹⁰ Since the 1970s, the Congolese military judicial system has had a record of inaction toward war crimes over which they have jurisdiction. It is also not appropriate for the military court to hear cases against civilians or for victims to have to recount their stories in front of a uniformed bench which they may associate with their abusers.

⁷¹¹ The ICC could perhaps explore the possibility of seeking assurances from the Congolese authorities that the death penalty would not be applied in cases involving ICC cooperation.

⁷¹² The Mixed Justice Committee was created as a result of an audit of the Congolese judicial system conducted in 2004 by the European Union and several other foreign donors. The Committee is a platform for Congolese government officials, judicial officials and donors to meet and discuss priorities, specific projects and developments in the field of judicial reform. The Committee meets monthly in Kinshasa.

⁷¹³ *Prosecutor v. Bemba Gombo*. Supra note 29; he is a national of the Democratic Republic of the Congo, who was alleged President of the Mouvement de liberation du Congo (MLC), this ‘Movement for the Liberation of Congo’ is an opposition political party in the Democratic Republic of the Congo. Bemba’s case, which is a referral by the Central African Republic to the ICC, is only case before the ICC that has involved an accused being charged with command responsibility under Article 28 of the Statute. The Pre-Trial Chamber III of the ICC, on 3 March 2009, requested the Prosecutor to amend the charge against Bemba; the Chamber provided that ‘it appears to the Chamber that the legal characterisation of the facts of the case may amount to a different mode of liability under article 28 of the Statute.’ The different form of liability for him includes ‘superior responsibility’

those situations where the superior does not exclusively perform a military function.⁷¹⁴ The Pre-Trial Chamber interpreted the notion of a *de jure* ‘military commander’ as referring to commanders ‘who are formally or legally appointed to carry out a military commanding function’, whereas *de facto* military commanders were interpreted as ‘persons effectively acting as military commanders’ as per Article 28 (a).⁷¹⁵ In the *Bemba* case it provided that:

[T]he Chamber considers that this term is meant to cover a distinct as well as a broader category of commanders. This category refers to those who are not elected by law to carry out a military commander’s role, yet they perform it *de facto* by exercising effective control over a group of persons through a chain of command.... Article 28 of the Statute is drafted in a manner that distinguishes between two main categories of superiors and their relationships - namely, a military or military like commander (paragraph (a) and those who fall short of this category such as civilians occupying *de jure* and *de facto* positions of authority (paragraph (b)).⁷¹⁶

The ICC did not clearly explicate what a ‘military like commander’ is and how this concept is different from that of a ‘military commander’, nor did it explicitly state whether Bemba qualifies as a *de jure* or *de facto* military commander;⁷¹⁷ but it seems that, though *Bemba* did not have a military title or rank,⁷¹⁸ he ‘qualified’ as a military commander under the scope of Article 28(a) of the Statute.⁷¹⁹ The ICC’s Pre-Trial Chamber appears in fact to be trying to limit the distinction between civilian and military command responsibility and has adopted the concept of a *de facto* ‘commander’ similar to the ICTY.⁷²⁰

[I]ndividuals in positions of authority, ..within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility.⁷²¹

⁷¹⁴ *Decision Pursuant to Art. 61(7), (a), (b), of the Rome Statute on the Charge of the Prosecutor Against Jean- Pierre Bemba Gombo*, Chamber II (2009), at 142, Para 408. the *Report on programme performance of the International Criminal Court for the year 2010, to the Assembly of State Parties*, provided that: ‘During the year a total of 1,436 victims were authorized by Chambers to participate in the different proceedings, the largest number being in the Bemba case in the period leading up to the start of the trial

⁷¹⁵ Rome Statute Article 28(a).

⁷¹⁶ *Prosecutor v. Bemba Gombo* . *Ibid*, at 141-142, Para 406 and 409.

⁷¹⁷ This has been criticised by Nora Karsten, who insists that *Bemba* meets the criteria to be considered as a *de facto* military commander; for more details; Karsten N ‘Distinguishing Military and Non-military Superiors, Reflections on the Bemba Case at the ICC’ (2009) 7 *Journal of International Criminal Justice* 983-104.

⁷¹⁸ *Prosecutor v. Bemba Gombo*. *Ibid*, at 142, Para 408: ‘[t]he concept [of military commanders] embodies all persons who have command responsibility within the armed forces, irrespective of their rank or level. In this respect, a military commander could be a person occupying the highest level in the chain of command or a mere leader with few soldiers under his or her command.’

⁷¹⁹ *Id*, at 184-185. The Court, holds ‘that Jean-Pierre Bemba Gombo is criminally responsible within the meaning of article 28(a), [military command] of the Statute...’.

⁷²⁰ *Id*, Para 408 to 410, and 412.

⁷²¹ *Prosecutor v Zehnil Delahc et al*, ICTY, Trial Chamber, (1998), Para 354.

Considering that the Rome Statutes of the *ad hoc* tribunals, in contrast to that of the ICC, adopted a uniform standard of liability for military and non-military commanders, it is interesting that the Pre-Trial Chamber referenced the ICTY's Celebici case in connection with attributing the command doctrine of liability to an *arguably* civilian superior *Bemba*;⁷²² this indicates the trend of the ICC to be one of limiting the differentiation of standards in practice. The practice of the ICC in *Bemba* case has also indicated the fact that the distinction between military and nonmilitary superiors is a very complicated issue; this is borne out by the considerable body of case law related to endeavouring to find a suitable distinction and the problems which arise in this context.⁷²³ One may accordingly argue that the distinction between these two modes of liability in Article 28 has also a procedural impact and may be a cause of delay in prosecution and difficulties concerning the interpretation as to whether an accused is a *de facto* military commander or not.⁷²⁴

4.3.3 The Central African Republic and the extremes of sexual violence

In December 2004, the Central African Republic (CAR) became the third African country to refer a situation within its borders to the ICC.⁷²⁵ Though the trend of state referral continued, the circumstances that led to the opening of an investigation were markedly different than in the prior two situations.⁷²⁶ In the DRC and Uganda, state leaders, perhaps influenced by overtures made by Ocampo or motivated by their own political imperatives, decided to refer the situations within their borders to the Court.⁷²⁷ In the CAR, however, small local organizations played an instrumental role in orchestrating the ICC's involvement. They first tried to involve the ICC on its own, and when that failed, 'they appear to have engineered a state referral.'⁷²⁸

⁷²² *Prosecutor v. Bemba Gombo. Ibid*, Para 409.

⁷²³ Karsten N 'Distinguishing Military and Non-military Superiors, Reflections on the Bemba Case at the ICC' (2009) 7 *Journal of International Criminal Justice* 984.

⁷²⁴ *Id*, Para 457, the Pre-trial Chamber II found him *de jure* military commander, but also provided that Bemba had 'de facto ultimate control over MLC commanders'; in Para 409 the Chamber referred to him as a *de facto* commander, and in Para 410 to a 'military-like' commander; it provides that: 'the category of military-like commanders may generally encompass superiors who have authority and control over regular government forces such as armed police units including, *inter alia*, armed resistance movements and militias that follow a structure of military hierarchy or a chain of command.'

⁷²⁵ ICC (n 2) self-referrals; Articles 13(a) and 14 referral of a situation by a state party.

⁷²⁶ Glasius M 'Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic.' (2008) 33. 415.

⁷²⁷ In respect of the Central Africa Republic referral: 'The Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, has received a letter sent on behalf of the government of the Central African Republic. The letter refers the situation of crimes within the jurisdiction of the Court committed anywhere on the territory of the Central African Republic since 1 July 2002, the date of entry into force of the Rome Statute' (available at http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html (accessed 22 October 2015)).

⁷²⁸ Glasius M 'Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic' (2008) 33 465.

When the Prosecutor eventually did open a formal investigation in May 2007,⁷²⁹ he announced that ‘my Office has carefully reviewed information from a range of sources. We believe that grave crimes falling within the jurisdiction of the Court were committed in the Central African Republic. We will conduct our own independent investigation, gather evidence, and prosecute the individuals who are most responsible.’⁷³⁰ The crimes committed in the CAR were in many ways substantively different from those committed in the other cases before the Court. As the OTP press release stated, ‘this was the first time the Prosecutor is opened an investigation in which allegations of sexual crimes far outnumbered alleged killings.’⁷³¹ The allegations of sexual crimes were detailed and substantiated. The information suggested that the rape of civilians was committed in numbers that cannot be ignored under international law.’⁷³² The peak of this sexual violence took place in October 2002 and March 2003, around the time of two coup attempts, the second of which was successful, by the forces of François Bozizé Yangouvonda against the government of Ange-Félix Patassé. At the time, Jean-Pierre Bemba, a Congolese warlord who sent a mercenary force in support of Patassé,⁷³³ is the only individual to be charged in connection with crimes committed in the CAR. He was arrested near Brussels on 24 May 2008 on the basis of an arrest warrant issued by the International Criminal Court.⁷³⁴ Although he was originally charged with three counts of crimes

⁷²⁹ Prosecution application for a warrant of arrest 9 May 2008; Warrant of arrest issued by Pre-Trial Chamber III: under seal on 23 May 2008, unsealed on 24 May 2008, arrest by Belgian authorities 24 May 2008, initial appearance before Pre-Trial Chamber III 4 July 2008, Confirmation of charges hearing From 12 to 15 January 2009, decision on the Confirmation of charges 15 June 2009, commencement of trial 22 November 2010.

⁷³⁰ Office of the Prosecutor. 2007. ‘Prosecutor opens investigation in the Central African Republic.’ ICCOTP-20070522-220. Situation: Central African Republic.

⁷³¹ Karsten N ‘Distinguishing Military and Non-military Superiors, Reflections on the Bemba Case at the ICC’ (2009) 7 *Journal of International Criminal Justice* 983-104.

⁷³² Office of the Prosecutor. 2007. ‘Prosecutor opens investigation in the Central African Republic.’ ICCOTP-20070522-220. Situation: Central African Republic.

⁷³³ Bemba Gombo’s MLC, based in northern DRC, was invited into the CAR by the then President Ange-Felix Patasse to help quell a rebellion led by Francois Bozize. Bozize took power in a military coup in 2003 and is the current president of CAR.

⁷³⁴ ICC-CPI-20101118-MA80; Commencement of the trial in the case *The Prosecutor v Jean-Pierre Bemba Gombo*, 22 November 2010, Situation is the Central African Republic Case: Bemba is allegedly criminally responsible, as a person effectively acting as military commander within the meaning of Article 28(a) of the Rome Statute, for two crimes against humanity (murder and rape) and three war crimes (murder, rape and pillaging) allegedly committed in the territory of the Central African Republic during the period from 26 October, 2002 to 15 March, 2003. After his arrest by the Belgian authorities in accordance with a warrant of arrest issued by the Pre-Trial Chamber of the ICC, he was transferred to the Court on 3 July, 2008. He is currently being detained at the ICC; ICC-CPI-20131124-PR962. On 23 and 24 November 2013, the authorities of the Netherlands, France, Belgium and the Democratic Republic of the Congo (DRC) acting pursuant to a warrant of arrest issued by Judge Cuno Tarfusser, the Single Judge of the Pre-Trial Chamber II of the ICC, arrested four persons suspected of offences against the administration of justice ‘Article 70’ allegedly committed in connection with the case of *The Prosecutor v Jean-Pierre Bemba Gombo*, (a breach of Article 69) The warrant of arrest in respect of the same charges also served on Jean-Pierre Bemba at the ICC’s detention centre, where he has been detained since 3 July 2008; On 20 November 2013, Judge Tarfusser issued a warrant of arrest for Jean-Pierre Bemba Gombo, his Lead Counsel Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo (a member of Mr Bemba’s defence team and case manager), Fidèle Babala Wandu (a member of the DRC Parliament and Deputy Secretary General of the Mouvement pour la Libération du Congo), and Narcisse Arido (a Defence witness); Judge CunoTarfusser found that there are reasonable grounds to believe that these persons are criminally responsible for the commission of offences against the administration of justice (Article 70 of the Rome Statute) by corruptly influencing witnesses before the ICC and presenting evidence that they knew to be false or forged. The suspects, it is alleged, were

against humanity and five counts of war crimes, in October 2010, the ICC reduced the charges to two counts of crimes against humanity and three counts of war crimes. On 21 March 2016, he was convicted on these charges humanity.⁷³⁵

Due to the unique way in which the situation came before the Court, criticism from civil society within the country has been relatively muted, though it has picked up steam in the last year. Unlike the other situations before the Court,⁷³⁶ the citizenry in the CAR has been an integral and instrumental part of the investigation. Victims have come forward by the hundreds, recounting stories of unimaginable perversity.⁷³⁷ While the crimes suffered are tragic, the willingness to come forward and the active participation of citizens and civil society in the process has created a different operational environment for the OTP. It created an environment in which the ICC is seen more as a partner of civil society rather than as a tool of the government. As a result of this active participation, there is less vocal opposition to the ICC's involvement than in Uganda.

That does not mean, however, that there has been no criticism. Some scholars such as Dov Jacobs and Noora Arajärvi have been critical of the political manipulations by African leaders, particularly by Bozizé, in deciding to refer the situations in their countries to the ICC. They claim that 'this arrest warrant confirms a trend in self-referrals:⁷³⁸ that they allow for the prosecution of rebel groups only. After Uganda and the DRC, it is difficult to escape the conclusion of instrumentalisation of the ICC by governments.⁷³⁹ This is especially the case in this situation, where the arrest warrant not only targets a former opponent of the current president of CAR, but also the most notable political opponent to the government in the DRC.'⁷⁴⁰ Tellingly, this criticism has more to do with the political motivations on the part of the referring government than it does with the ICC's involvement in the situation. In addition, there also is the now-familiar criticism that the OTP is not casting a wide enough net. While Bemba's arrest and prosecution was warmly received by most advocates, that single arrest is not seen as enough.⁷⁴¹ According to Glasius, 'if the prosecutions stop there, it will seem like another case of prosecuting the vanquished, not the sitting

part of a network for the purposes of presenting false or forged documents and bribing certain persons to give false testimony in the case against Mr Bemba.

⁷³⁵ Du Plessis M 'The International Criminal Court and its Work in Africa: Confronting the Myths' (2008) (173) *Institute for Security Studies* 7.

⁷³⁶Jurdi N 'The prosecutorial interpretation of the complementarity principle: Does it really contribute to ending impunity on the national level?' (2010) 10 *International Criminal Law Review* 73.

⁷³⁷Glasius M 'Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic' (2008) 33 426.

⁷³⁸ Kress C 'Self-referrals' and 'waivers of complementarity' (2004) 2 *Journal of International Criminal Justice* 944.

⁷³⁹Nyabola N 'Does the ICC have an Africa Problem?' available at Aljazeera: <http://www.aljazeera.com/>(accessed on 29 March 2016)

⁷⁴⁰Dov J and Arajärvi N 'The International Criminal Court'(2005) 7 *The Law and Practice of International Courts and Tribunals* 128.

⁷⁴¹ Gentile L 'Understanding the International Criminal Court' in M Du Plessis (ed) *The African Guide to the International Criminal Court* (2008) 31.

government.⁷⁴² If the OTP were to issue arrest warrants for officials within the Bozizé government, or for Bozizé himself,⁷⁴³ in connection to crimes committed in the north since 2005, it would likely go a long way to demonstrate to civil society, in CAR and internationally, that the Court is not simply a pawn of African governments.

Though, as will be demonstrated, when the Prosecutor did shift his focus to state leaders, as he did in Sudan, he faced an entirely different form of criticism in style and substance that is potentially more damaging to the Court. While the ICC has not encountered any large-scale opposition to its operation in the CAR from any collective of African nations, Bozizé did request that the UNSC suspend the Court's investigation in accordance with Article 16 of the Rome Statute.⁷⁴⁴ In a letter to the UN Secretary General in August 2008, Bozizé wrote that investigations into crimes committed later than the originally declared period of interest (25 October 2002 to 15 March 2003) would 'jeopardize the Comprehensive Peace Agreement were any of the combatants to be arrested' and that 'CAR tribunals are competent to try cases involving acts committed during the periods covered by amnesty laws.'⁷⁴⁵ Noting this situation, he asked that the UNSC defer these investigations. While it is not possible to conclusively determine whether the motivation for this request is genuine, most indicators suggested that it was based more in Bozizé's realisation of his own vulnerability than any obstructive influence the ICC presents for the CAR peace process. As mentioned above, the crimes committed in the northern conflicts were more attributable to the government than to other forces. Additionally,⁷⁴⁶ placement just months before Bozizé's request, one expert in the CAR wrote that 'the possibility of the ICC investigation interfering with peace negotiations one of the most sensitive points in the Uganda situation is rather hypothetical in the case of the CAR. While hostilities and alliances are fluid in Central African politics, reconciliation between Bozizé and Patassé at the time seemed unlikely. Nor was it a priority for the Central African people.'⁷⁴⁷ This request potentially represented one of the first indicators of an African head of state attempting to directly influence the operation of the Court in his own self-interest.

⁷⁴² According to Glasius, 'In both of these conflicts, the burden of violations seems to lie overwhelmingly with the army, for which the Bozizé government is ultimately responsible. These areas are considered unsafe to travel in without armed convoy, even by local human rights activists so it is unlikely that the prosecutor's office is currently in a position to pursue investigations there, but this may change as the humanitarian operation recently mounted by the United Nations gets underway'

⁷⁴³Glasius M 'Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic' (2008) 33 6.

⁷⁴⁵Article 16 of the Rome Statute gives the UNSC the power to defer any investigation by the ICC for up to one year. The article states: 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.'

⁷⁴⁶ Coalition for the International Criminal Court 'CAR Government calls the UN Security Council to suspend ICC investigation.' CICC-Africa Newsletter, 10 November 2008. 4.

⁷⁴⁷Glasius M 'Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic' (2008) 33-45.

4.3.4 The ICC intervention in Kenya: A further cause for discontent from AU members

Kenya ratified the Rome Statute in 2005 and became a state party to the ICC. By becoming a state party,⁷⁴⁸ Kenya accepted the jurisdiction of the Court over war crimes, crimes against humanity, and genocide committed on its territory or by one of its nationals, thereby opening the door for the prosecutor's investigation into acts which are not being investigated and prosecuted by national authorities.⁷⁴⁹ The situation in Kenya was the ICC fifth investigation. In March 2010, Pre-Trial Chamber (PTC) II authorized the ICC prosecutor to open an investigation into crimes against humanity allegedly committed in Kenya in relation to violence that followed Kenya's 2007 presidential election, which killed over 1,200 and displaced 600,000. This was the first time that the prosecutor used his '*proprio motu*'⁷⁵⁰ powers to initiate an investigation without first having received a referral from a state party or the UNSC. At the time deputy Prime Minister Uhuru Kenyatta, Education Minister William Ruto, Cabinet Secretary Francis Muthaura and Radio executive Joshua Sang were on trial for crimes against humanity. The trial of Ruto and Sang began on 10 September 2013.⁷⁵¹ They were suspected of planning and organizing crimes against humanity against perceived supporters of the Party of National Unity (PNU) predominantly from the Kikuyu, Kamba and Kisii ethnic groups during the 2007-08 post-election violence. Kenyatta was due to face trial on 5 February 2014.⁷⁵² He was charged with planning and organising crimes against humanity against perceived supporters of the Orange Democratic Movement (ODM),

⁷⁴⁸ Kenya has been a state party to the Rome Statute since 2005. On 31 March 2010, Pre-Trial Chamber II granted the Prosecutor's request to open an investigation *proprio motu* in the situation in Kenya. Following summonses to appear issued on 8 March 2011, six Kenyan citizens voluntarily appeared before Pre-Trial Chamber II on 7 and 8 April 2011. The confirmation of charges hearing in the case *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* were held from 1 to 8 September 2011. The confirmation of charges hearing in the case *The Prosecutor v. Uhuru Muigai Kenyatta* took place from 21 September to 5 October 2011. On 23 January 2012, the judges declined to confirm the charges against Henry Kiprono Kosgey and Mohammed Hussein Ali. Pre-Trial Chamber II confirmed the charges against William Samoei Ruto, Joshua Arap Sang, Francis Kirimi Muthaura and Uhuru Muigai Kenyatta and committed them to trial. On 18 March 2013, the charges against Francis Kirimi Muthaura were withdrawn. The trial of William Samoei Ruto (Kenya's Deputy President) and Joshua Arap started on 10 September 2013 and the trial of Uhuru Muigai Kenyatta (Kenya's President) is scheduled to start on 5 February 2015. See http://www.iccpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (accessed 28 January 2014).

⁷⁴⁹ Article 87(7) of the Rome Statute of the International Criminal Court.

⁷⁵⁰ *Proprio motu* refers to the powers afforded the Prosecutor to initiate investigations under his or her own authority. As Rod Rastan, a Legal Officer in the OTP explained, 'faced with the possibility of state or UNSC inaction, many considered it vital for the successful and impartial exercise of the Court's jurisdiction to enable the Prosecutor of the ICC to act also in the absence of a State or Security Council referral. What became known as the exercise of *proprio motu* powers by the Prosecutor was widely seen as a vital test for the independence of the ICC' (Rastan, Rod, 2007. 'The Power of the Prosecutor in Initiating Investigations.' International Centre for Criminal Law Reform and Criminal Justice Policy. A paper prepared for the Symposium on the International Criminal Court, February 3-4, 2007; Beijing, China 4).

⁷⁵¹ Ssenyonjo M 'Analysing the Impact of the International Criminal Court Investigations and Prosecutions of Kenya's Serving Senior state Officials' (2014)1 *State Practice and International Law Journal* 17.

⁷⁵² In the Case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute, 23 January 2012; In the Case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute, 23 January 2012.

predominantly from the Kalenjin ethnic group during the same period, however, the ICC judges rescheduled the start of the trial to 7 October 2014.⁷⁵³ The new date was intended to allow the Kenyan government time to comply with its obligations to cooperate with a prosecution request for the president's financial and phone records, which it believed were crucial to its case against Kenyatta.

On 26 November 2009, the ICC prosecutor sought authorisation from PTC II to open an investigation in relation to the crimes allegedly committed during the 2007-2008 post-election violence in Kenya. On 18 February 2010, pre-trial judges requested clarification and additional information from the prosecutor in order to decide whether to open an investigation. On 31 March 2010, in a majority decision, PTC II held that there was a reasonable basis to proceed with an investigation and that the situation appears to fall within the jurisdiction of the Court. On 31 March 2011 the Kenyan government challenged the admissibility of the cases before the Court pursuant to Article 19 of the Rome Statute, requesting that the two cases be declared inadmissible. The Kenyan government also argued that the adoption of the new Constitution and associated legal reforms had opened the way for Kenya to conduct its own prosecutions for the post-election violence. On 30 May 2011, PTC II rejected the Kenyan government's challenges. On 30 August 2011, the ICC Appeals Chamber confirmed this decision. Charges were confirmed against Kenyatta, Muthaura, Ruto and Sang.⁷⁵⁴ On 23 January 2012, PTC II decided to move the cases against Ruto and Sang, and Muthaura and Kenyatta to trial following confirmation of charges hearings held in September and October 2011. The trial against Ruto and Sang started on 10 September 2013 and is ongoing before the Court.⁷⁵⁵

The judges declined to confirm charges against Kosgey and Ali. The decisions were made by a majority of the Chamber, with Judge Hans-Peter Kaul dissenting.⁷⁵⁶ On 9 March 2012, PTC II rejected the applications of the four suspects for leave to appeal the decisions to send their cases to trial.⁷⁵⁷

⁷⁵³Kenya's 2013 Elections, International Crisis Group, Africa Report 197, 2013 available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/kenya/197-kenyas-2013-elections.pdf> (accessed on 13 January 2016).

⁷⁵⁴Sceats, S Africa's new human rights court: Whistling in the wind? (2009) Chatham House available at www.chathamhouse.org.uk (accessed on 19 March 2016).

⁷⁵⁵Umozurike U O 'The African charter on human and peoples' rights: Suggestions for more effectiveness' (2007) *Annual Survey of International and Comparative Law* 179.

⁷⁵⁶Groulx E 'The New International Justice System and the Challenges Facing the legal Profession' (2010) 39 *Revue quibicoise de droit international* 39-74.

⁷⁵⁷ In the Case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, No. ICC-01/09-01/11, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 August 2011; The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, No. ICC-01/09-02/11, Judgement on the appeal of the Republic of Kenya

On 24 May 2012, the Appeals Chamber unanimously rejected the appeals of the four regarding the challenges to the ICC's jurisdiction over the Kenya situation. On 11 March 2013, the prosecution withdrew all charges against Muthaura stating that a critical witness recanted a significant part of his evidence and was dropped from the witness list. Two trial chambers were established on 29 March 2012, Trial Chamber V was constituted to conduct the upcoming trials. However, on 21 May 2013, the ICC Presidency assigned the Ruto/Sang case to Trial Chamber V(a) and the Kenyatta case to Trial Chamber V (b). On 26 April 2013, Judge Christine Van den Wyngaert had been granted a request to be excused from Trial Chamber V due to her expected workload. She was replaced by Judge Robert Fremr.⁷⁵⁸ On the eve of the opening of the Ruto/Sang trial in September 2013, Kenyan lawmakers supporting termination of the cases against Kenyatta and Ruto voted to withdraw from the Rome Statute, to repeal domestic legislation dealing with international crimes and to end cooperation with the ICC.

On 2 October 2013, Pre-Trial Chamber (PTC) III made public an arrest warrant against Kenyan journalist Walter Barasa for interfering with witnesses in the Kenya cases. On 19 December 2013,⁷⁵⁹ the ICC prosecutor requested an adjournment of the trial date of 5 February 2013 in the Kenyatta case following the withdrawal of two key witnesses. On 5 December 2014, the prosecutor decided to drop charges against Kenyatta, two days after ICC Trial judges rejected another request for further adjournment. The prosecutor stated it had no alternative given the state of evidence but stressed the possibility of bringing a new case in the future if new evidence should appear, consequently,⁷⁶⁰ the ICC Trial Chamber V (b) terminated the proceedings in the case of Kenyatta on 13 March 2015. The Kenya situation, according to the AU, violated well-founded rules of customary international law on sovereign immunity.⁷⁶¹ These concerns have caused several African countries to call for a mass withdrawal of African states parties from the ICC Statute, a campaign that has failed to materialise as yet.⁷⁶²

against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2) (b) of the Statute, 30 August 2011.

⁷⁵⁸ Muthoni L 'The International Criminal Court's Cases in Kenya: Origin and *Impact*' (2003) *Institute for Security Studies*.

⁷⁵⁹ <https://www.icc-cpi.int.com> (accessed 17 June 2018).

⁷⁶⁰ Jackson M 'The customary international law duty to prosecute crimes against humanity: A new framework' (2007) 16 *Tulane Journal of International and Comparative Law* 117

⁷⁶¹ AU, Africa to Request Deferment of Indictments against Kenyan President and Vice President, 12 October 2013, available at <http://summits.au.int/en/icc/events/africa-request-deferment-indictments-against-kenyan-president-and-vice-president> (accessed on 20 October 2013).

⁷⁶² See The Nation, Sudan frustrated by AU failure to withdraw from ICC, available at <http://mobile.nation.co.ke/News/AU-summit-decision-on-ICC-is-frustrated/-/1950946/2030062/-/format/xhtml/-/yvae8e/-/index.html> (accessed on 16 October 2013).

4.4 The collision route of the AU and the ICC

When assessing the makeup of the ICC it is apparent that African states are highly represented numerically, it is worth noting that African states were very active in the negotiation and formation of the Rome Statute in the late 1990s. Fast forward to the early 2000s the AU became very critical of the ICC and to reinforce this sentiment the AU further adopted various resolutions reflecting this. The significant moment came in 2000 when Belgium issued an arrest warrant for the DRC's then-minister of foreign affairs, Abdoulaye Yerodia Ndombasi.⁷⁶³ This act by Belgium infuriated African states which led to the deteriorating of relations between Africa and Europe over the issue of sovereign immunity.⁷⁶⁴ In 2008, the chief of protocol to President Paul Kagame of Rwanda, Rose Kabuye, was arrested in Germany pursuant to a French arrest warrant in connection with the shooting down of the former Rwandan president's plane, which triggered the 1994 genocide.⁷⁶⁵ Kagame took up the issue at the UN, outlining it as an abuse of universal jurisdiction by European states aimed at embarrassing African political leaders. These are just two instances in a long series where European states relied on universal jurisdiction to hassle African leaders.⁷⁶⁶

During the Eleventh Ordinary Session of the Assembly of the AU which took place in Sharm El-Sheikh, Egypt on 30 June until 1 July 2008, AU member states were very vocal about the abuse of the Principle of Universal Jurisdiction since they viewed this as a threat to International law, order and security.⁷⁶⁷ The following concerns were tabled by members attending the assembly. Firstly many at the assembly felt that the principle of universal jurisdiction was being utilised as a political tool by judges from some non-African states against African leaders, particularly Rwanda and this according to them was a strong violation of the sovereignty and territorial integrity of these states. It was also a common view by AU members that the manipulation and misuse of indictments against African leaders had a disrupting effect that eventually led to a massive destabilisation on the political, social and economic development of African states and their ability to conduct international relations. The assembly concluded that those warrants shall not be executed in AU member states and that there is a necessity for the creation of an international regulatory body with

⁷⁶³ The case was brought to the ICJ; see *Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* available at the ICJ website: <http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/ICJcongobelgium> (accessed on March 2016).

⁷⁶⁴ Akande D 'International Law Immunities and the International Criminal Court' *98 the American Journal of International Law* (2004) 407-433.

⁷⁶⁵ Tran M 'Rwandan President Kagame Threatens French Nationals with Arrest' *The Guardian*, 12 November 2008.

⁷⁶⁶ Writ HV 'Universal Jurisdiction under Attack' *9 Journal of International Criminal Justice* (2011) 1043-1062.

⁷⁶⁷ Gallagher K 'Universal Jurisdiction in Practice' (2009) *7 Journal of International Criminal Justice* 1087-1111.

competence to review or conduct appeals arising out of abuse of the principle of universal jurisdiction by individual states.⁷⁶⁸

Numerous requests emerged after the conclusion of the assembly, firstly, the Chairperson of the AU forwarded the matter before the UNSC and the UN General Assembly for consideration. The Chairperson of the AU Commission immediately called a meeting between the AU and European Union (EU) to discuss the matter, with a the aim of finding a solution to this problem and in particular to ensure that those warrants are withdrawn and are not executable in any country. Finally it was requested that all UN member states, especially the EU states, impose a suspension on the execution of those warrants until all the legal and political issues had been exhaustively discussed between the AU, the EU and the UN. When analysing the troubled relationship between the AU and ICC it is vital to refer back to 2005 when the UNSC, acting under Chapter VII of the UN Charter and pursuant to Article 13(b) of the Rome Statute,⁷⁶⁹ referred the situation in the Darfur region of Sudan to the ICC.⁷⁷⁰

On 14 July 2008 the prosecutor presented evidence against President Al Bashir to the ICC Pre-Trial Chamber and requested that an arrest warrant be issued against the Sudanese President for ten charges of genocide, crimes against humanity, and war crimes.⁷⁷¹ On 4 March 2009,⁷⁷² the Pre-Trial Chamber handed down its judgment in which it agreed to issue an arrest warrant against Al Bashir for crimes against humanity and war crimes, but not for genocide.⁷⁷³ This was the watershed moment for the AU's relationship with the ICC, following the issuance of the first arrest warrant for President al Bashir of Sudan.⁷⁷⁴

The UNSC is at the heart of the AU and the ICC debacle, not simply because the UNSC was the council responsible for initiating the process that led to the issuing of an arrest warrant against Al

⁷⁶⁸ Assembly of the AU Eleventh Ordinary Session Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.199 (XI).30 June- 1 July 2008. The abuse of the Principle of Universal Jurisdiction is a development that could endanger International law, order and security; the political nature and abuse of the principle of universal jurisdiction by judges from some non-African states against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these states.

⁷⁶⁹ United Nations Security Council Resolution 1593 (2005).

⁷⁷⁰ Cryer R 'Sudan, Resolution 1593, and international criminal justice' (2006) 19 *Leiden Journal of International Law* 195.

⁷⁷² Cayley T 'The prosecutor's strategy in seeking the arrest of Sudanese President Al Bashir on charges of genocide' (2008) 6 *Journal of International Criminal Justice* 829.

⁷⁷³ *The Prosecutor v Omar Hassan Al Bashir* ICC-02/05-01/09. A detailed account of the activities of the Council, the prosecutor and the ICC in the period leading up to and immediately after the issuing of the arrest warrant is contained in the 'Tenth Report of the Prosecutor of the International Criminal Court to the Security Council' of 4 December 2009.

⁷⁷⁴ International Criminal Court, 'Warrant of Arrest for Omar Hassan Ahmad al Bashir', 4 March 2009, <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

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Bashir,⁷⁷⁵ but additionally because they hold power to defer the proceedings against Al Bashir under Article 16 of the Rome Statute.⁷⁷⁶ Fully aware of this power the UNSC possessed, the AU sort to counter thus in response to the prosecutor's application for an arrest warrant against Al Bashir,⁷⁷⁷ the AU Peace and Security Council issued a communiqué on 21 July 2008 on the prosecutor's application.⁷⁷⁸ During the communiqué on 21 July it was evident that the AU had taken a defiant position on Al Bashir's arrest warrant by the ICC.⁷⁷⁹ From the onset the communiqué echoed the PSC's 'obligation to combating impunity and upholding democracy,⁷⁸⁰ the rule of law and good governance ...' and condemning 'the gross violations of human rights in Darfur'.⁷⁸¹

In addition the communiqué stated that 'in order to achieve long-lasting peace' it is imperative to 'uphold principles of accountability and prosecute the perpetrators of gross human rights violations' in Darfur.⁷⁸² Intertwined throughout these pleas for an end to impunity and the promotion of justice and accountability, are robust objections to the prosecutor's application for an arrest warrant.⁷⁸³ The communiqué held the view that 'the search for justice should be pursued in a manner that doesn't or

⁷⁷⁵ Souare I 'The Legal-political Dilemma of the International Criminal Court's Involvement in Sudan' (2009) (2) *StudiaDiplomatica* 41-58.

⁷⁷⁶ Article 16 of the Rome Statute grants the UNSC the power to defer investigations and prosecutions for a renewable period of 12 months under whatever conditions may be laid down by the Council.

⁷⁷⁷ Article 17 of the Statute also provides the Court with the power to defer investigations or prosecutions for a one year period, and that deferral can be renewed each year indefinitely. The Rome Statute also has a number of mechanisms in place that limit whether the Prosecutor can begin an investigation, safeguards that ensure the Court's jurisdiction is invoked when specific preconditions have been met. These safeguards include: 'a) The personal, territorial and temporal parameters that define such a situation of crisis are included within the personal, territorial and temporal limits of the potential jurisdiction of the Court; b) The available information provides a reasonable basis to believe that crimes within the material jurisdiction of the Court have allegedly been committed in such a situation of crisis; c) The absence of action, the unwillingness, or the inability of national jurisdictions to properly investigate and prosecute the crimes allegedly committed in such a situation of crisis; d) The absence of any Security Council request in accordance with Art. 16 RS not to activate the potential jurisdiction of the Court with regard to such a situation of crisis; e) The sufficient gravity of the crimes allegedly committed in such a situation of crisis; and f) The lack of substantial reasons to believe that, despite the gravity of the crime and the interests of victims, the activation of the potential jurisdiction of the Court with regard to such a situation of crisis would not serve the interests of justice.' (Hector O 'The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor' *International Criminal Law Review* (2005) (5) 124-125. These safeguards have their origin in states parties' fear that an overzealous prosecutor could take advantage of his powers and initiate politically-motivated prosecutions that would damage the credibility of the Court or present a disruptive influence in global affairs. In other words, they represent a system of checks and balances.

⁷⁷⁸ AU Peace and Security Council Communiqué PSC/Min/Comm(CXLII) 21 July 2008.

⁷⁷⁹ De Waal A 'Writing in reference to a decision by the AU Peace and Security Council to criticize the ICC Prosecutor's decision to issue an arrest warrant for President Al-Bashir' ('CC, Making Sense of Darfur: Africa's Position on the ICC' posted by Alex de Waal, 23 September 2008, available at <http://www.ssrc.org/blogs/darfur/2008/09/23/africas-position-on-the-icc/> (accessed 12 October 2008). De Waal continues: 'The positions taken at the PSC do not provide much solace to the supporters of the ICC and the advocates of universal jurisdiction'.

⁷⁸⁰ Gaeta P 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315- 328.

⁷⁸¹ AU Peace and Security Council Communiqué PSC/Min/Comm (CXLII) 21 July 2008, par 2.

⁷⁸² AU Peace and Security Council Communiqué PSC/Min/Comm (CXLII) 21 July 2008, par 10.

⁷⁸³ Weldehaimanot S 'Arresting Al-Bashir: The AU's Opposition and the Legalities' (2011) 19 *African Journal of International and Comparative Law* 34-52.

threaten efforts aimed at promoting lasting peace'.⁷⁸⁴ Additionally, the communiqué outlines unease at the fact that the ICC arrest warrant on Al Bashir may portray 'double standards' and may amount to a 'misuse of indictments against African leaders'.⁷⁸⁵ In a reciprocal and reinforcing manner on the issues of non-impunity and peace, The PSC went on to request the UNSC,⁷⁸⁶

In accordance with Article 16 of the Rome Statute of the ICC, to defer the process initiated by the ICC, taking into account the need to ensure that the ongoing peace efforts are not ruined, as well as the fact that, in the current circumstances, a prosecution may not be in the interest of victims and justice in Darfur.⁷⁸⁷

This action was unprecedented because, while the AU Assembly has extensive abilities under Article 9 of the AU Constitutive Act, including the capability to 'determine the common policies of the Union,' suddenly, it seemed irregular for the AU to summon a meeting of states party to a treaty that the AU is not itself party to and which was not adopted under its auspices.⁷⁸⁸ This matter certainly raises the institutional question about the relationship between the AU and its member states with respect to other treaty bodies. In June 2009 the AU Commission called the meeting of Ministers of Justice of African states parties to the Rome Statute, it was during this meeting the Ministers of Justice meeting in Addis Ababa were numerous African state parties called for the withdrawal of support to the ICC, and some member states defended the ICC.⁷⁸⁹

The AU proposal for a withdrawal of its members from the ICC or refusal to cooperate on the Al Bashir indictment was made on with no cohesion amongst AU members'. This formed the main component of the AU/ICC decision, that in view of the fact that the Article 16 request by the AU has never been acted upon,⁷⁹⁰ the AU member states shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities,⁷⁹¹ for the arrest and surrender of Al Bashir of The Sudan. It can be definitely said that the Al Bashir arrest warrant caused the relations between the ICC and the AU to weaken. Many members of the AU were of the view the arrest warrant was an obstruction to the AU regional efforts to establish peace and reconciliation processes in Sudan, and that the ICC failed to acknowledge the effect that its actions were having on these efforts. Furthermore, the AU felt aggrieved by the ICC action of the warrant of arrest against Al Bashir because diplomatic offence was taken over the indictment of a sitting head of

⁷⁸⁴ AU Peace and Security Council Communiqué PSC/Min/Comm (CXLII) 21 July 2008, pars 4 and 11.

⁷⁸⁵ AU Peace and Security Council Communiqué PSC/Min/Comm (CXLII) 21 July 2008, pars 3 and 7.

⁷⁸⁶ Gosnell C 'The Request for an Arrest Warrant in Al Bashir, Idealistic Posturing or Calculated Plan?' 6 *Journal of International Criminal Justice* (2008) 841-851.

⁷⁸⁷ AU Peace and Security Council Communiqué PSC/Min/Comm (CXLII) 21 July 2008, par 11 (i).

⁷⁸⁸ Ciampi A 'The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute' (2008) 6 *Journal of International Criminal Justice* 885-897.

⁷⁸⁹ Report of the Meeting African 17 states parties to the Rome Statute on the ICC' 8-9 June 2009 AU/MinICC/Report.

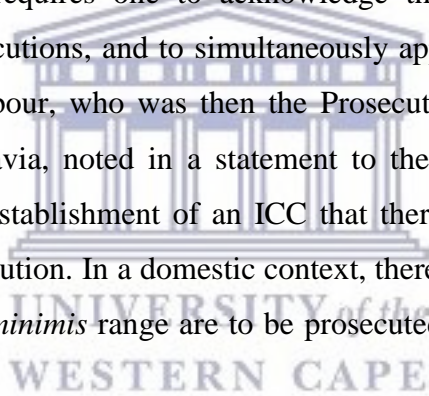
⁷⁹⁰ Report of the Meeting African 17 states parties to the Rome Statute on the ICC' 8-9 June 2009 AU/MinICC/Report.

⁷⁹¹ Wirth S 'Immunities related problems and Article 98 of the Rome Statute' 12 *Criminal law Forum* (2001) 429-458.

state,⁷⁹² which ignited a dispute over whether the Rome Statute can legitimately extinguish diplomatic immunity in states that are not parties to it, such as Sudan or even the USA.⁷⁹³

4.5 Evaluating the magnitude of the situation and judicial inaccuracy

We have already seen how the state referral mechanism has caused the ICC, through African invitation, to exercise jurisdiction over the situations in Uganda, the DRC and CAR (all states parties).⁷⁹⁴ Crucially, the Prosecutor also has the power to open an investigation on his or her own initiative on the basis of information indicating the commission of crimes within the Court's jurisdiction. Contrary to the expectations of those critics who fear a court with unprincipled 'universal' aspirations,⁷⁹⁵ the Prosecutor has to date never exercised this power to initiate an investigation but whether it is a state party referral or a future *proprio motu* investigation by the Prosecutor, even where all the jurisdictional requirements have been met, the case in question must meet an additional threshold of gravity before the Prosecutor can intervene. This criterion is most clearly expressed in Article 17(1) (d) of the Rome Statute.⁷⁹⁶ A proper appreciation of the gravity criterion in the Rome Statute requires one to acknowledge the inherent differences between domestic and international prosecutions, and to simultaneously appreciate the immense challenges facing the Prosecutor. Louis Arbour, who was then the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, noted in a statement to the December 1997 session of the Preparatory Committee on the Establishment of an ICC that there is a major difference between international and domestic prosecution. In a domestic context, there is an assumption that all crimes that go beyond the trivial or *de minimis* range are to be prosecuted. But,⁷⁹⁷ before an international



⁷⁹² Article 27 of the Rome Statute provides that 'official capacity as a head of state or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute'.

⁷⁹³ The principle of the head of state responsibility is enshrined in the Genocide Convention; Article 7 of the Nuremberg Charter; Article 6 of the Tokyo Charter; the Statute of the ICTY (Article 7); the ICTR (Article 6) and the ICC (Article 27); The ICJ in *Congo v Belgium* (Arrest Warrant) recognised the accountability of the head of state for the three crimes but subject to temporal immunity while in office as part of customary international law. Since Nuremberg, individuals became accountable for international crimes irrespective of what domestic law may authorise. A principle from the Nuremberg trials that 'crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced'; Janeczek EJ 'Nuremberg Judgment in the light of International Law' (1949) 83.

⁷⁹⁴ Article 15(1) of the Rome Statute.

⁷⁹⁵ On the myth that the Court has inclinations towards exercising a (politically or discriminatory) motivated form of universal jurisdiction.

⁷⁹⁶ According to this provision, the Court is bound to find a case inadmissible where it is 'not of sufficient gravity to justify further action by the Court'. In addition, Articles 53(1)(b) and 53(2)(b) of the Rome Statute refer to the admissibility test set out in Article 17, indicating that in his or her determination as to whether there is a reasonable basis to initiate an investigation or a sufficient basis for a prosecution, the Prosecutor must have regard to the Article 17 criterion of gravity, among others.

⁷⁹⁷ The state's 'inability' to prosecute the head of state because of the shield of personal immunity would thus trigger the ICC's jurisdiction. See Gaeta P 'Official Capacity and Immunities' (2002) in Cassese et al (ed) 'The Rome Statute of the International Criminal Court: A Commentary' (1994) (1) 997-1000. The ICC, acting within the complementarity scheme with domestic states, can only step into the fray when domestic states are either 'unwilling' or 'unable' to act. See article 17 read with article 1 of the Rome Statute.

tribunal 'the discretion to prosecute is considerably larger and the criteria upon which such Prosecutorial discretion is to be exercised are ill-defined, and complex.'⁷⁹⁸ Experience tells one that based on the work of the two Tribunals to date, the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones'.⁷⁹⁹

'Since the issue of trigger mechanisms relates to the special problems of activating an international criminal justice mechanism, it is hardly surprising that there could be no relevant legal precedents in national procedural laws. The ICC, however, presented a novel problem as it represented the first permanent international criminal law institution empowered to deal with future and unknown situations. Thus, it was necessary to determine the procedural mechanisms to 'trigger' ICC proceedings over future situations that may arise'.⁸⁰⁰ One of the ways in which the drafters of the Rome Statute purported to assist the ICC Prosecutor to choose from many complaints the appropriate ones for international intervention by the ICC was by means of the gravity criterion. The fact that the Prosecutor requires this trigger mechanism is made clear by the breadth and depth of complaints that the OTP has received. In its first three years of operation alone,⁸⁰¹ the OTP received nearly 2000 communications from individuals or groups in more than 100 countries. One can thus appreciate the manifest difference between the OTP's decisions on investigation and prosecution from those that a domestic prosecutor might have to make, the place for the gravity criterion within the Rome Statute, and the concomitant constraints placed on the Prosecutor. The Prosecutor has said that, in determining whether to exercise his powers, he is required to consider three factors, all of them rooted in the provisions of the Rome Statute. First, he must determine whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.⁸⁰² Secondly, he must assess whether the case would be admissible in accordance with Article 17 of the statute: this necessitates examining the familiar standard of whether the national courts are unwilling or unable genuinely to proceed. But it also involves assessing what Schabas has described as 'the rather enigmatic notion of

⁷⁹⁸ The prosecutorial strategy of the OTP has been published and is available at http://www.iccpi.int/otp/otp_events.html. (accessed on 24 April 2016).

⁷⁹⁹ 'Statement by Justice Louis Arbour to the Preparatory Committee on the Establishment of an International Criminal Court 8 December (1998) 159-160.

⁸⁰⁰ Cassese A et al (ed) 'The Rome Statute of the International Criminal Court: A Commentary' (2002) 620-621. Of importance in this respect is that the ICC Act in criminalising genocide, crimes against humanity and war crimes under South African law has adopted word for word the text of the Rome Statute in articles 6, 7 and 8. Arguably this mirroring of the Rome Statute will serve to justify South Africa's extension of universal jurisdiction over offenders that commit their crimes outside South Africa on the basis that the Rome Statute is itself reflective of broad international consensus on the most egregious crimes of concern to all humanity and which by their egregiousness attract universal jurisdiction.

⁸⁰¹ Cassese A 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 *Journal of International Criminal Justice* 592.

⁸⁰² Schabas W 'An Introduction to the International Criminal Court' (2007) 163, and Rome Statute Article 53(1) (a).

‘gravity’.⁸⁰³ If these conditions are met, then the third requirement must be considered: whether it is in the ‘interests of justice’⁸⁰⁴ for the matter to be investigated. As the Prosecutor he explained: ‘While, in a general sense, any crime within the jurisdiction of the Court is ‘grave’, the Statute requires an additional threshold of gravity even where the subject-matter jurisdiction is satisfied.’⁸⁰⁵ This assessment is necessary as the Court is faced with multiple situations involving hundreds of thousands of crimes and must select situations in accordance with the Article 53 criteria’.⁸⁰⁶

Furthermore, the Prosecutor’s decisions are subject to oversight by Judges of the Court.⁸⁰⁷ That is to say that much of the Prosecutor’s so-called independence is in fact significantly constrained. While the Prosecutor is not required to obtain authorisation to initiate an investigation when a state party or the UNSC refer a situation to the Court, he is still required at a preliminary stage to decide whether there is a ‘reasonable basis’ to proceed’.⁸⁰⁸ There is increased oversight over decisions to decline an investigation. For instance, where the Prosecutor declines to investigate a case he or she shall inform the Pre-Trial Chamber (and the relevant state in cases of state referrals and the UNSC in cases of a UNSC referral) of his or her conclusion and the reasons for the conclusion.⁸⁰⁹ In response, the state concerned or the UNSC may demand that the Pre-Trial Chamber review a decision of the Prosecutor not to proceed and may request the Prosecutor to reconsider that decision.⁸¹⁰ Therefore, where the Prosecutor, taking into account the gravity of the crime and the interests of victims, nonetheless declines to initiate an investigation because he or she has substantial reasons to believe that an investigation would not serve the interests of justice,⁸¹¹ the Prosecutor must inform the Pre-trial Chamber of the Court accordingly. The Pre-trial Chamber may, on its own initiative, review this decision, in which event it becomes final only when confirmed by the Chamber.⁸¹²

⁸⁰³Schabas W ‘An Introduction to the International Criminal Court’ (2007) 164.

⁸⁰⁴ Rome Statute Article 53(1) (c). Naturally these twin criteria of ‘gravity’ and ‘interests of Justice’ will interact, and together they ‘provide enormous space for highly discretionary determinations’ by the ICC Prosecutor but that is as an unavoidable consequence of creating a permanent international criminal court, and this ‘space’ is imperative in relation to the ICC Prosecutor’s difficult task described by Arbour, of choosing ‘from many meritorious complaints the appropriate ones for international intervention’. Whatever the largesse of the Prosecutor’s discretion in theory, in practice it is a discretion which must be justified by reference to the Rome Statute’s conditions and which is subject to review by the Judges of the Court (in relation to review by Judges of the Court).

⁸⁰⁵Schabas W ‘An Introduction to the International Criminal Court’ (2007) 163 and Rome Statute Article 53(1)(a).

⁸⁰⁶ Article 53(2) of the Rome Statute.

⁸⁰⁷ A powerful example of this is the decision of the Pre-trial Chamber in relation to the Lubanga matter.

⁸⁰⁸Schabas W ‘An Introduction to the International Criminal Court’ (2007) 239.

⁸⁰⁹ Article 53(2) of the Rome Statute.

⁸¹⁰ Article 53(3)(a) of the Rome Statute.

⁸¹¹ Article 53(1)(c) of the Rome Statute.

⁸¹² Article 53(3)(b) of the Rome Statute.

4.6 The ICC assumption of jurisdiction on behalf of African states

While it is a geographic fact that the ICC's first cases involve situations on the African continent, it is simplistic to argue that the ICC is therefore 'unfairly' targeting Africa. As the short synopsis of each situation has already indicated, each of these cases was before the ICC because the state in question self-referred the situation to the ICC in terms of the Rome Statute. Reportedly, at this time the Prosecutor had received self-referrals only from African countries.⁸¹³ Furthermore, the Prosecutor's decision to investigate each of these situations has been taken within the constraints laid down by the Rome Statute, including such factors as the gravity criterion and whether a reasonable basis exists for the prosecution of the perpetrators. The Rome Statute strictly defines the jurisdiction of the Court. The subject-matter jurisdiction of the Court is limited to investigations of the most serious crimes to the international community, and the temporal jurisdiction of the Court is limited to crimes occurring after the entry into force of the Statute, namely 1 July 2002.⁸¹⁴ For those states that become party to the Statute after 1 July 2001, the ICC has jurisdiction only over crimes committed after the entry into force of the Statute with respect to that state.⁸¹⁵ In addition to these subject-matter and temporal restrictions, the Rome Statute further restricts the jurisdiction of the Court to the most clearly established bases of jurisdiction known in criminal law: the territorial principle and the active national principle. In the absence of a referral from the UNSC, the Court may act only where its jurisdiction has been accepted by the state on whose territory the crime occurred, or the state of nationality of the alleged perpetrators.

All states that become parties to the Rome Statute thereby accept the jurisdiction of the Court with respect to these crimes. That is a consequence of ratification. In order to become a party to a multilateral treaty, a state must demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty. In other words, it must express its consent to be bound by the treaty. A state may express its consent to be bound in several ways, in accordance with the final clauses of the relevant treaty. One of the most common ways is ratification.⁸¹⁶ A state that has ratified the Rome Statute may refer a situation to the Prosecutor where any of these crimes

⁸¹³ Hanson S Global Policy Forum 'Africa and the International Criminal Court Council on Foreign Relations' (2008) cited in Arieff A et al '*International Criminal Court Cases in Africa: Status and Policy Issues*' (2008) 3.

⁸¹⁴ Article 11 of the Rome Statute.

⁸¹⁵ Article 12 of the Rome Statute.

⁸¹⁶ Article 12 of the Vienna Convention on the Law of Treaties provides for the consent to be bound by a treaty expressed by signing. Whereas the provision is clear that this form of consent applies where the treaty specifically addresses the issue of acceptance of the treaty provisions by the signature of state representatives, one can reach a logical conclusion that any state that sends representatives to international conferences where adoption of a treaty happens, such state unless it indicates otherwise during the adoption process, is wholly committed to the terms of the adopted treaty, although the specific obligations contained in the treaty provisions may not apply outside formal exchange of instruments of ratification. Specific obligations contained in the treaty provisions may not apply outside formal exchange of instruments of ratification.

appears to have been committed if the alleged perpetrator is a national of a state party or if the crime in question was committed on the territory of a state party or a state that has made a declaration accepting the jurisdiction of the Court. Thus, Article 12 of the Rome Statute provides that the Court may exercise jurisdiction if: (a) the state where the alleged crime was committed is a party to the Statute (*territoriality*); or, (b) the state of which the accused is a national is a party to the Statute (*nationality*). The Uganda, DRC and Central African Republic referrals demonstrate how in terms of Article 14 of the Statute any state party may refer to the Court a ‘situation’ in which one or more crimes within the jurisdiction of the Court appear to have been committed, so long as the preconditions to the Court’s exercise of jurisdiction have been met, namely, that the alleged perpetrators of the crimes are nationals of a state party or the crimes are committed on the territory of a state party.⁸¹⁷ As an illustration, it is just as well to recall the announcement by the Court after it received the first of its three African requests for investigation from the DRC:

‘The Prosecutor of the International Criminal Court, Luis Moreno Ocampo, has received a letter signed by the President of the DRC referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002. By means of this letter, the DRC asked the Prosecutor to investigate in order to determine if one or more persons should be charged with such crimes, and the authorities committed to cooperate with the International Criminal Court.’⁸¹⁸

The referrals, particularly by Uganda and the DRC demonstrate how there have been attempts by African states to use the ICC for political ends. It is no secret that the Ugandan and the DRC Governments had their own reasons for inviting the ICC to do business in their respective

⁸¹⁷ Press Release of the Prosecutor of the International Criminal Court, No.: pids.008.2003-EN, 15 July 2003, available at <http://www.icc.int> (accessed on 23 of April 2016). See also P Kirsch (QC) & D Robinson ‘Trigger mechanisms’ 623-625 in Cassese A et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* 1 (2002). Not relevant here, but discussed further below, is the ICC Prosecutor’s power under the Rome Statute in Article 15 to initiate independent investigations on the basis of information received from any reliable source. The granting to the Prosecutor of a *proprio motu* power to initiate investigations was one of the most debated issues during the negotiations of the Rome Statute. In the end, the drafters of the Statute determined that in order for the Prosecutor to exercise this power, the alleged crimes must have been committed by nationals of a state Party or have taken place in the territory of a State Party – the preconditions set out in terms of Article 12 (See Press Release of the Prosecutor of the International Criminal Court, No.: pids.008.2003-EN, 15 July 2003, available at <http://www.icc.int> (accessed on 23 October 2015)).

⁸¹⁸ In respect of the Ugandan referral: ‘In December 2003 the President Yoweri Museveni took the decision to refer the situation concerning the Lord’s Resistance Army to the Prosecutor of the International Criminal Court. ... President Museveni met with the Prosecutor in London to establish the basis for future co-operation between Uganda and the International Criminal Court.’ available at http://www.iccpi.int/pressrelease_details&id=16&l=en.html (accessed on 22 October 2015) In respect of the Central Africa Republic referral: ‘The Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, has received a letter sent on behalf of the government of the Central African Republic. The letter refers the situation of crimes within the jurisdiction of the Court committed anywhere on the territory of the Central African Republic since 1 July 2002, the date of entry into force of the Rome Statute’ available at http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html (accessed on 22 October 2015).

countries.⁸¹⁹ These appear to have been to employ the Court to prosecute rebel bands within their own territories.⁸²⁰ While there has been criticism directed at the ICC Prosecutor for too tamely complying with these self-referrals in order to ensure cases before the Court. There is a double irony in suggesting that these African situations are evidence of the ICC's meddling in Africa.⁸²¹

It is thus difficult to comprehend or take seriously suggestions that the DRC, Uganda and CAR referrals stand as proof that the ICC is unhealthily preoccupied with Africa. It is not that the ICC is transmuted into a Western court with some colonial affection for punishment of Africans guilty of crimes against humanity.⁸²² Assertions about the Court's apparently over-developed appetite for African atrocities, or intimations of USA-behind-the-scenes machinations in the Court's choice of African investigations, are complaints that do not match the facts or the processes adopted by the OTP.⁸²³ A reflection on the OTP's screening process and the self-referrals by Uganda, DRC and the CAR suggest rather that Africa is in the court's sights because of African states parties with serious consideration. One may fairly assume that their rights and responsibilities as states parties to the Rome Statute, and/or because of their own strategic objectives they have chosen that outcome, and the Court has accepted that there is a reasonable basis for initiating an investigation. There is thus an insincerity to the claim that the Court is acting 'unfairly' in respect of Africa.⁸²⁴ It reminds one of the host who invites guests round for dinner only to feign disappointment when they arrive.⁸²⁵

The invitations made by the independent governments of Uganda, DRC and CAR to the ICC to investigate situations in their respective states, are invitations made by states parties to the Rome



⁸¹⁹ ICC Press Release, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004); See ICC Press Release, Prosecutor of the International Criminal Court Opens Investigation into Northern Uganda (July 29, 2004).

⁸²⁰ See Amnesty International, 'Uganda: First Ever Arrest Warrants by International Criminal Court – A First Step Towards Addressing Impunity', 14 October 2005.

⁸²¹ In any event, it should be noted that the Court has consciously taken steps to resist attempts to use the Court for political ends. For instance, note the comments of the Prosecutor immediately following the Uganda referral, to the effect that the OTP would investigate conduct by all parties to the conflict – this despite the wording of the referral, which mentions only the 'situation concerning the Lord's Resistance Army.'

⁸²² Du Plessis M 'The International Criminal Court that Africa wants' (2010) *Institute for Security Studies* 33-50.

⁸²³ Struett MJ 'The politics of constructing the International Criminal Court: NGOs discourse and agency' (2008) *Palgrave Macmillan* 57-85.

⁸²⁴ A former supporter of international justice mechanisms, President Kagame of Rwanda, became one of the loudest critics of both the ICC and the ICTR. This had to do with the fact that the ICC had so far indicted only Africans, or with the fact that several European prosecutors want to try him for his alleged participation in the killing of his predecessor, an act that precipitated the genocide. At the time, the Government of Rwanda, like the Government of Sierra Leone years later, asked the Security Council to establish an international tribunal, though they would have been much happier if it had been located in Rwanda instead of Tanzania, and it incorporated the death penalty in the repertoire of possible sentences. The President of the African Union Commission, the Gabonese Jean Ping complained that the ICC has turned Africa into the laboratory for new international law, and demanded that Iraq, Sri Lanka, or Colombia be also taken up by the Court.

⁸²⁵ Robinson D 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *European Journal of International Law* (3) 481-505.

Statute. This is not insignificant.⁸²⁶ By ratifying the Statute these three states showed their acceptance morally, and legally under international law of the Rome Statute's ideals. Those ideals are captured in the Statute's preamble, which records, inter alia, a recognition by states parties that 'grave crimes threaten the peace, security and well-being of the world';⁸²⁷ an affirmation 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'; a determination 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,' and 'to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the UN system, with jurisdiction over the most serious crimes of concern to the international community as a whole'. By becoming states parties then, the DRC, Uganda and CAR 'resolved', along with all other states that chose or choose to become members of the Rome Statute, 'to guarantee lasting respect for the enforcement of international justice'. Putting to one side the political mileage that these Governments might have assumed was to be gained by self-referring a situation to the ICC,⁸²⁸ a plausible interpretation which deserves encouragement is that their actions also show respect for the principles of international criminal justice through a request to the ICC for assistance in acting against those members of rebel groups who are most responsible for international crimes. Suggestions that these three states are unwitting pawns in some neo-colonial project are not only patronizing, they also devalue the international rule of law.⁸²⁹

It is worth noting there are some generic problems with treaty implementation encountered in many countries in terms of following up the ratification of human rights instruments, for example.⁸³⁰ It is not necessary to explore the literature on this issue, except to note that the Rome Statute is not the only instrument of great aspirational and practical utility that countries are quite prepared to ratify, but which they have failed over many years to take steps to implement or compile reports upon. What is remarkable about the Uganda, DRC, and CAR referrals is that they

⁸²⁶ Pillay N 'African Perspectives on Universal Jurisdiction for International Crimes Africa Legal Aid'(2002)123-130.

⁸²⁷ Ralph J 'The International Criminal Court and the Uneasy Revolution' in *International Society* (2004) 8 *International Journal of Human Rights* 2 235-247.

⁸²⁸ Morris M 'Universal Jurisdiction in a Divided World: Conference Remarks' (2001)35 *New England Law Review* 337-362.

⁸²⁹ Moghalu KC 'Global justice: The politics of war crimes trials' (2006) *Praeger Security International* 129.

⁸³⁰ An African example relates to the African Charter on Human and Peoples' Rights. Parties are obliged to recognize the rights, duties and freedoms enshrined in this charter and should undertake to adopt legislative or other measures to give effect to them (see Article 1 of the Charter and the decisions of the African Commission on Human and Peoples' Rights in *Commission Nationale des Droits de l'Homme et des Libertés v Chad* 55/91 Para 20, and *Amnesty International and Others v Sudan* 48/90, 50/91, 52/91, 89/93, Para 40). The African Charter was drafted and acceded to voluntarily by African states wishing to ensure the respect of human rights on this continent. Once ratified, states parties to the Charter are legally bound to its provisions. As the African Commission has noted, a state not wishing to abide by the African Charter might have refrained from ratification (*see International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* 137/94, 139/94, 154/96 and 161/97 Para 116).

buck this trend.⁸³¹ By choosing to self-refer under the Rome Statute each of the states parties demonstrated their commitment to utilise the Rome Statute and the principles agreed on at Rome by African and other states. Sadly, critics who denounce the ICC'S involvement in these states as anti-African not only miss the point, they also unwittingly contribute to what is rightly regarded as an African disorder: the failure to take seriously treaty commitments voluntarily assumed by states.⁸³²

4.7 The ICC: Doubts of an unrestrained Court or a misunderstanding of universal jurisdiction by the AU

Alex de Waal wrote that 'Africa has lost confidence in the ICC and is taking rapid steps to become a zone free of universal jurisdiction'.⁸³³ It is not clear whether De Waal himself believes that the ICC was the means which established the 'zone' of universal jurisdiction. Domestic crimes,⁸³⁴ as is the tradition, are largely the responsibility and concern of domestic legal systems. However, certain crimes, through their seriousness, take on a characteristic which 'internationalises' them.⁸³⁵ Two broad opportunities for prosecution arise from the internationalisation of the offender's conduct. Firstly, the international crimes at issue might be the subject of a prosecution before an international criminal tribunal constituted especially for the investigation and prosecution of such universally despicable acts.⁸³⁶ The Rome Statute provides nations with the opportunity to prosecute the ICC crimes through their domestic courts acting as an international surrogate.⁸³⁷ Quite aside from this treaty-inspired prosecution under the aegis of the Rome Statute, the internationalisation of certain crimes in turn provides the potential to all states of the world (in addition to the territorial state) to investigate and prosecute the offender under their domestic legal systems and before their domestic courts.⁸³⁸ This entitlement goes under the heading of what international lawyers understand as the principle of 'universal jurisdiction': the competency to act against the offender,⁸³⁹ regardless of

⁸³¹ Hurd I 'After anarchy: Legitimacy and power in the UN Security Council' (2007) 184.

⁸³² Gaeta P 'Is the Practice of 'Self-Referrals' a Sound Start for the ICC?' (2004) 2 *Journal of International Criminal Justice* 949.

⁸³³ Alex de Waal, writing in reference to a decision by the AU Peace and Security Council to criticize the ICC Prosecutor's decision to issue an arrest warrant for President el-Bashir ('ICC, Making Sense of Darfur: Africa's Position on the ICC' posted by Alex de Waal, 23 September 2008, available at <http://www.ssrc.org/blogs/darfur/2008/09/23/africas-position-on-the-icc/> (accessed on 12 October 2015). De Waal continues: 'The positions taken at the PSC do not provide much solace to the supporters of the ICC and the advocates of universal jurisdiction'.

⁸³⁴ De Waal A 'ICC, Making Sense of Darfur: Africa's Position on the ICC' (2008) available at <http://www.ssrc.org/blogs/darfur/2008/09/23/africas-position-on-the-icc/>. (accessed on 15 March 2016).

⁸³⁵ Goodhart M 'Neither relative nor universal: A response to Donnelly' (2008) 1 *Human Rights Quarterly* 18.

⁸³⁶ Du Plessis M 'The creation of the ICC: Implications for Africa's Despots Crackpots and Hotspots' 2003 *African Security Review* 1-28.

⁸³⁷ Another possibility of prosecution before an international criminal tribunal is exemplified in the ad hoc tribunals which have been created for Yugoslavia (the International Criminal Tribunal for the Former Yugoslavia), Rwanda (the International Criminal Tribunal for Rwanda), East Timor, Kosovo, Cambodia and Sierra Leone.

⁸³⁸ Du Plessis M & Stone L 'A court not found?' (2007) 7 *African Human Rights Law Journal* 522.

⁸³⁹ Mubangizi JC 'Some reflections on recent and current trends in the promotion and protection of human rights in Africa: The pains and the gains' (2006) 6(2) *African Human Rights Law Journal* 146.

where the crime was committed and regardless of the nationality of the criminal. While there is ongoing debate about the scope and limits of the potential exercise of universal jurisdiction under international law, Cassese previously President of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has convincingly explained that universal jurisdiction cannot sensibly be an absolute right of jurisdictional competence (such that any and every state is empowered to investigate and prosecute the occurrence of an international crime).⁸⁴⁰ Rather, while all states are potentially empowered to act against international criminals, ‘universality may be asserted subject to the condition that the alleged offender be on the territory of the prosecuting state’.⁸⁴¹

The state concerned must of course have taken steps under its domestic law to empower its officials and Courts to act upon this potential. France and Spain are examples of state that have done so, much to Rwandan President Kagame’s annoyance.⁸⁴² The AU added its voice in a strongly worded declaration, African Presidents at the AU Heads of state Summit in the Egyptian port city of Sharm El Sheikh condemned the French and Spanish indictments against senior officers of the Rwanda Defence Forces. The declaration of the Assembly of the union 11th Ordinary Session calls for a meeting between the AU and the European Union to discuss lasting solutions and to ensure that the warrants are withdrawn. The declaration of the Assembly of the union 11th Ordinary Session concludes that ‘the political nature and abuse of the principle of universal jurisdiction by judges from non-African states against African leaders is a clear violation of their sovereignty and territorial integrity’.⁸⁴³

These examples and De Waal’s sentiments about Africa taking steps to become a universal jurisdiction free zone chime with the view of many (African) critics of the ICC who believe that the ICC may, like the French and Spanish judges in respect of Kagame and other senior officers in the Rwanda Defence Forces, exercise a form of universal jurisdiction against African leaders. This belief invokes images of the ICC with unlimited interference power: that it is a superpower unto itself. Mamdani’s concerns about the Court are reflected in different language, but the result is the same. His complaint is that ‘the new humanitarian order’ of which he believes the ICC to be a part

⁸⁴⁰ The danger of countenancing such an absolute notion of universal jurisdiction was highlighted by the International Court of Justice in the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) ICJ Rep 14 Feb. 2002 case (the Arrest Warrant case). President Guillaume held, for instance, that such a system ‘would risk creating total judicial chaos’, and would ‘encourage the arbitrary for the benefit of the powerful, purportedly acting as an agent for an ill-defined ‘international community’ (para. 15).

⁸⁴¹ O’Keefe R ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *JICJ* 735.

⁸⁴² See the earlier discussion of Kagame’s response to the ‘arrogant’ European calls for an investigation of his role in the Rwandan genocide.

⁸⁴³ Bouwknege T ‘African Presidents Condemn Western Indictments’ (2008) *International Justice*, RNW, available at <http://www.rnw.nl/internationaljustice/specials/Universal/080702-rwanda> (accessed on 12 October 2017).

has resulted “once again [in] a bifurcated system, whereby state sovereignty obtains in large parts of the world but is suspended in more countries in Africa and the Middle East.”⁸⁴⁴

4.8 AU rebelliousness towards the ICC with regards to Al Bashir

The AU response to the Al Bashir arrest warrant was instant, starting with the petition to the UNSC to defer the indictment, arguing that it would damage the prospects for success of the ongoing peace process in Sudan. After this proved futile, AU members took more aggressive methods, during the AU summit in Libya in the beginning of July 2009,⁸⁴⁵ the organisation passed a resolution and announced that ‘AU member states shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Al Bashir of The Sudan.’⁸⁴⁶ The stance taken by the AU is one of the most significant and active moves in opposition to the ICC, both legally and politically. It is an issue with profound historical roots. Additionally, it has extensive ramifications both for the ICC and for conflict in the African continent. It is possible, however, that Al Bashir’s indictment served as a catalyst for the expression of grievances that had already been created by the preceding situations. For the ICC, this was an inopportune time for its largest regional bloc of states parties to express, very publicly, its dissatisfaction.⁸⁴⁷

The Al Bashir’s case represents, in theory, the very type of case for which the ICC was designed to handle that of a leader who allegedly had perpetrated massive crimes against humanity and was unlikely to be held accountable by any national or standard judicial institution. The indictment was a significant moment in the history of the ICC and international justice, and it helped put an additional focus on the situation in Darfur. The reaction from the AU, however, helped to partially shift the discourse away from the problems in Darfur and instead focus on the role of the ICC in

⁸⁴⁴ Mamdani’s thesis is set out in a recent article appearing in *The Nation* (29 September 2008) under the title ‘The New Humanitarian Order’ available at <http://www.thenation.com/doc/20080929/mamdani> (accessed on 8 April 2016).

⁸⁴⁵ ‘Decides that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar Al Bashir of The Sudan.’ Para 10, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII)

⁸⁴⁶ In the same resolution that was passed stating the AU’s refusal to cooperate with the ICC, the collective of states also reiterated the ‘unflinching commitment of member states to combating impunity and promoting democracy, rule of law and good governance throughout the continent, in conformity with the Constitutive Act of the AU.’ The AU’s consistent position that the body does not condone impunity, despite their declaration of non-cooperation.

⁸⁴⁷ Decision of the 17th AU Heads of State and Government Summit in Malabo, Equatorial Guinea on 15 July 2011 condemning the issuance of arrest warrants by the ICC for Muammar Mohammed Abu Minyar Gaddafi and two other high-level Libyan officials. Participating states at the summit also criticized the UNSC for not requesting the ICC to defer investigations and prosecutions in the situation in Darfur, Sudan under Article 16 of the Rome Statute. Such a request by the UNSC has the effect of suspending the ICC arrest warrant against Sudanese President Omar Al-Bashir; See CICC Press Release, African Union Maintains Contradictory Stance on Justice, (18 July 2011)

Africa, specifically, and international affairs more generally.⁸⁴⁸ Given that Al Bashir's indictment and the subsequent reaction to it by the AU are of central importance to this thesis, it is important to understand the situation that developed in Darfur and Al Bashir's alleged role in the affair. In addition to a brief synopsis of the conflict in Darfur,⁸⁴⁹ this sub-heading will further set out other elements of the underlying context at play in the ICC's involvement in Sudan and the AU's opposition to it. I feel that this should have come in the first para of this subsection.

Besides the individual decisions of the African states parties to the Rome Statute not to honour their engagement by enforcing the ICC indictment, the AU has officially endorsed a common policy and has raised issues concerning the matter.⁸⁵⁰ The involvement of the AU in matters that concern primarily state parties and individuals is a collective stance for weaker players in the international arena. The African leaders, measuring the extent to which many of them could become potential 'victims' of the ICC prosecutor's machine, or of the 'European judges' invoking the principle of universal jurisdiction, have responded with a common voice and made a bloc against the expansion of the ICC's powers into the internal affairs of their states.⁸⁵¹ On 14 July 2009, the Commission of the AU issued a document titled 'Decision on the meeting of African state parties to the Rome Statute of the ICC'.⁸⁵² The document notes that the decision was arrived at 'by consensus with only one opinion to the contrary' and that the meeting and the decisions made during the sessions follow to the recommendations of the meeting of the African states parties to the Rome statute held on 9 June 2009, and the recommendations of the Executive Council of the AU this may need to be rephrased doesn't sound right. The AU found it necessary moreover to reiterate the fact that the decision made, although contrary to the actions of the ICC, nonetheless reflects 'the consistent position of the AU of resolute commitment of AU member states to combating impunity and promoting democracy, the rule of law, and good governance on the continent'.⁸⁵³

⁸⁴⁸ Kastner P 'The ICC in Darfur – Saviour or spoiler?' (2007) 14 *Journal of International and Comparative Law* 100-145.

⁸⁴⁹ Kress C 'The Darfur Report and genocidal intent' (2005) 3 *Journal of International Criminal Justice* 562.

⁸⁵⁰ Philip A 'The Darfur Commission as a Model for Future Responses to Crisis Situations' (2005) 3 *Journal of International Criminal Justice* 45-60.

⁸⁵¹ Du Plessis M & Gevers C 'Darfur goes to the International Criminal Court' (2005) 14 *African Security review* 23-34.

⁸⁵² Specifically, the July 2009 AU decision on the ICC states that the AU 'deeply regrets that the request by the AU to the UN Security Council to defer the proceedings initiated against President Bashir ... has neither been heard nor acted upon. Decides that in view of the fact that the request by the AU has never been acted upon, the AU member states shall not cooperate pursuant to the provisions of Article 98 of the

Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan': AU Assembly 'Decision on the meeting of African states Parties to the Rome Statute', above at note 5 (emphasis added). See also AU Assembly 'Decision on the progress report of the Commission', above at note

3 at paras 4 and 5; AU Peace and Security Council 'Communiqué of the 142nd meeting of the Peace and Security Council': PSC/MIN/Comm (CXLII) (Addis Ababa, 21 July 2008), available at: <<http://www.africa-union.org/root/ua/actualites/2008/juillet/psc/142-communique-eng.pdf>> (accessed on 30 September 2015).

⁸⁵³ Opotow S 'Reconciliation in Times of Impunity: Challenges for Social Justice' (2001) 14 *Social Justice Research* 129-140.

It is clear that the AU is not opposed to the idea of the pursuit of justice per se; the point of discontent is the ICC's actions in the continent. The ICC is the best permanent mechanism that the international community has come up with so far in order to deal with the most heinous crimes. While some critics could formulate the opinion that the AU is taking a stance against the ICC, it is important to underline the fact that African states have not just tried to undermine the work of the ICC without proposing alternatives. Indeed, at this time the AU Commission had reiterated 'the need to empower the African Court on Human and People's Rights to deal with serious crimes of international concern in a manner complementary to national jurisdiction.' Therefore, it recognizes the need to establish a mechanism of international laws that would work in coordination with the national courts to prosecute crimes against humanity in the African continent.⁸⁵⁴

The priority is for an African mechanism, which suggests that the ICC is viewed as a foreign tool that is abusing its power in Africa and is violating the sovereignty of African states.⁸⁵⁵ The collective appeal to an African international court is a testament to the identification of Africa as a single entity in the international system, which comes together to reinforce its presence and power in reaction to what it views as infringement upon its sovereignty by the ICC.⁸⁵⁶ The AU justifies its decision not to cooperate with the ICC as a logical consequence of the manner in which the prosecution against President Al Bashir has been conducted specifically. The 'publicity-seeking approach of the ICC prosecutor, the refusal by the UNSC to address the request made by the AU for deferral of the indictment against Al Bashir of The Sudan, under Article 16 of the Rome Statute of the ICC sentence is incomplete.'⁸⁵⁷

It is interesting to note that the AU is not arguing for or against the guilt of the Sudanese president. The decision not to cooperate with the ICC is due to the 'approach of the ICC prosecutor', and the decision of the UNSC not to honour the AU's call for a deferral of the indictment of Al Bashir.⁸⁵⁸ Furthermore, the AU restated that the 'the situation in Darfur is too serious and complex an issue to be resolved without recourse to a harmonized approach to justice and peace, neither of which should be pursued at the expense of the other.' The delicate balance between delivering justice to the victims and pursuing peace is once again at the heart of the polemic between the ICC and the AU.⁸⁵⁹ A harmonized approach to peace and justice in Sudan would take into consideration the

⁸⁵⁴ Viljoen F 'AU Assembly should consider human rights implications before adopting the amending merged African court protocol' 2012 available at <http://africlaw.com> (accessed on 08 February 2016).

⁸⁵⁵ Moghalu C 'Global justice: The politics of war crimes trials' (2008) *Westport Praeger Security International* 27.

⁸⁵⁶ Nagan WP & Hammer C (2004) 'The Changing Character of Sovereignty in International Law and International Relations' (2004) 43(1) *Columbia Journal of Transnational Law* 141-187.

⁸⁵⁷ Ciampi A 'The proceedings against President Al Bashir and the prospects of their suspension under article 16 ICC Statute' (2008) 6 *Journal of International Criminal Justice* 885.

⁸⁵⁸ Mamdani M 'Saviors and survivors: Darfur, politics, and the war on terror' (2009) 58-72.

⁸⁵⁹ Protocol to the court of justice of the AU <http://www.au.int/en/treaties> (accessed 20 April 2016).

geographical and historical roots of the conflict in Darfur but also the referendum on the independence of South Sudan, which took place in 2011,⁸⁶⁰ and its potential consequences should have not being ignored. The ‘three interlocking issues of peace, justice, and reconciliation’ are also at the heart of the statement issued by the AU on 4 February 2010, a day after the judgment of the ICC Appeals Chamber on Darfur. This was in reference to the appeal initiated by the ICC prosecutor in order to include charges of genocide in the indictment of President Al Bashir.⁸⁶¹ The AU has reiterated once again that it ‘has always emphasized its commitment to justice and its total rejection of impunity.’⁸⁶² However, the AU also stresses on the fact that ‘the search for justice should be pursued in a manner not detrimental to the search for peace’ while the indictment of President Al Bashir does not pursue that endeavour.⁸⁶³

4.9 Concerns with the July 2010 AU decision and visits by Al-Bashir to ICC state parties

The decision that the AU adopted on the ICC at its July 2010 summit in Kampala, Uganda, raises serious concerns. Most significantly it called for AU member states not to cooperate in arresting President Al-Bashir; rejecting ‘for now’ opening an ICC liaison office in the Ethiopian capital, Addis Ababa; and criticises the ICC prosecutor’s conduct on the grounds he ‘has been making egregiously unacceptable, rude and condescending statement[s]’ in the case against President Al Bashir and ‘other situations in Africa’.⁸⁶⁴ The call for non-cooperation in President Al-Bashir’s arrest is contrary to the obligations of states parties’ to cooperate with the ICC.⁸⁶⁵

While the core of the call is not new it restates a decision requesting non-cooperation that the AU Assembly made one year earlier, the reiteration of the earlier decision indicates the initial call was not an isolated event and gives it added emphasis.⁸⁶⁶ Meanwhile, the rejection of a liaison office is a

⁸⁶⁰Mammdami M ‘The New Humanitarian Order’ 2008 available at www.insidesectionism.blogspot.com/2008/10/mahmood-mamdani-new-humanitarian_order.html (accessed on 14 February 2016).

⁸⁶¹Elagab O ‘The Darfur Situation and the ICC: An appraisal’ (2008) 1 *Journal of Politics and Law* 43.

⁸⁶²Cryer R ‘Prosecuting the leaders: Promises, politics and practicalities’ (2009) 1 *Göttingen Journal of International Law* 45.

⁸⁶³ Elise K ‘Managing Setbacks for the International Criminal Court in Africa’ (2011) *Journal of African Law, School of Oriental and African Studies* 11.

⁸⁶⁴ The AU’s decision does not provide specific examples of statements made by the prosecutor that it viewed as problematic. See AU Assembly ‘Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270 (XIV) on the second ministerial meeting on the Rome Statute of the International Criminal Court (ICC): Doc.Assembly/AU/10 (XV)’ in Decisions, Declarations, Resolution of the 15th ordinary session of the AU Assembly: Assembly/AU/Dec.296 (XV) (Kampala, July 2010) 24 at paras 5, 8 and 9, available at: http://www.au.int/en/sites/default/files/assembly_en_25_27_july_2010_bcp_assembly_of_the_african_union_fifteenth_ordinary_session.pdf(accessed on 30 September 2015).

⁸⁶⁵ Rome Statute of the International Criminal Court (Rome Statute): UN doc A/CONF.183/9 (17 July 1998, entered into force 1 July 2002) at part 9, available at: [http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf)(accessed on 30 September 2015).

⁸⁶⁶ AU Assembly ‘Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC) – Doc.Assembly/AU/13(XIII)’ in Decisions and Declarations of the 13th ordinary session of the AU Assembly: Assembly/AU/Dec.245 (XIII) (Sirte, July 2009) 7 at para 10, available at:

missed opportunity to facilitate enhanced communication between the AU and ICC, which could enable better information exchange and understanding between the two entities. Finally, comments about the prosecutor suggest a degree of disrespect for his office, if not disregard for his independence.⁸⁶⁷ In addition, President al-Bashir visited the territories of two ICC states parties subsequent to the issue of his warrant. On 22 July 2010, he travelled to Chad to attend a summit of the Community of Sahel-Saharan states.⁸⁶⁸ On 27 August, he travelled to Kenya to attend celebrations for the country's new constitution.⁸⁶⁹ Some African officials justified the visits by citing special circumstances including, for the visit to Chad, the normalisation of relations between Sudan and Chad after years of proxy war and, for the visit to Kenya, intense anxiety over stability in the region in the lead-up to the referendum on Southern Sudan's secession in January 2011.⁸⁷⁰ However, the visits ran counter to Chad and Kenya's binding international treaty obligations under the Rome Statute.⁸⁷¹ They have also made it more difficult to ensure that al-Bashir is held to account for his alleged role in crimes committed in Darfur and damaged Chad and Kenya's credibility when it comes to justice issues.

The July 2010 AU summit decision and President Al Bashir's visits to Chad and Kenya intensified existing challenges to advancing justice for serious crimes that violate international law. There are no easy solutions to these obstacles, but three areas merit special consideration. These are providing greater attention to the role of the UNSC in concerns that the AU has regarding the ICC;⁸⁷² ensuring states parties have more accurate information concerning their obligations to arrest ICC suspects in their territories; and promoting continued and intensified shows of support to the ICC by states parties and the civil society. The AU premised its call for its member states not to cooperate in the arrest of President Al Bashir on the grounds that the UNSC ignored its July 2008 request to defer

<http://www.au.int/en/sites/default/files/assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_%20message_congratulations_motion_0.pdf> (accessed on 30 march 2016).

⁸⁶⁷ This is not the first time the AU has raised concerns over the prosecutor's conduct, but the language is more provocative than previously. See, for example, *id* at para 11.

⁸⁶⁸ The Prosecutor v Omar Hassan Ahmad Al Bashir ICC case no ICC-02/05-01/09, 'Decision informing the United Nations Security Council and the Assembly of the states Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad' (27 August 2015), available at: <<http://www.icc-cpi.int/iccdocs/doc/doc931075.pdf>> (accessed on 30 September 2015).

⁸⁶⁹ The Prosecutor v Omar Hassan Ahmad Al Bashir ICC case no ICC-02/05-01/09, 'Decision informing the United Nations Security Council and the Assembly of the states Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad' (27 August 2015), available at: <<http://www.icc-cpi.int/iccdocs/doc/doc931075.pdf>> accessed on 30 September 2015).

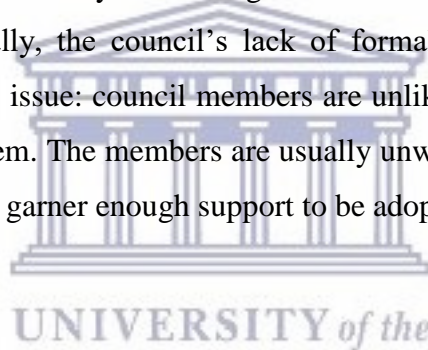
⁸⁷⁰ See, for example, 'Bashir defies warrant on Chad trip' (22 July 2010) Al-Jazeera, available at: <<http://english.aljazeera.net/news/africa/2010/07/201072183438656172.html>> (accessed on 8 August 2017).

⁸⁷¹ Opiyo P 'Raila slams Bashir invitation' (30 August 2010) The Standard, available at: <<http://www.standardmedia.co.ke/archives/InsidePage.php?id=2000017133&cid=4>> (accessed 16 on September 2015); Otieno S and Lucheli I 'How Bashir was sneaked into Kenya' (28 August 2010) The Standard, available at: <<http://www.standardmedia.co.ke/archives/news/InsidePage.php?id=2000017088&cid=4>> (accessed on 2 September 2015).

⁸⁷² Jalloh C 'Regionalizing International Criminal Law?' (2009) 9 *International Criminal Law Review* 445.

the case against him.⁸⁷³ The UNSC displayed massive disrespect to the AU by ignoring the deferral against Al Bashir and this was unjustifiable.

Even among officials who strongly support the ICC, concern has mounted that the UNSC showed disrespect for the AU by failing to respond either positively or negatively to its deferral request.⁸⁷⁴ More attention to the reasoning underlying the AU call for non-cooperation with the ICC could be valuable in promoting a more accurate portrayal of African views on the ICC. Firstly, such attention would underscore that much of the AU's expressed concern vis-à-vis the ICC relates to UNSC inaction, and not the court itself. Secondly, it could help show that the UNSC has not in fact ignored the AU's deferral request, although it has not formally granted or rejected it. Specifically, ten days after the AU Peace and Security Council (PSC) first called for a deferral, the UNSC acknowledged the request in UNSC resolution 1828, adopted on 31 July 2008.⁸⁷⁵ The request was also discussed in a public meeting of the UNSC on the resolution, during which a number of UNSC members expressed views on a deferral and the fact that the council had not granted a deferral.⁸⁷⁶ The comments that states expressed in the July 31 meeting make clear the request was also considered in other council discussions.⁸⁷⁷ Finally, the council's lack of formal response does not support the conclusion that it has ignored the issue: council members are unlikely to issue a formal response if there is no consensus between them. The members are usually unwilling to table a resolution that is likely to be vetoed, or that cannot garner enough support to be adopted.⁸⁷⁸



⁸⁷³ Specifically, the July 2009 AU decision on the ICC states that the AU 'deeply regrets that the request by the AU to the UN Security Council to defer the proceedings initiated against President Bashir ... has neither been heard nor acted upon ... Decides that in view of the fact that the request by the AU has never been acted upon, the AU member states shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar Al Bashir of The Sudan': AU Assembly 'Decision on the meeting of African states parties to the Rome Statute', AU Assembly 'Decision on the progress report of the Commission'.

3 at paras 4 and 5; AU Peace and Security Council 'Communiqué of the 142nd meeting of the Peace and Security Council': PSC/MIN/Comm (CXLII) (Addis Ababa, 21 July 2008), available at: <<http://www.africa-union.org/root/ua/actualites/2008/juillet/psc/142-communique-eng.pdf>> (accessed on 30 September 2017).

⁸⁷⁴ AU 'Report of the meeting of African states parties to the Rome Statute of the International Criminal Court' (Addis Ababa, 8–9 June 2009): MinICC/Rpt at para 15(v) (on file with the author); letter from the Kenyan attorney general to the AU Commission chairperson (3 June 2010), available at: <http://www.coalitionfortheicc.org/documents/AULO-African_SPs_Letter.pdf> (accessed on 30 March 2016).

⁸⁷⁵ UN Security Council res 1828 (2008): S/RES/1828 (2008) at preambular para: 'Taking note of the AU (AU) communiqué of the 142nd Peace and Security Council (PSC) contd Meeting dated 21 July (S/2008/481, annex), having in mind concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008, and taking note of their intention to consider these matters further'.

⁸⁷⁶ In particular, the Russian government indicated that a deferral was not possible at the time 'as a result of resistance by a number of Security Council members'. The Libyan government similarly stated, 'despite all the reasons that we put forward to justify our proposed amendments to the draft resolution [in favour of deferral], we did not receive the hoped-for response from certain Council members': UNSC 5947th meeting, S/PV.5947 (31 July 2008).

⁸⁷⁷ There are indications that the council discussed the deferral request informally on other occasions, including in a meeting with AU officials during a Security Council visit to Addis Ababa in May 2009: Human Rights Watch email exchanges with Security Council report analyst (16 September and 7 October 2010).

Meanwhile, other paths for council action, such as presidential or press statements require consensus. Council members also tend to avoid drawing attention to issues where consensus is lacking as it highlights UNSC impotence to act. The deteriorating relations between the AU and ICC led to legal conflict for states that were parties to both institutions; this has caused an ethical dilemma for different African governments. For instance in 2011 when President Jacob Zuma was due to be inaugurated in South Africa, invitations were sent out to all African heads of state, including Al Bashir. South Africa as a party to the Rome Statute was expected to fulfil its obligation under international law and arrest Al Bashir if he attended the inauguration.⁸⁷⁹ This became a diplomatic crisis for South Africa with civil society organisations threatening to approach the courts and force the governments to arrest Al Bashir.⁸⁸⁰ This situation was very difficult for the government to deal with because of the position the AU had taken of non-compliance to the ICC warrant. The South African Government ultimately took the decision that it would be under an obligation to arrest Al Bashir if he arrived in South Africa, and the Sudanese president did not attend the inauguration. South Africa's position on this instance complied with the Rome Statute but this was far cry compared to the recent Al Bashir debacle.⁸⁸¹

On June 2015 when Al Bashir attended the AU Summit, civil rights groups approached the Courts for his arrest. On Monday 15 June despite the North Gauteng High Court ruling that Al Bashir be arrested and sent to the ICC, the South African Government quite simply ignored the judge's ruling. This was unthinkable given the high judicial rule of law in South Africa and in addition to the fact that ignoring the court decisions was a constitutional violation. Yet it is likely that many other African states faced with a similar decision would side with the AU, not the ICC based on the debauched relationship between the two institutions. In 2011, the National Transitional Council (NTC) in Libya permitted Bashir to visit Tripoli but, remarkably, none of the NATO states present tried to intervene regarding the arrest of Al Bashir as they did in the case of South Africa. It is no secret that Al Bashir was the first foreign head of state to visit the NTC in Libya after the fall of the Gaddafi regime,⁸⁸² since he provided aid to rebels in Benghazi during the rebellion that toppled

⁸⁷⁹ Du Plessis M 'Recent cases and developments: South Africa and the International Criminal Court' (2009) 3 *South African Journal of Criminal Justice* 443.

⁸⁸⁰ Kwinika S 'Sudan President Bashir, accused of war crimes, would be arrested in South Africa, says ANC' (28 July 2010) *The Christian Science Monitor*, available at: <<http://www.csmonitor.com/World/Africa/Africa-Monitor/2010/0728/Sudan-President-Bashir-accused-of-war-crimes-would-be-arrested-in-South-Africa-says-ANC>> (last accessed 16 September 2010); South African Government Information 'Notes following the briefing of Department of International Relations and Co-operation's Director-General, Ayanda Ntsaluba' (31 July 2009), available at: <<http://www.info.gov.za/speeches/2009/09073110451001.htm>> (accessed on 23 September 2015).

⁸⁸¹ Katz A 'An act of transformation: The incorporation of the Rome Statute of the ICC into national law in South Africa' (2003) 12 *African Security Review* 27

⁸⁸² Tsagourias N 'The Application of Public International Law to the Crisis in Libya' (2012) 14 *International Community Law Review* 305-307.

Gaddafi.⁸⁸³ One can highlight the fact that Libya is not a party to the Rome Statute relatively explains the NTC's unwillingness to arrest Al Bashir, but this does not give justification why states such as the USA and the United Kingdom who indisputably had a moral responsibility to intervene and call for Libya to arrest Al Bashir did not do so.⁸⁸⁴

During the Common Market for Eastern and Southern African states summit in October 2011 that took place in Malawi, the then president of Malawi Bingu wa Mutharika allowed Al Bashir to attend. Malawi went to great lengths to accommodate Al Bashir by issuing a formal memorandum in support of its decision to host Al Bashir, which it on premise the following: (i) the AU's resolution, passed in response to President Bashir's arrest warrant,⁸⁸⁵ urging states not to cooperate with the ICC, (ii) the customary international law doctrine of head-of-state immunity and (iii) the fact that Sudan was not a party to the Rome Statute and could therefore not be bound by its suspension of immunity.⁸⁸⁶

In June 2012 President of Malawi, Joyce Banda, refused to allow Bashir to attend an AU meeting in Malawi,⁸⁸⁷ forcing the organisers to move the meeting just three weeks before it was scheduled. Many AU members' displeasure with the ICC stem from the notion that a western institution, should not exercise jurisdiction on African leaders. This notion is also enhanced by the idea that AU leaders view the arrest warrant as imperialist arrogance or a form of neo-colonialism.⁸⁸⁸ In the AU decision based on the Report of the Ministerial Preparatory Meeting on the Rome Statute of the ICC held in Addis Ababa; there are suggestions that AU leaders seemed determined not to be prosecuted under non-African systems. The decision, for instance, called on the AU Commission to investigate the possibility of empowering the African Court on Human and Peoples' Rights to 'try serious crimes of international concern', presumably as an alternative to non-African courts and

⁸⁸³ Copnall J 'Sudan armed Libyan rebels, says President Bashir' available at <http://www.bbc.com/news/world-africa> (accessed 19 June 2017).

⁸⁸⁴ Guzman AT 'How International Law Works, A Rational Choice Theory' (2008) 46.

⁸⁸⁵ Gaeta P 'Does President Al Bashir enjoy immunity from arrest?' (2009) 7 *Journal of International Criminal Justice* 315.

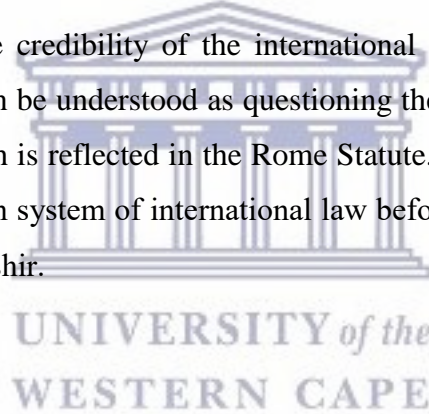
⁸⁸⁶ Fox H 'The First Pinochet Case: Immunity of a former head of state' (1999) 48 *International and Comparative Law Quarterly* 207- 216.

⁸⁸⁷ Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, 12 December 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf>.

⁸⁸⁸ Kofi Annan has noted that in the months leading up to the July 2009 Summit, 'some African leaders have expressed the view that international justice as represented by the ICC is an imposition, if not a plot, by the industrialised West.' Annan 'Africa and the International Court' New York Times 30 June 2009.

tribunals.⁸⁸⁹ In addition the decision, also, outlines that the AU ‘reserves the right to take any decision’ in order to protect the ‘dignity, sovereignty and integrity of the continent’.⁸⁹⁰

The Organisation of Islamic Conference (OIC) a multi-lateral, inter-government organization currently comprised of 57 member-states and recognized internationally as the official institutional voice of ‘the Muslim world.’ Drawing from the organizational and operational model of the United Nations (UN), the OIC is the second largest inter-government organization in the world after the UN. The OIC has a global footprint: current member-states are drawn from four continents Asia (28), Africa (26), South America (2), and Europe (1) and include countries with both Muslim-majority populations and non-Muslim-majority demographics.⁸⁹¹ The OIC has been very open with regards to its position with the ICC. In its communiqué of 27 March 2009, the OIC described the ICC hunt of Al Bashir as ‘void and lacking sound reasoning’, and stated that ICC activities were a threat to the ‘sovereignty, independence, territorial integrity’ of Sudan. It further portrayed Sudan as ‘a victim of this scheming’.⁸⁹² The communiqué went further to state the ICC actions were based on ‘selective and a display of double standards’ evident in the decisions of the ICC. It finally noted that these would adversely affect the credibility of the international legal system under international law.’⁸⁹³ The stance of the AU can be understood as questioning the validity of the new value-based system of international law which is reflected in the Rome Statute.⁸⁹⁴ It is thus fitting to firstly have a brief assessment on this modern system of international law before evaluating the AU’s objection to the ICC’s indictment of Al Bashir.



⁸⁸⁹ Dec 245(XIII) n 1 above at par 5. Paragraph 7 of the decision also encourages capacity building programmes to enable Africans to undertake the work of ‘dealing with serious crimes of international concern’.

⁸⁹⁰ Dec 245(XIII) Paragraph 12 of the decision also encourages capacity building programmes to enable Africans to undertake the work of ‘dealing with serious crimes of international concern’.

⁸⁹¹ Prodromou EH ‘What is the Organization of Islamic Cooperation (OIC)?’ (2013) 2.

⁸⁹² ‘Final Communiqué of the Expanded Meeting of 23 the Executive Committee of the OIC at the level of Permanent Representatives on the ICC’s Moves Targeting HE The President of Sudan’ New York 27 March 2009 par 1.

⁸⁹³ ‘Final Communiqué of the Expanded Meeting of 23 the Executive Committee of the OIC at the level of Permanent Representatives on the ICC’s Moves Targeting HE The President of Sudan’ New York 27 March 2009 par 3. The idea that Arab countries in the AU have played the most prominent role in steering the AU towards an anti-ICC view is reflected in the statements of African Arab states on the ICC, most notably Libya. On 29 March 2009, eg, the Libyan leader, Muammar Gaddafi described the arrest warrant as ‘First World terrorism’, while Libyan African Affairs Minister, Ali Triki, prophesied that the ‘33 African member states of the ICC will meet in the immediate future to consider withdrawing from the ICC’ reported in ‘Darfur, Ghadafi: ICC are terrorists’ Africa Times 29 March 2009 available at <http://www.africa-times-news.com> (accessed on 10 March 2016).

⁸⁹⁴ ‘Final Communiqué of the Expanded Meeting of 23 the Executive Committee of the OIC at the level of Permanent Representatives on the ICC’s Moves Targeting HE The President of Sudan’ New York 27 March 2009 par 3. The idea that Arab countries in the AU have played the most prominent role in steering the AU towards an anti-ICC view is reflected in the statements of African Arab states on the ICC, most notably Libya. On 29 March 2009, eg, the Libyan leader, Muammar Gaddafi described the arrest warrant as ‘First World terrorism’, while Libyan African Affairs Minister, Ali Triki, prophesied that the ‘33 African member states of the ICC will meet in the immediate future to consider withdrawing from the ICC’ reported in ‘Darfur, Ghadafi: ICC are terrorists’ Africa Times 29 March 2009 available at <http://www.africa-times-news.com> (accessed on 10 August 2015).

4.10 Conclusion

In conclusion it is clear that the future of Africa's relationship with the ICC is uncertain. Some African governments have a history of manipulating the ICC for their own political advantage expertly in some instances, as recently demonstrated by Kenya. And when their obligations under the Rome Statute conflict with their obligations to the AU, historically, too few African governments have lived up to the former. But the picture is not entirely bleak. While the expansion of the African Court's jurisdiction to criminal matters has been interpreted as an attempt to undermine the ICC there could be a valid role for the African Court, given the right political and financial support. There is also a valid role for domestic prosecutions in international criminal justice. Meanwhile, there is encouraging evidence that calls for domestic action by civil society organizations are being increasingly listened to. The AU Assembly's request to the AU Commission to consider whether it would be possible to request an advisory opinion from the International Court of Justice (ICJ) on the question of immunity can also be viewed in a positive light to the extent that it demonstrates the AU's desire to oppose the ICC through legal channels where possible.⁸⁹⁵

As this chapter has set out to highlight that there were substantively different reactions to the four situations before the Court, and to individual cases within those situations. In Uganda, DRC, and CAR, the opposition came more from civil society than it did from African governments. This, in itself, was a significant development. In reference to Uganda, 'for the first time in the history of international law those opposing the enforcement of humanitarian and human rights law were not self-interested government officials or rebel leaders' but 'the Ugandan human rights community itself, from activists, lawyers, and civil-society organisations working for peace in the North.'⁸⁹⁶ When the tide shifted to the president of Sudan Al Bashir the ICC's involvement in the continent became highly questionable and suspect. While Uganda, DRC, and CAR all came through state referrals, Sudan was the first of its kind to come through a UNSC referral. Given that the role of the UNSC in the Court's affairs is one of the most controversial aspects of its operation, and has been since the Rome Conference in 1998, it is hardly surprising that the reaction in this case was substantively different than in the others. The principle of complementarity as contained in the Malabo Protocol will be discussed in great detail in the chapter below.

⁸⁹⁵ Ellis MS 'Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability The Role of International War Crimes Tribunals'(2006) 2 *Journal of National Security Law & Policy* 111-164.

⁸⁹⁶ Adam B 'International Justice, Local Injustice: The International Criminal Court in Northern Uganda' (2008) 51 3.

Chapter Five – An analysis of the Malabo Protocol’s strengths and weaknesses

5.1 Introduction

The previous chapter scrutinised the relationship between the AU and the ICC and further examined the root causes of the animosity between the two institutions. In addition the chapter analysed matters of state referrals, Africa’s Numerical Legacy within the ICC and the connection between Africa and the Rome Statute.⁸⁹⁷ Additionally the legal basis for the creation of the ACC was assessed. This chapter will look at the rationale of creating the ACC with jurisdiction over international crimes. Furthermore an in-depth analysis of the Malabo protocol will be conducted sighting the strengths and weaknesses of the establishment of the ACC. The chapter will also explore the relationship between the ACC and the ICC and concludes with outlining the potential areas of concurrent jurisdiction between the ICC and the ACC.

The original plan for the ACJHR was a court with two sections - a general affairs section and a human rights section. The Malabo Protocol introduced a third section: the international criminal law section. Thus, if the Malabo Protocol comes into force, the ACJHR will have jurisdiction to try the following 14 crimes: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression. In essence, the international criminal law section of the ACC will serve as an African regional criminal court, operating in a manner akin to the International ICC but within a narrowly defined geographical scope, and over a massively expanded list of crimes.

The adoption of the Malabo Protocol was a step in the right direction. The stipulated principles and values underlying the Protocol are praiseworthy. They include: respect for human rights and sanctity of life; condemnation, rejection and fighting of impunity; strengthening of AU’s commitment to promote sustained peace, security and stability; and prevention of serious and massive violations of human rights.⁸⁹⁸ The ACC can potentially play a vastly positive role on a continent persistently afflicted by the scourge of conflict and impunity for crimes under international law and other serious violations and abuses of human rights. In recent, as well as in ongoing conflicts, tens of thousands of civilians have lost their lives and untold numbers have been maimed and displaced from their homes. Emerging from these conflicts are disturbing and horrific

⁸⁹⁷Grono N ‘Briefing Darfur: The International Community’s Failure to Protect’ *African Affairs -London- Royal African Society* (2006) 621-632.

⁸⁹⁸ Malabo Protocol, Preamble, paragraphs 9, 10, 11, 12, and 16.

accounts of killings, torture, rape, mutilation of bodies, recruitment of child soldiers, and meaningless destruction of property. In essence, blatant violation of international human rights and humanitarian law is a common feature of conflicts on the continent. Armed groups and government forces alike are responsible for the abuses and violations. For instance, in north-east Nigeria, there is strong evidence to suggest that crimes against humanity and war crimes have been committed both by the armed group Boko Haram and by Nigerian security forces.⁸⁹⁹ In Cameroon, Boko Haram has committed crimes under international law that may amount to war crimes.⁹⁰⁰ Cameroonian security forces deployed to fight Boko Haram have also committed serious crimes under international law.⁹⁰¹ In South Sudan, the AU Commission of Inquiry established in March 2014 to investigate human rights violations and abuses committed in the conflict that erupted in the country in December 2013, found that there are reasonable grounds to believe that war crimes such as murder, rape, and torture have been committed in the conflict that has plagued the country since December 2013.⁹⁰²

All over the African continent, victims' cry for justice is loud and clear yet,⁹⁰³ impunity is a common denominator in Africa's conflicts, with those suspected of criminal responsibility for crimes under international law rarely held to account. All too often national governments are unwilling or unable to conduct prompt,⁹⁰⁴ independent, impartial, and effective investigations into allegations of crimes under international law, and ultimately to bring all those suspected of criminal responsibility to justice in fair trials before ordinary civilian courts and without recourse to death penalty. Thus, the ACC as envisaged under the Malabo Protocol, has the potential to fill the accountability gap evident at domestic levels.

However, many have expressed serious concerns about the motivation behind the proposal to establish the ACC. Some commentators have argued that the proposal is an attempt by the AU to shield African heads of state and senior state officials from being held to account when there is

⁸⁹⁹ Amnesty International, 'Our job is to shoot, slaughter and kill': Boko Haram's reign of terror in north-east Nigeria, April 2015; available at www.refworld.org/docid.htmml. (accessed on 24 October 2017). Amnesty International, Stars on their shoulders, blood on their hands: War crimes committed by the Nigerian military. available at www.refworld.org/docid.htmml. (accessed on 24 October 2017)

⁹⁰⁰ Amnesty International, Human rights under fire: Attacks and violations in Cameroon's struggle with Boko Haram available at www.refworld.org/docid.htmml. (accessed on 24 October 2017)

⁹⁰¹ Amnesty International, Human rights under fire: Attacks and violations in Cameroon's struggle with Boko Haram. available at www.refworld.org/docid.htmml. (accessed on 24 October 2017)

⁹⁰² Final report of the African Union Commission of Inquiry on South Sudan available at www.peaceau.org/uploads/auciss.final.report. (accessed on 19 November 2015).

⁹⁰³ Amnesty International, Crying for justice: Victims' perspectives on justice for the post-election violence in Kenya. available at www.refworld.org/docid.htmml. (accessed on 24 October 2017)

⁹⁰⁴ Brandon B and Du Plessis M (ed) *The prosecution of international crimes: A practical guide to prosecuting ICC crimes in Commonwealth states* (2005) 35.

reasonable grounds to believe that they are criminally responsible for crimes under international law.⁹⁰⁵

It is also argued that the proposal by the AU is an effort to score political points with the ICC rather than address the need for justice and accountability for crimes under international law. Beyond the motivation behind the adoption of the Malabo Protocol, it is worth noting that there some of the legal standards contained in the Protocol and about the capacity of the ACC to deliver on its expanded mandate. The AU's decision to create the ACC could have far reaching legal and institutional implications. As an attempt to engage with this discussion, this chapter examines some of these implications by identifying how the expanded jurisdiction may affect the enjoyment of human rights on the continent. The chapter will go onto look at how the expanded jurisdiction will affect relevant stakeholders, including victims of gross violations of human rights, the AU, and Civil Society Organizations.

5.2 The description of the crimes in the Malabo Protocol

The Malabo Protocol contains an extensive and ambitious list of crimes. Some of these crimes,⁹⁰⁶ such as genocide, crimes against humanity and war crimes, are already well established in international criminal law, while other crimes, such as mercenarism, terrorism, corruption, money laundering, and trafficking on hazardous wastes are already defined in existing AU treaties.⁹⁰⁷ The list also contains crimes over which the ICC and other international courts have no jurisdiction. In addition to the extensive list of crimes, the Malabo Protocol also leaves open the possibility of new crimes to be added.⁹⁰⁸

Arguably, the list covers areas or crimes which have particular relevance to the African continent. However, some crimes included under the jurisdiction of the ACC are yet to be well articulated and established in international law, prominent among these is the crime of unconstitutional change of government. Unconstitutional change of government is a phenomenon that is considered as 'one of the essential causes of insecurity, instability and violent conflict in Africa'.⁹⁰⁹ But as stated above,

⁹⁰⁵ 'Immunity before the African Court of Justice and Human and Peoples' Rights – The potential outlier' available at www.justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/ (accessed on 4 January 2018). Abraham G 'Africa's evolving continental court structures: At the crossroads? (2015) SAIIA Occasional Paper 209. available at www.saiia.org.za/occasional-papers/africas-evolving-continental-court-structures-at-the-crossroads (accessed on 4 January 2018).

⁹⁰⁶ Amended ACJHR Statute, Article 28A.

⁹⁰⁷ These treaties are: Convention for the Elimination of Mercenarism in Africa, adopted 3 July 1977 and entered into force 22 April 1985; OAU/AU Convention on the Prevention and Combating of Terrorism, adopted 1 July 1899 and entered into force December 2002; AU Convention on Preventing and Combating Corruption, adopted 1 July 2003 and entered into force 5 August 2006; and the Bamako Convention on the Ban of the Import into Africa and the control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted 30 January 1991 and entered into force 22 April 1998.

⁹⁰⁸ Amended ACJHR Statute, article 28(A) (2).

⁹⁰⁹ African Charter on Democracy, Elections and Governance, Preamble, para. 6.

the definition of the crime of unconstitutional change of government was contentious throughout the drafting process. At the centre of this controversy was whether to include popular uprising as a form of unconstitutional change of government.

The concern of including popular uprising as constituting a crime of unconstitutional change of government was that this would result in criminalizing protest. In the end the issue of ‘popular uprising’ was deleted from the definition adopted in the Malabo Protocol. Despite this positive amendment, such phenomenon has not been widely prosecuted as a crime at the international level and it remains to be seen what effect the criminalization of this crime within the Malabo Protocol will have regionally. It is noteworthy that conflict and crimes committed in this context (such as genocide, crimes against humanity, and war crimes) have intractable connections to most, if not all, of the transnational or organized crimes listed in the Malabo Protocol. For instance, according to the UN Office on Drugs and Crime (UNODC), the long-standing conflict in Somalia is an important driving factor of maritime piracy along the coast of Somalia and the smuggling of migrants from the country to Yemen and Saudi Arabia.⁹¹⁰

The intersections between African conflicts and illicit exploitation of natural resources, mainly minerals, are also well documented.⁹¹¹ Illicit exploitation of natural resources was a defining characteristic of the conflicts in Angola, Sierra Leone and Liberia, and remains a dominant feature of the ongoing conflicts in the DRC and CAR. In September 2015, Amnesty International published a report demonstrating how the diamond industry in the CAR is financing armed groups in the country.⁹¹² Corruption and trafficking in persons are also crimes that affect the enjoyment of human rights across the continent. Apart from specific concerns about the inclusion of vague and overly broad crimes like terrorism, Amnesty International welcomes efforts by the AU to suppress transnational and organized crimes that negatively impact the enjoyment of human rights on the continent. Amnesty International also notes that in doing so, the AU must ensure full fair trial rights and must ensure that the substantive criminal laws applied do not violate other rights, such as the right to equality and freedom from discrimination. However, many of these crimes have not been widely prosecuted at the international level and it is still to be seen what effect criminalization of these acts within the Malabo Protocol will have regionally and on the rights of the accused.

⁹¹⁰ UNODC, Transnational organized crime in Eastern Africa: A threat assessment, September 2013, available at www.unodc.org/documents/data-and-analysis/Studies/TOC_East_Africa_ (accessed on 6 January 2017).

⁹¹¹ International Alert, The role of the exploitation of natural resources in fuelling and prolonging crises in the Eastern DRC available at www.international-alert.org/sites/default/files/publications/Natural_Resources_ (accessed on 7 January 2015).

⁹¹² Amnesty International, Chains of abuse: The global diamond supply chain and the case of the Central African Republic, September 2015, Index: AFR 19/2494/2015.

On the other hand, the definitions of the three core international crimes in the Malabo Protocol seem to conform to the internationally agreed definitions of the crimes. The definition of genocide in the Malabo Protocol is slightly more progressive and reflective of recent jurisprudence than the definition in the Rome Statute. Under Article 28B(f) of the Amended ACJHR Statute ‘acts of rape or any other form of sexual violence’ committed with intent to destroy, in whole or in part, a national, racial or religious group, as such, constitutes genocide. A similar provision is not available in the Rome Statute. However, following the *Akayesu* decision at the ICTR,⁹¹³ it is commonly accepted that rape is a tool of war, which can be committed as an act of genocide. The clear inclusion of rape as an act of genocide within the Malabo Protocol points towards a more progressive and an up-to-date document reflecting more recent jurisprudence and definitions of genocide. Regarding crimes against humanity, the definition in the Malabo Protocol incorporates the Rome Statute definition, including the definition of ‘attack directed against any civilian population’ which positively incorporates the expanded contextual element of ‘pursuant to or in furtherance of a State or organizational policy.’⁹¹⁴ This has been interpreted by the ICC in the Kenya cases as expanding the actors who may commit crimes against humanity to include, for example, criminal gangs. One key definitional difference in the Malabo Protocol definition is the inclusion of the term ‘enterprise’ included as a contextual element of crimes against humanity alongside ‘attack’.

The Malabo Protocol does not provide a definition of the term ‘enterprise’ and as such it is unclear what would constitute an ‘enterprise’ against a civilian population. The definition of war crimes in the Malabo Protocol explicitly mentions the First Additional Protocol and adds six more acts to the list included in the Rome Statute constituting violations of the laws and customs applicable in international armed conflict, namely; unjustifiably delaying the repatriation of prisoners of war or civilians, willfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination, making non-defended localities and demilitarized zones the object of attack, slavery and deportation to slave labour, collective punishments and despoliation of the wounded, sick, shipwrecked or dead.⁹¹⁵ Whereas the Rome Statute only lists 12 acts constituting violations in armed conflicts not of an international character, the Malabo Protocol lists 22 acts,⁹¹⁶ and includes the use of nuclear weapons or other weapons of mass destruction.⁹¹⁷ While the definitions of the three core international crimes largely conform to the internationally agreed definitions, those of some of the other crimes in the

⁹¹³ *Prosecutor v. Akayesu*, Judgment Case No. ICTR-96-4-A.

⁹¹⁴ Amended ACJHR Statute, Article 28(c).

⁹¹⁵ Amended ACJHR Statute, Article 28D(b), paras iv, xxviii, xxix, xxx, xxxi, xxxii

⁹¹⁶ Amended ACJHR Statute, Article 28D(e), paras i- xxi.

⁹¹⁷ Amended ACJHR Statute, Article 28D(g).

jurisdiction of the ACJHR are controversial and concerning. Amnesty International is particularly concerned about the definition of terrorism as adopted in Article 28G of the Amended ACJHR Statute.⁹¹⁸ There is no agreed definition of terrorism under international law. Definition of terrorism in regional instruments varies greatly, and Amnesty International has frequently criticized these definitions for being vague and overly broad, thus undermining the principle of legality. Amnesty International's research demonstrates that many governments across the world invoke broad definitions of terrorism in order to repress political opposition, target human rights defenders, and harass and intimidate 'suspect' religious and ethnic groups, and clamp down on legitimate exercise freedom of expression, association, assembly and other human rights.

The definition in the Malabo Protocol may be used for similar purposes as it is overly broad. This challenge is compounded by the fact that Article 28G (A) partly defines the crime in question by referring to an open-ended list of offences contained in a series of international, regional and domestic legal frameworks, including where such offences are themselves ill or vaguely defined, thus adding to the confusion and likely overbroad nature of the crime and its arbitrary application. This raises serious concerns as to compliance with the principle of legality, a core general principle of law, enshrined, *inter alia*, in Article 15 of the International Covenant on Civil and Political Rights (ICCPR), which requires laws to be clear and accessible and for their application in practice to be sufficiently foreseeable. With regard to criminalization, the principle of legality requires that the law must classify and describe offences in precise and unambiguous language that narrowly defines the punishable behavior.⁹¹⁹

In addition, any ancillary offence contained in the Amended ACJHR Statute should have been strictly limited to acts which are closely connected to the perpetration of the principle offence as sufficiently delimited. In this regard, Article 28G (B) prevents individuals to ascertain with sufficient certainty which conduct could constitute a criminal offence. As such, it raises significant concerns, including with regard to the principle of legality, and paves the way for arbitrary application in practice.

5.3 The relationship between the ACC and the ICC

The ACC and the ICC will exercise the same subject matter jurisdiction, at least in relation to the Rome Statute crimes committed in states which have ratified both the Malabo Protocol and the Rome Statute. However, given the immediate political circumstances that accelerated the proposal

⁹¹⁸ Amended ACJHR Statute, Article 28G.

⁹¹⁹ *inter alia*, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. E/CN.4/2006/98 of 28 December 2005, para. 46. ; Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/28/28 of 19 December 2014, para. 28.

to establish the ACC, the Malabo Protocol makes reference neither to the Rome Statute nor the ICC. The Malabo Protocol fails to clarify how the two courts will function together in terms of, for instance, cooperation and surrender of suspects. The Malabo Protocol envisages a complementarity relationship between the ACC, on the one hand, and national courts and courts of the regional economic communities, on the other hand.⁹²⁰

Unfortunately, the Malabo Protocol does not foresee a similar relationship with the ICC despite the fact that it is obvious that such a relationship would be necessary and desirable. However, the Malabo Protocol, as it currently stands, does not in any way override the obligations undertaken by states that have ratified the Rome Statute. The obligations of these states to cooperate with the ICC will continue regardless of the Malabo Protocol and regardless of the establishment of the ACC unless those states withdraw from the ICC. The determination of the admissibility of a case before the ICC will continue to be made by the ICC irrespective of whether an ICC member state ratifies the Malabo Protocol. This relationship will hopefully develop over time, but currently there is no legal reason for the ICC to defer to the ACC unless it were legitimately acting to bring those suspected of Rome Statute crimes to justice. In addition, the fact that the Malabo Protocol grants immunity to a large category of persons who have no immunity under the Rome Statute mean that the ACC's jurisdiction would not affect the admissibility question before the ICC in all cases involving such suspects.

The omission in the Malabo Protocol of a possible relationship based complementarity provisions with the ICC has brought wild spread criticism, As Du Plessis observed: 'It is unfathomable that the draft protocol nowhere mentions the ICC..Either this is a sign that the AU hopes its members will sidestep the ICC, or it is a case of irresponsible treaty making forcing signatories to become party to an instrument that willfully or negligently ignores the complicated relationship that will exist for states parties to the Rome Statute.'⁹²¹

Furthermore Abraham, argued that the 'only reasonable interpretation of this exclusion can be that it is a conscious rebuke to the ICC by the AU'.⁹²² However, Deya, director of PALU, the organization that was tasked with drafting the Malabo Protocol, is adamant that it is not a deliberate rebuke, and that throughout the process it has been clear that the ACC intends to cooperate with, and complement the ICC.⁹²³ He points to Article 46L,⁹²⁴ which allows the ACC to 'seek the co-

⁹²⁰ Amended ACJHR Statute, Article 46(H).

⁹²¹ Du Plessis M 'Implications of the AU decision to give the African Court jurisdiction over international crimes' available at <https://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt>. (accessed 19 June 2017).

⁹²² Abraham G 'Africa's Evolving Continental Court Structures: At the Crossroads?' available at www.saiia.org.za/occasional-papers/669-africas-evolving-continental-court-structures-at-the-crossroads (accessed 19 June 2017).

⁹²³ Deya D (personal communication, August 26, 2015).

operation or assistance of ... international courts ... and may conclude Agreements for that purpose', and therefore suggests that the ACC could sign a Memorandum of Understanding with the ICC at the earliest opportunity that would set out how the two institutions will work together. It must also be questioned whether complementarity under the Rome Statute extends to regional courts, such as the ACC, or it is intended to only apply to national courts.⁹²⁵ If the latter were true, it would create serious tension between the two institutions, as the ICC could refuse to accept that an individual they wished to try could be tried by the ACC instead.

It would also mean that any state that is a party to the founding treaties of both the AU and the ICC could find itself in a position where it risks breaching obligations under one treaty by complying with the other treaty. However, it seems likely that in the spirit of 'positive' complementarity the ICC would allow, even encourage, an added layer of regional courts, even if this required the Assembly of state parties to the Rome Statute to amend the wording of the Rome Statute accordingly. This would of course be subject to the condition that the purpose of the said regional court was not simply to shield certain individuals from prosecution an accusation that the ACC may face due to the addition of the immunity provision in the Malabo Protocol. Cooperation would benefit both institutions greatly. It would allow the caseload to be shared, with the ICC focusing on the highest-level perpetrators of core international crimes, while the ACC concentrated on perpetrators of crimes not under the jurisdiction of the ICC, or mid-level perpetrators of the core crimes. A good working relationship with the ACC could also be an opportunity for the ICC to regain its legitimacy in the African continent and re-establish the strong relationship it once had with the AU. More importantly, it is essential that the ACC does not hinder the work of the ICC and in so doing prioritize political grandstanding over securing justice for victims. If this were to happen, the court would instantly lose its credibility among both the international community and a significant portion of Africans.

In his conclusion, Du Plessis referred to such silence of the Malabo Protocol as '*negative complementarity*' which is 'an attempt to secure a regional exceptionalism in the face of the ICC's currently directed investigations on the continent.'⁹²⁶ The overlapping jurisdiction on the common crimes stipulated under both Statutes may not include the crime of genocide in which the Genocide Convention gives power to Regional Criminal Tribunal like the ACC.⁹²⁷ Both Statutes of ICC and

⁹²⁴ Malabo Protocol Article 46L.

⁹²⁵ Murungu C 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) *JICL* 9 1067.

⁹²⁶ Du Plessis M 'A case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes' *EJIL* 2 45 available at www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/ (accessed on 5 January 2018).

⁹²⁷ Article VI of the Genocide Convention.

ACC are treaties and thus, hierarchically, are in equal footings.⁹²⁸ With this silence in both Statutes, it is difficult to identify the potential strength the ACC might have over the ICC pending cases and future investigations in which member states of both Statutes are involved. The obligation of ICC Member States is absolute.⁹²⁹ Therefore, while member states of ICC are also signatories of the ACJHPR Statute, the member states will bear conflicting obligations and may find it difficult to contribute financially to both criminal tribunals.⁹³⁰ Concerning their right of referral, African States who are members of both Statutes will be caught in forum shopping, and be equipoised on which criminal tribunal to refer situations to. The stipulation of the Vienna Convention on successive treaties indicates that, there applicability towards member states of both treaties will be 'the earlier treaty [Rome Statute] applies only to the extent that its provisions are compatible with those of the later treaty [ACJHPR Statute].' 185 However, since African states are not the only members of the ICC, there are other members who are not from Africa, this provision could not solve the overlapping jurisdiction once the Statute of ACJHPR came in to force. Generally, the fact that the overlapping jurisdiction between the ICC and the Criminal Chamber of ACJHPR was left unaddressed under both Statutes has significant consequences on the development of international criminal justice. Rau noted that this overlapping jurisdiction will cause 'uncertainty for victims, defendants, and Prosecutors of international crimes [for instance risk of double jeopardy or *ne bis in idem*] or result in forum-shopping by the accused.'⁹³¹ Moreover, Rau observed that there would be a risk that both Courts will "compromise [their] legitimacy...by risking light sentences, weak enforcement, un-warranted acquittals, or politicized benches."⁹³²

In a 'Draft Decision on Africa's Relationship with the ICC' emanating from the Extraordinary AU Session of 12 October 2013, it was stated that the AU: 'proposes that African states parties to the Rome Statute introduce amendments to the Rome Statute to recognize African regional judicial mechanisms dealing with international crimes in accordance with the principles of complementarity.'⁹³³ However, this language was changed in the final resolution of that AU session, which decided that 'African states parties propose relevant amendments to the Rome

⁹²⁸ Article 38 of the Statute of ICJ, *Statute of International Court of Justice*, USA, San Francisco, (1945).

⁹²⁹ Even in case of withdrawal, the Rome Statute, insist on "...withdrawal shall not affect any cooperation with the Court in connection with Criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective". See Article 127 para 2 of the Rome Statute.

⁹³⁰ www.au.int/en/financingau (accessed on 17 July 2017).

⁹³¹ Sharon A & Schabas W *Article 17: Issues of Admissibility, in Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article By Article*, Triffterer O, 2nd edition (2008) 605-613, Stated in Rau K; *Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights* *Minnesota Law Review* (2012) 52.

⁹³² Sharon A & Schabas W , *Article 17: Issues of Admissibility, in Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article By Article*, Triffterer O, 2nd edition (2008) 605 - 613, Stated in Rau K; 'Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights' *Minnesota Law Review* (2012) 37.

⁹³³ Draft Decision on Africa's Relationship with the International Criminal Court (ICC), 12 October 2013, para. 9(viii).

Statute, in accordance with Article 121 of the Statute'.⁹³⁴ To date, the only country that has acted on this AU decision is Kenya, which proposed an amendment to Preambular Paragraph 10 of the Rome Statute on 7 November 2013, to read: 'Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions.'⁹³⁵ At the time of writing, this amendment had yet to be formally considered outside of the Assembly's working group on amendments. However, certain scholars have suggested 'that this would in principle be workable if [the Malabo Protocol] creating the ACC also recognized, just as states parties do, that while the ICC will defer to genuine national (or regional) proceedings, this is contingent on the ACC's acceptance of the binding nature of ICC complementarity judgments on forum allocation.'⁹³⁶

In terms of cooperation between the ICC and the ACC, the Rome Statute provides for cooperation between the ICC and 'regional organizations'⁹³⁷ and it is therefore at least in theory possible for the Prosecutor or the ICC to seek information or cooperation from the ACC. Article 46L(3) of the Amended ACJHR Statute also permits the ACJHR to 'seek the co-operation or assistance of regional or international courts, non-states parties or co-operating partners of the AU and may conclude Agreements for that purpose'. Hopefully, the ACC will invoke this provision to establish a working relationship with the ICC. However, the feasibility of establishing such a relationship is likely to be dependent on the broader relationship between the AU and the ICC. At present, the relationship seems to be at its lowest. In 2010, the AU rejected a proposal by the ICC to open a liaison office in Addis Ababa, Ethiopia.⁹³⁸ More importantly, the AU has consistently called on its members not cooperate with the ICC.

5.4 Concurrency jurisdiction of regional economic Communities

According to the Malabo Protocol, the ACC could assume jurisdiction not only after national Courts of states parties had failed to prosecute but also tribunals' of Regional Economic Community are unwilling and unable to investigate and prosecute the specific crime. Abbas referred this stipulation of *sub regional complimentary* as 'not only problematic but also ill advised' and puts three reasons behind his assertion; 1) Overlapping RECs memberships, 2) Individual access to

⁹³⁴ Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1(Oct.2013), at para 10(VI).

⁹³⁵ Report of the Working Group on Amendments, ICC-ASP/13/31, 7 December 2014, at page 17

⁹³⁶ The ICC at a Crossroads: The Challenges of Kenya, Darfur, Libya and Islamic State' available at www.chathamhouse.org/sites/files. (accessed on 12 December 2017).

⁹³⁷ Rome Statute Articles 54(3)(c) and 87(6).

⁹³⁸ Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.296 (XV), para. 8.

tribunals of RECs and 3) Jurisdictions of international Criminal under RECs tribunals.⁹³⁹ An AU member state could be a member of more than one RECs at a time.⁹⁴⁰ Therefore, in case where a national of a state which has membership in more than one RECs for example Tanzania a member of SADC and EAC is suspected of a crime, it is difficult to select the RECs for the purpose of complementarity. Furthermore, while individuals have access to national courts, most tribunals of RECs have no access to or only admit individual complaints upon Member states declaration to that effect The other setback is the fact most RECS (such as SADC) do not allow direct access for individual complaints and 2) That even if they did, most, if not all, do not have criminal jurisdiction?.⁹⁴¹

5.4.1 Omission of the requirement for 'genuineness' in failure to prosecute

Unlike the Rome Statute, the complementarity provision of the Malabo Protocol failed to incorporate the 'genuine' requirement for the inability and unwillingness of either national or RECs tribunals. Such failure, according to critical observation of Abass has implication on the strangeness of evidential standard and gives member states an opportunity to withdraw their responsibility to prosecute in which the ACC will be left with a lot of case backlogs. Abass wrote;

[t]he word 'genuine' serves to prevent a trivialization of that criterion by states. However, the formula adopted by the draft Protocol dispenses with 'genuineness'. The non-qualification of 'inability to prosecute' dangerously lowers the evidentiary standard of 'inability' and may seriously undermine that criterion. It implies that African States will easily avoid prosecuting their nationals and offload such cases on to the ACC, thereby unduly burdening the ACC and making it a Court of first rather than last resort'.⁹⁴²

5.5 Legal Obligation of the AU and its member states to investigate, prosecute and punish perpetrators of international crimes

The AU in its institutional capacity and its member states in their individual capacity have duty to investigate and prosecute perpetrators of international crimes. The duty emanates from different sources, namely; constitutive instruments of international organizations, multilateral conventions, customary international law, national and international judicial decisions and that of writings of respected scholars.

⁹³⁹ Abass A 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) *European Journal of International Law* 939.

⁹⁴⁰ Of all African States 25 of them belong to two RECs, 17 are member of three RECs, and 6 countries are members of four regional economic communities.

⁹⁴¹ Abass A 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) *European Journal of International Law* 945.

⁹⁴² Abass A 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) *European Journal of International Law* 945.

5.5.1 Obligations under the AU Constitutive Act

The objectives of the AU are promoting peace,⁹⁴³ security, stability and promoting protecting human and people's rights.⁹⁴⁴ As of principle, the organization is empowered 'to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.' If the member states intend to empower AU to intervene in occasions of these heinous crimes, there is no way that the Constitutive Act intends for prosecuting perpetrators of such crimes. Abbas has indicated that 'such [right to intervention] proscription of the foregoing international crimes by the AU Act necessarily implies the obligation to take measures to redress violations.'⁹⁴⁵ The power and obligation of AU to establish regional criminal tribunal could be inferred from article 4(h) of AU Constitutive Act and other regional commitments on international crimes. Thus, the AU Assembly with its power granted under article 9 paragraph 2 of the Constitutive Act, should delegate its power to the ACC.

5.5.2 Obligations under multilateral treaties

In addition to the AU Constitutive Act, other substantive multilateral treaties in which AU member states are parties contain obligations to investigate, prosecute and punish perpetrators of gross human rights violations. These multilateral treaties include the Geneva Conventions with their Additional Protocols, the Convention on the Prevention and Punishment of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Rome Statute and other human rights instruments. African states who are members of the above mentioned treaties are required to abide by those obligations stipulated under these conventions, that the very principle of *pacta sunt servanda* is applicable.⁹⁴⁶

5.5.3 The 1949 Geneva Conventions and Additional Protocols I and II

The Geneva Conventions and their Additional Protocols contain an obligation for member states to investigate, prosecute and punish 'grave breaches',⁹⁴⁷ i.e. war crimes that took place in cases of international armed conflicts. While all African states other than Somalia are parties to the Geneva Conventions, fifty and forty African states had ratified the Additional Protocols I and II

⁹⁴³ *Constitutive Act of the African Union*; Adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government, Lome, Togo (July 11, 2000)

⁹⁴⁴ Article 2 paragraph f of AU Constitutive Act.

⁹⁴⁵ Article 4 paragraph h of AU Constitutive Act.

⁹⁴⁶ Article 26 of the Vienna Convention on the Law of Treaties.

⁹⁴⁷ *Grave Breaches* are stipulated under art 50 Geneva Convention I, art 51 Geneva Convention II, article 130 Geneva Convention III, art 147 Geneva Convention IV and article 4 Protocol I Additional. These are willful killing; torture or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury to body or health; extensive destruction of property not justified by military necessity; willfully depriving a civilian of the rights of a fair and regular trial; and the unlawful confinement of a civilian.

respectively.⁹⁴⁸ The obligations of state parties to the Geneva Conventions includes ‘to search for, prosecute, and punish perpetrators of these ‘grave breaches’ unless they opt to hand over such persons for prosecution by another state party.’⁹⁴⁹

5.5.4 The 1952 Convention on Crimes of Genocide

The 1952 Convention on Crimes of Genocide is another multilateral treaty which imposes obligation on member states to investigate, prosecute and punish perpetrators of one of the conventional international crime namely genocide.⁹⁵⁰ The Genocide Convention was designed to prevent the occurrence of genocide by punishing those who perpetrate the crime. The Convention clearly stipulates that, despite individual's official capacity, one should be responsible and punished for committing the crime of genocide.⁹⁵¹ Accordingly, state parties are under obligation to investigate, prosecute and punish those who perpetrate genocide as defined under the Convention.⁹⁵² In 1951, the ICJ, giving its advisory opinion that obligations of the Genocide Convention, declares that ‘[the obligations]...are recognized by civilized nations as binding on states, even without any Conventional obligation’.⁹⁵³ Therefore, African states, even without being a party to the Genocide Convention, are obliged to prosecute perpetrators of genocide.

5.5.5 Obligation under Customary International Law

Pursuant to article 38 of the ICJ Statute, customary international law, next to treaties, is the second authoritative source of international law. An act to be considered as an international customary law should fulfill two requirements; *state practice*, that a certain act is conducted by the international community for a long period of time and *psychological elements* or *opinio juris*, that a certain act is practiced by states with belief that it is legally obligatory.⁹⁵⁴ The international communities in general and individual states in particular have investigated, prosecuted and punished grave human rights violations. After WWII, the international community agreed to protect the world from the most heinous crimes of human kind, in which one of the means to do this is to prosecute those

⁹⁴⁸ available at www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp (accessed on 20 January 2018).

⁹⁴⁹ Obura K ‘Duty to Prosecute International Crimes Under International Law’ *Pretoria University Law Press* (2011) 16.

⁹⁵⁰ Genocide is defined under article 2 of the Genocide Convention as, ‘any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.’

⁹⁵¹ Article 4 of Genocide Convention.

⁹⁵² Article 5 of Genocide Convention states, ‘[t]he Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of Genocide or of any of the other acts enumerated in article III’.

⁹⁵³ Obura K ‘Duty to Prosecute International Crimes Under International Law’ *Pretoria University Law Press* (2011) 17.

⁹⁵⁴ Shaw N *International Law 6th edition* (2008) 76-93.

individuals who are responsible of perpetrating the most heinous crimes. Obura has indicated, the fact that an *ad hoc* and hybrid tribunals to prosecute international crimes are previously established,⁹⁵⁵ that various international documents incorporate the duty to prosecute,⁹⁵⁶ that number of activities of UN and other intergovernmental institutions promote for this effect are evidences to states' duty to investigate, prosecute and punish international crimes are an emergent principle customary law.⁹⁵⁷

5.6 Implications arising from the function of the African Criminal Court

5.6.1 Implications for member states to the Rome statute

The establishment of the ACC with criminal jurisdiction may cause difficulties for states who are also party to the Rome Statute. Out of the 54 member states comprising the AU, 32 are also state parties to the ICC. Therefore, the expansion of the jurisdiction of ACJHR to cover international crimes will likely have a number of consequences on those AU member states which would have simultaneous obligations towards the ACC and the ICC. It is noteworthy that the Malabo Protocol contains no provisions detailing the ACC's relationship with the ICC, or at least how member states must deal with competing obligations which may arise in relation to the ACC. The Rome Statute does have certain provisions, regarding competing obligations, as they relate to cooperation with the ICC, contained in Articles 90 and 98. However, Article 90, which deals with competing requests for the surrender of a person from another state, does not provide for how a state party should deal with a competing request for surrender from another international court. Article 97 of the Rome Statute also provides for a consultation procedure which a state party must undertake if it identifies problems which may impede the execution of a cooperation request. Both the ICC and the ACC are creations of treaties and as such, neither has *prima facie* primacy over the other. However, it is clear that with the creation of the International Criminal Law Section within the ACJHR, those states which are party to both treaties will encounter the issues of overlapping jurisdictions and competing

⁹⁵⁵ The most notable examples are; the Special Court for Sierra Leone, established through an agreement made between UN and the Sierra Leone government to try atrocities committed during the 11 years of civil war (S.C. Res. 1315, U.N. DOC. S/RES/1315 (August 14, 2000)) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), established through an agreement entered between the UN and Cambodia to try persons responsible for crimes committed during the Khmer Rouge regime from 1975 to 1979 (UN-Cambodia, for the Establishment of the Extraordinary Chamber in the Courts of Cambodia, attached to GA Res. 57/228B of May 13, 2003).

⁹⁵⁶ *The Declaration on the Protection of All Persons from Enforced Disappearances*, GA Res 47/133 UN Doc A/47/49 (1992); *Principle 18 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, (GA Res 60/147), (2005); *Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* Security Council Res 1674 (2006); *Resolution on War Criminals*, GA Res 2840(XXVI) UN Doc A/8429 (1971); *Principles of International Cooperation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, GA Res 3074 (XXVIII) UN Doc A/9030 (1973).

⁹⁵⁷ Obura K *Duty to Prosecute International Crimes Under International Law* Pretoria University Law Press (2011) 25.

obligations owed to both the ACC and the ICC. In this scenario, the lack of discussion in the more recent Malabo Protocol on competing obligations is striking.

5.6.2 Overlapping jurisdiction and competing obligations

It is clear that, in relation to jurisdiction and particularly the crimes which they will prosecute, the ICC and the ACC overlap on a number of crimes. This may lead to competing and overlapping obligations for member states, for example, in the event that the ACC and the ICC indict the same person and order his or her surrender. This may lead to state parties to both the Rome Statute and the Malabo Protocol having to choose which obligation they would fulfill and which they would breach. The Malabo Protocol is silent on which obligation will take priority and states parties to both instruments may find themselves in difficult legal situations if both courts hold that they have jurisdiction over a particular case. The issue of competing obligations would likely arise in relation to competing indictments, but may also arise conceivably in relation to a number of other areas including in relation to competing cooperation requests. This may, for example, be in cases where both the ICC and ACC request specific assistance or documents.

5.6.3 Domestic implementing legislation

Under the Rome Statute system, and due to the principle of complementarity, state parties to the ICC are under a duty to enact domestic implementing legislation. This legislation should domesticate the Rome Statute crimes as well as provide for procedures of cooperating with the ICC.⁹⁵⁸ The Malabo Protocol also provides that it is complementary to national jurisdictions,⁹⁵⁹ and as such, those states party to the Malabo Protocol will also have to ensure that their domestic legislation is in line with the Malabo Protocol. It follows that the process of amending, updating or indeed adding further provisions into domestic legislation to incorporate the Malabo Protocol legislative requirements will need to be considered by states party to both the ICC and the ACC. This may present a number of difficulties for those ICC states parties which have or are in the process of domesticating the Rome Statute. For example, as detailed earlier, the Malabo Protocol contains some variations in the definitions of Rome Statute crimes as well as a number of crimes which are not included in the Rome Statute. This may require a substantial amount of drafting and legislative work within current Rome Statute member states to bring domestic laws in line with the statutes of both the ICC and the ACC. This may even prove impossible if states parties are unable to domestically legislate definitional differences found in the Malabo protocol and Rome Statute systems. For example, the Kenyan International Crimes Act 2008 incorporates directly in its

⁹⁵⁸ Rome Statute, Article 88.

⁹⁵⁹ Malabo Protocol, Article 46H.

domestic implementing legislation the definitions of genocide, crimes against humanity and war crimes found in the Rome Statute.⁹⁶⁰

Furthermore, states parties to the ICC are required to enact domestic legislation ensuring cooperation requests, including for arrest and surrender, are properly executed by state parties. A number of African states parties' domestic legislation provides for specific ICC related cooperation, this will also have to be adapted in order to accommodate also cooperation requests of the ACC. On a more practical level, member states of both the Rome Statute and the ACC will have to contribute financially to both the ICC and the ACC, which may prove a heavy financial burden.

5.6.4 Implications for the AU

The AU Assembly will be responsible for a number of activities related to the operationalization and functioning of the ACC, including: appointment of the Judges, the Prosecutor, and Deputy Prosecutors of the ACC; determining when all the judges of the ACC will perform their functions on a full-time basis;⁹⁶¹ determining the salaries and conditions of service of the judges, and members and staff of the OTP and the Registry;⁹⁶² inserting, if necessary, additional crimes into the jurisdiction of the ACC;⁹⁶³ establishing the Trust Fund;⁹⁶⁴ receiving the annual activity reports of the Court;⁹⁶⁵ and monitoring state compliance with the judgments of the ACC.⁹⁶⁶ For the AU, the most obvious implication of the decision to expand the jurisdiction of the ACJHR relates to its financial ability to effectively operationalize and sustain the ACC. As highlighted above, on two separate occasions during the process of drafting the Malabo Protocol, the AU Commission was requested to prepare a study on the financial and structural implications of expanding the jurisdiction of the ACC. It is therefore apparent that even the AU itself is concerned about the financial implications of operationalizing the ACC.⁹⁶⁷ Indeed, a key reason for the earlier decision to merge the African Human Rights Court and the African Court of Justice was the realization by the AU that it would not have the requisite resources to service two separate courts on the continent. More recently, in January 2015 at its 26th Ordinary Session, the AU Executive Council while

⁹⁶⁰ Kenya International Crimes Act 2008 available at [https://www.issafrica.org/anicj/uploads/Kenya International Crimes Act 2008](https://www.issafrica.org/anicj/uploads/Kenya_International_Crimes_Act_2008). (accessed on 10 January 2018).

⁹⁶¹ Amended ACJHR Statute, Article 8(5).

⁹⁶² Amended ACJHR Statute, Article 22A(10) and 22B(10).

⁹⁶³ Amended ACJHR Statute, Article 28A(2).

⁹⁶⁴ Amended ACJHR Statute, Article 46M.

⁹⁶⁵ Amended ACJHR Statute, Article 57.

⁹⁶⁶ Amended ACJHR Statute, Article 46(4) and (5).

⁹⁶⁷ Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Assembly/AU/Dec.427(XIX), para 2; Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, EX.CL/Dec.766 (XXII) para 2.

emphasizing the need to ‘expeditiously operationalize’ the ACC also underscored the ‘need to ensure predictable and sustainable funding.’⁹⁶⁸

The AU Executive also decided to establish a “Special Fund” and to convene a resource mobilization conference to raise funds that will enable the operations of the ACJHR to be initiated and sustained.⁹⁶⁹ These twin efforts may possibly raise the resources to start off the operations of the Court, but it is doubtful whether they are sustainable sources of funding. The ideal source of funding for the Court should be the state parties themselves and/or the AU. Yet, the AU has traditionally struggled to adequately finance the operations of its own institutions, including human rights treaty bodies. The African Commission and the African Court have continually raised concerns about the meager resources allocated to them by the AU. Since its establishment, the African Commission has suffered from a perennial lack of resources. For about two decades, the budget of the African Commission was subsumed under that of the Political Affairs Department of the AU Commission. In July 2007, the Executive Council directed the African Commission to begin presenting and defending its own budget before the Permanent Representatives’ Committee (PRC).⁹⁷⁰ Thus, from 2008 when the African Commission began to do this, its budgetary allocation from the AU has improved. In 2008, the African Commission received USD 6 million, marking a significant boost from the USD 1.2 million it had received in 2007.⁹⁷¹ The Commission’s budget had increased to USD 7.9 million by 2011,⁹⁷² but this dropped to USD 6.3 million in 2014.⁹⁷³ The USD 6.3 million allocated to the African Commission in 2014 did not include funds for program activities.⁹⁷⁴ Similarly, the AU did not allocate any funds for program activities in its 2015 budget allocation to the Commission.⁹⁷⁵ This means that for 2014 and 2015, the African Commission relied fully on donor funding to execute its program activities.¹⁴⁰ As observed by the Commission in its 37th Activity Report ‘such a situation cannot be right.’⁹⁷⁶ Although the African Human Rights Court is better resourced than the African Commission, the funding it ordinarily receives matches neither the task it is entrusted nor its resource requirements. The 2014 budget of the African Human Rights Court was just under USD 9 million, which is comprised of USD 6.6 million from state

⁹⁶⁸ Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC), EX.CL/Dec.868(XXVI), para xii.

⁹⁶⁹ Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC), EX.CL/Dec.868(XXVI), para xiv(b).

⁹⁷⁰ Decision on the 21st Activity Report of the African Commission on Human and Peoples’ Rights, EX-CL/Dec.344 (X), para. 2(iv).

⁹⁷¹ 23rd Activity Report of the African Commission on Human and Peoples’ Rights, para. 113; 24th Activity Report of the African Commission on Human and Peoples’ Rights, para. 246.

⁹⁷² Combined 32nd and 33rd Activity Report of the African Commission on Human and Peoples’ Rights, EX.CL/782(XXII) Rev. 2, para.

⁹⁷³ 37th Activity Report of the African Commission on Human and Peoples’ Rights, para. 48.

⁹⁷⁴ 37th Activity Report of the African Commission on Human and Peoples’ Rights, para. 48.

⁹⁷⁵ 37th Activity Report of the African Commission on Human and Peoples’ Rights, para. 49.

⁹⁷⁶ 37th Activity Report of the African Commission on Human and Peoples’ Rights, para. 49.

contributions and USD 2.2 million from partner funds.⁹⁷⁷ The funding it receives pales in comparison to the funding allocated to other regional human rights court, especially the European Court of Human Rights (ECHR). In 2014, the budget of the ECHR stood at 67,650,400 Euros.⁹⁷⁸ In the same year, the ECHR received additional voluntary funding of more than 2,000,000 Euros from member states.⁹⁷⁹ In 2003, the AU Ministerial Conference on Human Rights in Africa acknowledged that the continent's human rights institutions are not adequately funded or resourced.⁹⁸⁰ The Conference called upon the AU policy organs to establish a voluntary human rights fund which would be used to provide additional finances to the human rights institutions.⁹⁸¹

This recommendations was not acted upon until November 2006 when, on the prompting of the African Commission,⁹⁸² the Executive Council adopted a decision in which it requested the AU Commission to 'put in place the necessary modalities and structures for the effective operationalization of the Voluntary Contributions Fund for African Human Rights institutions.'⁹⁸³ Amnesty International is not aware of any actions taken to implement this decision. The chronic underfunding of the regional human rights institutions reflects a wider problem within the AU. The AU is heavily dependent on donors to finance the bulk of its budget. It is currently able to finance under 30 percent of its annual operational and programmes budget. For 2015, the AU had an estimated total budget of USD 522 million, with 25.1 percent of this assessed from member states and 71.7 percent secured from and/or solicited from partners.⁹⁸⁴ The AU Assembly has in the past acknowledged the 'dire financial situation of the AU' and expressed concern over 'the growing reliance on partner funds to finance the continental integration and development agenda'.⁹⁸⁵ This situation is as a result of a number of factors. AU member states are often late in the submission of their assessed contributions. It is estimated that in 2009 and 2010 member states arrears amounted

⁹⁷⁷ Annual report of the African Court on Human and Peoples' Rights, 2013.

⁹⁷⁸ European Court of Human Rights, Annual Report 2014, p. 14, available at www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf (accessed on 9 January 2018).

⁹⁷⁹ European Court of Human Rights, Annual Report 2014, p. 14, available at www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf (accessed on 9 January 2018).

⁹⁸⁰ Declaration of the 1st African Union (AU) Ministerial Conference on Human Rights in Africa, 8 May 2003, (Kigali Declaration), para. 23.

⁹⁸¹ Decision on the 21st Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.344 (X), para. 2(vi).

⁹⁸² Resolution on the Establishment of a Voluntary Contribution Fund for the African Human Rights System, adopted at the 40th Ordinary Session of the African Commission on Human and Peoples' Rights, November 2006.

⁹⁸³ Decision on the 21st Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.344 (X), para. 2(vi).

⁹⁸⁴ Decision on the Budget of the African Union for the 2015 Financial Year, EX-CL/Dec.813 (XXV), para. 2(i).

⁹⁸⁵ Decision on Alternative Sources of Financing the African Union, Assembly/AU/Dec.364 (XVII), paras. 3 and 4.

to USD 40 and USD 43 million respectively.⁹⁸⁶ According to the High Level Panel constituted to explore alternative sources of financing the AU:

Another problem is the continued dependence of the Union on five countries (Algeria, Egypt, Libya, Nigeria, and South Africa) for financing the bulk of its activities. The five countries each account for 13.272% of the Union Budget. That is, around 66.36% of the total Union budget comes from only five countries. The implication of the heavy dependence on a few countries is that failure to honour their commitments by any one of the countries could mean a serious financial trouble for the Union.⁹⁸⁷

In spite of its dire financial situation, a fact which it is acutely aware of, the AU continues to establish more institutions, in effect adding onto itself extra financial burden. In addition to the ACJHR, there are plans to establish an International Constitutional Court which will serve as an ‘advisory and jurisdictional body responsible for ensuring the respect and promotion of democratic principles, human rights and the rule of law.’⁹⁸⁸ Plans are also underway to establish several other institutions in the coming years, including the Pan-African Intellectual Property Organization (PAIPO),⁹⁸⁹ and the African Observatory on Science,

Technology and Innovation.⁹⁹⁰ From the discussion above, it is apparent that without the assistance of donors, the AU will not be able to adequately finance the operations of the ACJHR. Yet, some donors who have traditionally financed the AU may be reluctant to finance the Court given the inclusion of the immunity clause in the Malabo Protocol and other concerns they may have. Indeed, the European Union, has been very clear on this issue. At the November 2015 African Judicial Dialogue, the EU representative stated that:⁹⁹¹

Regarding the matter of an expanded African Court, I can reconfirm that the EU is not in a position to support the Malabo Protocol creating the additional Criminal Chamber as it includes the provision of immunity for sitting heads of state and senior state officials and lacks complementary with the ICC.

⁹⁸⁶ Progress Report for the High Level Panel on Alternative Sources of Financing the African Union, Assembly/AU/18 (XIX).

⁹⁸⁷ Progress Report of the High Level Panel on Alternative Sources of Financing the African Union, Assembly/AU/18 (XIX).

⁹⁸⁸ Decision on the Establishment of an “International Constitutional Court”, Assembly/AU/Dec.458 (XX).

⁹⁸⁹ Decision on the Creation of the Pan-African Intellectual Property Organization (PAIPO), Assembly/AU/Dec.453 (XX).

⁹⁹⁰ Decision on the Creation of the African Observatory on Science, Technology and Innovation in the Republic of Equatorial Guinea, Assembly/AU/Dec.452(XX).

⁹⁹¹ EU Statement at the African Judicial Dialogue, 6 November 2015, Arusha, Tanzania’ available at www.eas.uropa.eu/delegations/african_union/documents/press_corner/eu-statement-judicial-dialogue-06-11-2015 (accessed on 13 January 2016).

It is difficult at this hopeful point to accurately predict the future budget and expenditure of the ACC. However, given the broad mandate of the ACC there is no doubt that the operationalization and functioning of the ACC will require vast resources. The functioning of the ACC will particularly demand significant financial and human resources. Unlike the General Affairs Section and the Human Rights Section, the ACC has different and additional resource requirements. As already envisaged in the Malabo Protocol, the ACC will be supported by a number of other organs and units, including the OTP, Defence Office, Victims and Witnesses Unit, and the Detention Management Unit. These organs and units will not only require staffing, but more importantly, they will also require dedicated facilities. For example, the Court is expected to maintain a detention facility and a safe house, and to bear the associated costs of keeping perpetrators in the detention facility and witnesses in the safe house. In addition, the ACC will have to be partly responsible for litigation costs before it, in keeping with the practice of international criminal courts. The 2012 AU Commission report on the financial and structural implications of extending the jurisdiction of the ACJHR to cover international crimes estimated that at the outset the OTP will require four legal officers and two investigators.⁹⁹² As stated earlier, the AU Commission also projected that the entire Court would require a total of 211 staff members, including the judges, prosecutors, registrars, and defence counsels.⁹⁹³ If the staffing levels of the ICC and other hybrid or ad hoc criminal tribunals are considered, it becomes apparent that the AU Commission grossly underestimated the funding and staffing needs of the international criminal division.

The projected staffing level of the ICC at the end of 2015 comprises 1309 total staff, including 786 established posts and 317 general temporary assistance staff.⁹⁹⁴ The proposed staffing level of the ICC OTP for 2016 stands at 218 permanent staff.⁹⁹⁵ In terms of the ICC Office of Public Counsel for the Defence (not a full organ of the ICC),⁹⁹⁶ the proposed staffing level for 2016 was 5 staff and a budget of 660,000 euros.⁹⁹⁷ The ICC's Victims and Witnesses Section has a proposed staffing

⁹⁹² Sirleaf M 'Regionalism, Regime Complexes and the Crisis in International Criminal Justice'(2016) 54 Columbia Journal of Transnational Law 699.

⁹⁹³ Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10, available at https://www.iccpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG. (accessed on 15 April 2018).

⁹⁹⁴ Report of the Committee on Budget and Finance on the work of its twenty fourth session, ICC-ASP/14/5 available at www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-5-ENG.pdf (accessed 11 December 2018).

⁹⁹⁵ Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10 available at https://www.iccpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf (accessed 11 December 2018).

⁹⁹⁶ The Rome Statute does not provide for a defence 'organ'. However, pursuant to Regulation 77 of the ICC Regulations of the Court, the Registrar has established an 'Office of Public Counsel for Defence' which 'represents and protects the rights of the defence'

amongst a number of functions. See Regulation 77(4) ICC Regulations of the Court

⁹⁹⁷ Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10 available at https://www.iccpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf (accessed 7 January 2018).

level in 2016 of 63 established posts and a proposed budget of 11.59 million euros.⁹⁹⁸ In 2016, the proposed legal aid budget for the Principal Defender's Office stands at 4.8 million euros.⁹⁹⁹ At the Special Court for Sierra Leone (SCSL), at its height, the Principal Defender's Office had a staff of 9, with a budget in 2007 of 4.8 million euros.¹⁰⁰⁰ In a nutshell, the experience of the ICC and international *ad hoc* and hybrid criminal tribunals shows that hundreds of millions of dollars are required on an annual basis for the effective and smooth running of an international criminal court. The SCSL spent on average around USD 30 million per year while the ICTR reached an overall spend of nearly USD 1 billion. Since 2002 until 2016, the ICC has received approximately 1.33 billion euros in budget appropriations.¹⁰⁰¹ The ICC's budget for 2016 amounts to 139 million euros, with this figure (in line with the current trend) likely to increase year on year as the Court looks to reach its basic and subsequently optimal capacity.

It is estimated that it will cost approximately 8 million Euros to try Hissène Habré in the Extraordinary African Chambers in Senegal. The 2012 AU Commission report on the financial and structural implications of extending the jurisdiction of the ACJHR to cover international crimes observed that the cost of trying Hissène Habré would be the most appropriate comparative costing' for estimating the financial needs of the ACJHR.¹⁰⁰² The report further noted that 'some of the envisaged trials that would not involve former heads of state could cost significantly cheaper'.¹⁰⁰³ It will be important also that the ACJHR's independence and ability to fulfill its mandate is not compromised through its budget appropriation and the process through which its budget is allocated.

This will require a transparent budgeting process which will enable the principals of the ACJHR to propose a budget that they require to meet the demands placed upon the Court. Looking at the ICC experience, the budgeting process is an annual one, with the principals of the Court requesting the

⁹⁹⁸ Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10, available at https://www.iccpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf (accessed 15 January 2018).

⁹⁹⁹ Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10 available at https://www.iccpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf (accessed 10 January 2018).

¹⁰⁰⁰ 5th Annual Report of the Special Court for Sierra Leone, available at <http://www.rscsl.org/Documents/AnRpt5.pdf> (accessed 19 January 2018).

¹⁰⁰¹ Based on budget appropriations provided in annual budget resolutions adopted by the ICC Assembly of States Parties, which provide as follows: 2002-2003: €30 893 500, 2004: € 53 071 846, 2005: € 66 784 200, 2006: € 80 417 200, 2007:€ 88 871 800, 2008: € 90 382 100, 2009: €101 229 900, 2010: €103 623 300, 2011: €103 607 900, 2012: €108 800 000 , 2013: €115 120 300, 2014: €121 656 200, 2015:€ 130 665 600, 2016: €139 590 600. Total: €1.334.714.446

¹⁰⁰² Sirleaf M 'Regionalism, Regime Complexes and the Crisis in International Criminal Justice'(2016) 54 Columbia Journal of Transnational Law 699.

¹⁰⁰² Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10, available at https://www.iccpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG. (accessed on 15 April 2018).

¹⁰⁰³ Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10, available at https://www.iccpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG. (accessed on 15 April 2018).

budget they require around six months before states parties decide to adopt the Court's budget for the next year. This budget proposal includes, where possible known budgetary assumptions for the following year. Following the proposal of a budget, an independent expert body (the Committee on Budget and Finance) made up of 12 budgetary experts who are elected by states parties, reviews the budget requested by the Court and makes a report with recommendations to the Assembly of states parties thereon. States parties then decide on the budgetary appropriation at their Annual Assembly session. Such a reasonably transparent budgetary process does ensure a level of independence in the Court's operations, although it would be preferable for a long term budget process to be developed to allow the ACC to reach its optimum capacity and prevent political interference during annual budget negotiations. The other crucial budgeting instrument at the ICC is the 'contingency fund' which the Court can access in the event of any unforeseen expenditures, such as those related to new or unforeseen investigations. This fund is meant to ensure that the Court can meet its demand and is also important to ensure that the Court has a measure of independence in reacting to new developments. It will be crucial that the ACJHR adopts a transparent budget process and contingency mechanism to meet unforeseen demands and unforeseen developments it will encounter.

5.6.5 Implications for the African Human Rights Court

The Malabo Protocol and the decision to expand the jurisdiction of the ACJHR to cover international crimes will definitely impact on the operations and future of the African Human Rights Court. Firstly, and as mentioned earlier, the Amended ACJHR Statute reduces the number of judges who will be responsible for human rights issues at the ACJHR. The Human Rights Court has 11 judges at present. The Human Rights Section of the ACJHR will have only five judges with specific expertise in human rights. This will significantly and adversely impact the capacity of the Human Rights Section to expeditiously adjudicate human rights cases.

Secondly, Although the Preamble to the Malabo Protocol notes 'the steady growth of the African Court on Human and Peoples' Rights and the contribution it has made in protecting human and peoples' rights',¹⁰⁰⁴ the Malabo Protocol does not provide for the transfer of judges and the registrar of the African Human Rights Court to the ACJHR. The Malabo Protocol provides that the terms and appointment of the current judges and registrar of the African Human Rights Court will terminate on the coming into force of the Malabo Protocol, although they will remain in office until the new judges are sworn in.¹⁰⁰⁵ The Malabo Protocol also provides that the staff of the African

¹⁰⁰⁴ Malabo Protocol, Preamble, para. 6.

¹⁰⁰⁵ Malabo Protocol, Article 4 and 7(1).

Human Rights Court will be absorbed into the ACJHR but only for the remainder of their subsisting contracts.¹⁰⁰⁶

This runs the risk of losing the institutional history, experience and expertise of the judges in the new Court and does not allow for continuity. It will be important to allow for some continuity because the ACC will be required to pick up the cases pending before the African Human Rights Court.¹⁰⁰⁷ Thirdly, the Malabo Protocol may delay, or actually prevent, any new ratification of the African Human Rights Court Statute. A total of 27 African states have not ratified the Malabo Protocol on the Establishment of an African Court on Human and Peoples' Rights.¹⁰⁰⁸ With the expansion of the jurisdiction of the ACJHR to cover international crimes, those states which would have considered ratifying the African Human Rights Court Statute may reconsider their position. During the 2012 Meeting of Ministers of Justice and Attorneys General, state representatives proposed that 'states should be allowed to choose which instrument or section of the Court to belong to',¹⁰⁰⁹ an indication that some states were not willing to be party to a Court with an expanded jurisdiction covering international crimes.

This proposal was not taken on board as the Legal Counsel explained that allowing states to pick which section of the Court to belong to was not advisable and would result in 'many technical and practical difficulties based on the proposed number and deployment of judges within the Court'.¹⁰¹⁰ Thus, in the end, the Malabo Protocol provides states with 'an all-or-nothing option'.¹⁰¹¹ As a commentator observed when the first draft of the Amended ACJHR Protocol and Statute was adopted in 2012: 'When it is faced with an all-or-nothing choice, a state that would be attuned to the protection of human rights or its obligations under the ICC Statute, may decide not to ratify the Amending Court Protocol at all, due to its reticence to accept a court that deals with international criminal justice issues'.¹⁰¹²

¹⁰⁰⁶ Malabo Protocol, Article 7(2).

¹⁰⁰⁷ Malabo Protocol, Article 6.

¹⁰⁰⁸ For the list of countries that have ratified the African Human Rights Court Protocol see www.au.int/en/sites/default/files/treaties/7778-sl-achpr_1.pdf (accessed on 7 January 2018).

¹⁰⁰⁹ Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters, 14 and 15 May 2012, Addis Ababa,

Ethiopia, Min/Legal/Rpt., para. 17(iv).

¹⁰¹⁰ Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters, 14 and 15 May 2012, Addis Ababa,

Ethiopia, Min/Legal/Rpt., para. 18(ii).

¹⁰¹¹ F Viljoen 'AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol', available at <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amendingmerged-african-court-protocol/> (accessed on 7 January 2018).

¹⁰¹² F Viljoen 'AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol', available at <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amendingmerged-african-court-protocol/> (accessed on 7 January 2018).

On a positive note, the Malabo Protocol provides that the seat of the ACJHR would be the seat of the existing African Human Rights Court.¹⁰¹³ This has the advantage of increasing the ability for the African Human Rights Court to leave a legacy in terms of human rights, as documentation will be available to the ACJHR. This is important because the potential exists that the legacy of the African Human Rights Court and any experience it has attained could be lost in the process of transition to a court with a broader mandate.

5.7 Strength of the Malabo Protocol

5.7.1 Office of the Defence

In the history of international and hybrid tribunals for the prosecution of international crimes, only one – the Special Tribunal for Lebanon – had a defence office as an independent organ of the court. The ICC, for example, has an office of public counsel for the defence that is part of the Registry, whereas the office of the prosecutor is an independent organ of the court. It must be noted that one of the greatest weaknesses of international criminal tribunals in general has been that the defence counsels often had poor capacity and little institutional support,¹⁰¹⁴ this left defendants vulnerable to unfair trials. The Malabo Protocol proposes the creation of a defence office as a separate and independent organ of the ACC, this is a massive boost for the court since it will bring the Presidency, Office of the Prosecutor, and Registry Article 2(4). The Malabo Protocol further cites additional provisions in the form of Article 22C, this Article must be fully utilized to entrench the defence office's duty to protect the rights of the accused; require 'adequate facilities [for] defence counsel and persons entitled to legal assistance'; and creates a Principal Defender who will enjoy 'equal status with the Prosecutor in respect of rights of audience and negotiations'.

A provision requiring there to be 'adequate facilities' is significant; it specifically addresses the problem of inadequate funding that has afflicted international criminal tribunals, particularly the ICTR.¹⁰¹⁵ Furthermore, placing the Principal defender on equivalent with the prosecutor is an important innovation of the Malabo Protocol that must help ensure the principle of 'equality of arms' and provide a more effective channel through which concerns about defence can be raised and addressed.

¹⁰¹³ Amended ACJHR Statute, Article 25.

¹⁰¹⁴ Tuinstra J 'Defending the defenders: The role of defence counsel in international criminal trials' (2010) 8 *JICL* 463–486.

¹⁰¹⁵ Kerr K 'Fair trials at international criminal tribunals: Examining the parameters of the international right to counsel' (2005) 36 *GJIL* 1227.

5.7.2 Victims office

It is no secret that most international criminal trials involve very influential individuals, sometimes with access to state machinery thus making witnesses and victims very vulnerable to intimidation, harassment, bribery, and even assassination. Indeed, of all the lessons to be learned from the Kenyan cases before the ICC, the most significant is the need for protection of victims and witnesses. Sufficient protection is not only necessary for the sake of the individuals, but also important for maintaining a strong and credible case. In light of this, it is praiseworthy that the Malabo Protocol creates a Victims and Witnesses Unit within the Registry office. It is essential that this unit must provide, among other things, ‘protective measures and security arrangements, counseling and other appropriate assistance’ Article 22B.¹⁰¹⁶ Furthermore, Article 46M of the Malabo Protocol establishes a Trust Fund ‘for legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families.’¹⁰¹⁷ This is similar to the ICC, which also has a ‘Victims and Witnesses Unit’, as well as a Trust Fund. It is vital that the protection of, and respect for victims and witnesses would be taken seriously not only by the ACC but also by African states themselves. The occurrences that took place at the ICC have taught us that regardless of what protections are created by the Malabo Protocol, if African states undermine this prerogative and are complicit in acts of intimidation, bribery and assassination of witnesses or victims, the ACC would rapidly lose its credibility and ability to build strong cases.

5.7.3 Additional crimes

There are massive benefits from the inclusion of additional crimes in the Malabo Protocol which bring about great optimism about the ACC functioning but at the same time, there are also reasons for concern regarding the additional crimes the ACC is intended to deal with. Firstly, the definitions of each of the new crimes is outside the scope of this thesis, but one definition that needs attention is that of Unconstitutional Change of Government outlined in Article 28E of the Malabo Protocol.¹⁰¹⁸ It is an extremely broad definition that was ruined by the inclusion of an exception for ‘any act of a sovereign people peacefully exercising their inherent right’, but this exception was unfortunately removed during the drafting process.

The definition of the crime of unconstitutional change of Government in Article 28E should be amended to reintroduce a provision that ‘any act of a sovereign people peacefully exercising their inherent right shall not constitute an offence under this article’. This is a necessary limitation for an

¹⁰¹⁶ Malabo Protocol Article 22B.

¹⁰¹⁷ Malabo Protocol Article 46M.

¹⁰¹⁸ Malabo Protocol Article 28E.

otherwise extremely broad definition that criminalizes the democratic right of a people to initiate a peaceful uprising.

In comparison, the definition of terrorism in Article. 28G has an exception for ‘struggle waged by peoples according to the principles of international law for their liberation or self-determination’, which was not removed. As Du Plessis points out:

‘The perverse result of these two provisions, when read together, is that any person peacefully exercising his or her rights, which results in an ‘unconstitutional change of government’ may be guilty of a crime, but a person who commits violent acts – including those that cause ‘death to ... any number of persons’ – and does so with the purpose of causing ‘general insurrection’ in a state, may be excused from criminal liability.’¹⁰¹⁹

Secondly, the addition of so many crimes introduces a level of complexity that will make the judges’ work difficult, at least to begin with. An colossal number of interpretational questions will have to be answered before the definitions will be of sufficient clarity to be applied, which will slow the progress of cases significantly.

Thirdly, even though the Malabo Protocol requires crimes to be ‘of sufficient gravity’ before the court can exercise jurisdiction Article 46H,¹⁰²⁰ there is the potential for the court to be overwhelmed by cases that prevent it from attending to sensitive cases. For example, individual terrorists and pirates could be continually flooding the possibly inadequately staffed ACC so as to divert the court’s attention from, high-level politicians orchestrating major corruption or violent conflict in their countries. This, of course, is not definite scenario but it could be avoided by judges interpreting the threshold of ‘sufficient gravity’ strictly and ensuring the prosecutor appointed has the necessary integrity and independence to pursue sensitive cases.

5.7.4 Corporate criminal liability

Africa has not only suffered at the hands of individuals, but also corporations the human rights violations of mining companies in the Democratic Republic of Congo are but one example. Foreign and multinational companies can be particularly damaging to African economies: a recent study showed that Africa loses billions of USA dollars every year to tax dodging and illicit financial outflows.¹⁰²¹ The Malabo Protocol, in recognition of this, provides that ‘the Court shall have jurisdiction over legal persons, with the exception of states’.¹⁰²² There are a number of challenges

¹⁰¹⁹ Du Plessis M ‘Shambolic, shameful and symbolic: Implications of the African Union’s immunity for African leaders’ (2014) *ISS Paper 7*.

¹⁰²⁰ Malabo Protocol Article 46H.

¹⁰²¹ Health Poverty Action ‘Honest Accounts? The true story of Africa’s billion dollar losses’ (PDF 2014) available at www.francofonie.org/IMG/pdf/honest-accounts_final-version.pdf>(accessed on 15 January 2018).

¹⁰²² Article, 46C Malabo Protocol.

related to corporate liability that the ACC will have to overcome. Firstly, the court will have to be careful to separate instances of individual actions and corporate policy. Secondly, proving the mental element (or *mens rea*) of a crime is much harder to establish with a corporation made up of numerous individuals, each with different motivations and states of mind, than it is for one individual.

Nevertheless, there are serious merits in extending liability to corporations, particularly in the African context. Firstly, many corporations operating on the continent are foreign/multinational and have tended to avoid prosecutions by arguing that an African state has no jurisdiction to try them, irrespective of the harm they have caused.

The Malabo Protocol would nullify this argument with regards to serious crimes. Secondly, many of the crimes in the Malabo Protocol would undoubtedly have significant institutional and corporate elements to them, particularly corruption, trafficking in hazardous waste, illicit exploitation of natural resources and money laundering. Lastly, it would send an important message that corporations are held to the same moral standards as individuals, and are deserving of the same stigma and retribution should they pursue criminal policies.

5.7.5 Proximity to the continent

As well as the positive aspects of the Malabo Protocol, there is a more general advantage to having international crimes tried by an African based court, in that it allows trials to be conducted where possible in, or at least closer to, the region in which the atrocities were committed. This has clear benefits for investigations by the prosecution, who will arguably have easier access to evidence and witnesses. More importantly, however, it gives victims and citizens a greater sense of ‘ownership’ over the trial and would likely facilitate greater interest, participation and reconciliation. This is combined with a sense of empowerment that African institutions are capable of handling trials, rather than relying on international tribunals, and hopefully eliminates the toxic debates around neo-imperialism and bias that have plagued the ICC trials. Indeed because of these advantages that one of the founding principles of the ICC is ‘complementarity’ making the ICC a court of last resort, and should prioritize facilitating and encouraging trials at the national level.¹⁰²³

¹⁰²³ Article 1, Rome Statute.

5.8 Weaknesses of the Malabo Protocol

5.8.1 Immunity

In almost every critique of the Malabo Protocol, there is one controversial provision that remains the focal point and raises the most questions about the efficacy and legitimacy of the ACC. It is Article 46A *bis* of the Malabo Protocol, which states:

‘No charges shall be commenced or continued before the Court against any serving AU head of state or Government, or anybody acting or entitled to act in such a capacity, or other senior state officials based on their functions, during their tenure in office.’

In summary, Article 46A *bis* provides immunity for sitting heads of state and ‘senior state officials’ (an undefined term) of the AU. It should be noted that this immunity is not absolute: it is only for the duration of their tenure in office, after which they could be tried, and it does not prevent them from being investigated or called as a witness. The article was inserted due to a directive by the AU Assembly, on the basis that it is consistent with the AU’s policy on sequencing peace and justice.¹⁰²⁴ In essence, the AU argues that the removal of a sitting head of state is a recipe for destabilizing a state even further and causing chaos at a time when peace negotiations should be prioritized. Libya and Somalia are often cited as examples of a failure to sequence peace and justice, while the trials of former presidents Laurent Gbagbo of Côte d’Ivoire, Hissène Habré of Chad and Charles Taylor of Liberia are cited as good examples of a head of state being removed first and tried once the country had returned to relative peace and stability. However, it is unlikely this was the sole motivation behind the article. The granting of immunity could be seen as African states cementing their position that sitting heads of state should enjoy immunity, even for international crimes a position that has been the centre of many of the AU’s quarrels with the ICC. It is also plausible that leaders would support the addition of the article simply out of self-interest and a desire to avoid being held accountable for their actions, particularly if they see the ACC as a replacement, rather than an ally, of the ICC.

Whatever the motivations, the justifications provided by the AU are weak in the extreme, for several reasons: One of the most significant threats to sustainable peace and security on the continent, and one of the greatest betrayals of the rights of victims, is impunity, particularly amongst the political elite. It is the ability of those in power to act, knowing there will likely be no serious consequences, which so often enables individuals to commit atrocities, leaving helpless victims in their wake. Indeed, the AU Constitutive Act recognizes this under Article 4(o), which

¹⁰²⁴ Abraham G ‘Africa’s Evolving Continental Court Structures: At the Crossroads?’ (2015) SAIIA, available at www.saiia.org.za/occasional-papers/africas-evolving-continental-court-structures-at-the-crossroads (accessed on 11 February 2018).

specifically calls for the ‘rejection of impunity’. It sends a conflicting message that a court is set up to address impunity and hold individuals to account, yet provides immunity for individuals occupying precisely the type of position that would allow them to commit mass, organized crimes. Although perpetrators may still be tried at a later date, this provides a perverse incentive for a head of state or senior state official to cling onto power for as long as they can.¹⁰²⁵ While the African Governance Architecture (AGA) has provisions that are supposed to ensure leaders only stay in power constitutionally, there have undoubtedly been extensions of power by heads of state.

The absurdity of the AU’s position is further demonstrated by the fact that the immunity provision only applies to an AU head of state. If the AU genuinely believes sitting heads of state should enjoy immunity under international law, the question that begs an answer is why not extend this immunity provisions to *any* head of state? The AU’s policy of sequencing peace and justice has proven to be flexible. In South Sudan, for example, the AU decided to investigate human rights violations parallel to peace negotiations and this should be encouraged. A rigid policy, under which peace and justice are treated as mutually exclusive, is neither logical nor constructive. The immunity provision provides an unwelcome and unnecessary suggestion that it would never be in the best interests of an AU state to try a sitting head of state or senior state official. A possible alternative would be to remove the immunity article and instead have a provision that allows the Peace and Security Council of the AU to submit a request to a separate chamber of the ACC to defer a trial for a year, if it was in the interest of peace and stability. This would be much like the relationship between the UNSC and the ICC, with the difference being that in the case of the ACC, it would be the judges who would have the final say as to whether a deferral should be granted. Of course, the relationship between the ICC and the UNSC is not without its critics. For many, the idea that a political body can subvert the mission of a judicial entity is unpalatable. For example, the former Chief Prosecutor for the ICTY and ICTR, Louise Arbour, has long advocated for ‘a separation of the justice and political agendas’.¹⁰²⁶ This is the reason why it would be preferable to have the Peace and Security Council of the AU mandated to make a request for consideration and determination by the ACC.

5.8.2 Financial constraints

Another major concern of adding a third chamber to the ACJHR is the additional costs that will come with it. The AU and its institutions are chronically underfunded and heavily reliant on international donors who provide 72 per cent of the AU’s budget which was the main reason why it

¹⁰²⁵ Joint Civil Society Letter on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court on Justice and Human Rights’ (2014) available at www.hrw.org/node/253666 (accessed on 14 June 2017).

¹⁰²⁶ Kersten M ‘The UN Security Council and the ICC: Between a Rock and a Hard Place’. available at www.justiceinconflict.org/2011/05/06/the-un-security-council-and-the-icc-between-a-rock-and-a-hard. (accessed on 12 January 2018).

was suggested that the ACJ and AfCHPR be merged. Moreover, international criminal trials have proven to be incredibly costly; it has been estimated that a single international criminal trial costs USA \$20 million.¹⁰²⁷ To put it into perspective: the AU's total budget for 2016 was roughly US\$416 million, with US\$10 million going to the AfCHPR;¹⁰²⁸ by comparison, the total budget of the ICC for 2016 is €139 million, or approximately USA \$153 million at the time of writing.¹⁰²⁹ Lack of adequate funds not only risks impacting negatively on the efficiency of the ACC, but has a direct impact on the fairness and credibility of trials. Adequate funds are needed to allow for thorough investigations, adequate defence of the accused, and robust protection of witnesses and victims.¹⁰³⁰ The ICC, for example, strives to place the interests of victims at the heart of its operations, yet its Trust Fund for Victims remains 'scandalously underfunded'¹⁰³¹ and therefore often unable to provide any, let alone sufficient, victim support.¹⁰³² The AU will have to come up with an answer as to how it will raise significantly more money in order to fund the court. If it cannot, then the court is unlikely to ever get off the ground, let alone conduct high profile cases. Nevertheless, there are promising signs that the AU is looking into creative ways of increasing its budget and reducing its dependence on donors. At an AU summit in 2015, heads of state reconsidered proposals originally put forward in 2012 by a panel chaired by former president of Nigeria, Olusegun Obasanjo that new taxes on airline tickets, hotel stays and text messages could bring in up to USA \$2.3 billion per year.¹⁰³³ Although those particular proposals have faced resistance from AU states reliant on tourism, it is at least an encouraging indication that the AU is aware of the need to drastically increase its budget.

5.8.3 Judges

Merging jurisdiction over international law (IL), international human rights law (IHRL) and international criminal law (ICL) into one, means that the 'scope of the court's jurisdictional reach is

¹⁰²⁷ Du Plessis M 'Implications of the AU decision to give the African Court jurisdiction over international crimes' (2012) ISS Paper 235.

¹⁰²⁸ Decision No: Assembly/AU/Dec. 577(XXV), available at www.saflii.org/au/AUDECISIONS/2015/19.html (accessed on 18 January 2018).

¹⁰²⁹ Resolution ICC-ASP/14/Res.1, available at www.asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10 (accessed on 23 January 2018).

¹⁰³¹ Support and Funding for Victims Is Crucial for the I.C.C., New York Times, available at <http://www.nytimes.com/roomfordebate/2014/12/11/do-we-needthe-> (accessed on 21 January 2018).

¹⁰³² Goetz AM 'Support and Funding for Victims Is Crucial for the I.C.C.'. available at www.nytimes.com/roomfordebate/2014/12/11/do-we-need-theinternational-criminal-court/support-and-funding-for-victims-is-crucial-for-the-icc. (accessed on 24 February 2018).

¹⁰³³ Progress Report Of The High Level Panel On Alternative Sources Of Financing The African Union, available at www.ccpau.org/wp-content/uploads/2014/03/Obasanjo-Panel-Progress-Report-Assembly-AU-18-XIX-2012- (accessed on 17 January 2018).

brehtaking.¹⁰³⁴ Not only does this make the court's work incredibly complex, but also it raises questions as to the capacity of judges to handle the array of possible cases. Article 4 of the Protocol stipulates that five judges shall be elected with experience and competence in IL, five judges shall be elected with experience and competence in IHRL, and six will be elected with experience and competence in ICL making a total of 16 judges.

The ICC experience has shown that even the 18 judges they have dedicated to criminal trials have been insufficient to ensure speedy judicial process, and therefore the 16 judges of the ACC would be spread far too thin to allow for swift trials. Furthermore, neither five nor six judges would be capable of stretching themselves over the three chambers (pre-trial, trial, and appeals) so as to ensure that, for example, only ICL judges heard ICL trials. Alternatively,

if the Malabo Protocol was intended to allow any of the judges to try any case, regardless of whether they have sufficient expertise in that particular area of law or not, then this risks unfair trials and inconsistent jurisprudence. Quite clearly, the ACC needs a larger roster of judges if it is to carry out its work efficiently and effectively.

5.8.4 Negative aspects of the extended jurisdiction

Pursuant to article 17 paragraph 3 of the Malabo Protocol, the Criminal Chamber of the ACC are empowered 'to hear all cases relating to the crimes specified in this Statute.'¹⁰³⁵ These crimes are listed under article 28 of the Statute in which there are ten additional crimes other than those orthodox international crimes being incorporated under the Rome Statute,¹⁰³⁶ war crimes, genocide and crimes against humanity. Furthermore, the AU assembly upon consensus of member states may extend the jurisdiction with intent to reflect developments in international law.¹⁰³⁷ Although international tribunals largely focus on crimes that are international and serious, those crimes that are articulated under the Malabo Protocol should fulfill these two requirements.¹⁰³⁸ While the requirement of '*international*' is simple to identify, the '*seriousness*' qualification is subjective and difficult to evaluate. Schabas noted that crimes are international and serious where;

'they [international crimes] were generally considered to be offences whose repression compelled some international dimension.... [in which] this feature of the crime necessitated special

¹⁰³⁴ Progress Report Of The High Level Panel On Alternative Sources Of Financing The African Union, available at www.ccpau.org/wp-content/uploads/2014/03/Obasanjo-Panel-Progress-Report-Assembly-AU-18-XIX-2012- (accessed on 17 January 2018).

¹⁰³⁵ Article 17 para 3 of the Statute of ACJHPR.

¹⁰³⁶ Ten of the crimes that are not incorporated under the Rome Statute are the crime of unconstitutional change of government, piracy, terrorism, mercenaries, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of and natural resources.

¹⁰³⁷ Article 28A(2) of the Statute of ACJHPR.

¹⁰³⁸ Abass wrote the two requirements are '*sine qua non* to establishing jurisdiction over international crime since, international Criminal tribunals are, by very their nature, only reserved for the most serious international crimes.'

jurisdictional rules as well as cooperation between states ... [and their] nature elevates them to a level where they are of 'concern' to the international community.'¹⁰³⁹

Not all of the peculiar crimes that are incorporated under the Malabo Protocol are trans-boundary in their nature and thus are not considered as international. Piracy committed on high seas, terrorism, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources could be trans-boundary in their nature and regional concerns of the African continent. Because these mentioned crimes are regional concerns, State cooperation is a necessity. The crime of corruption, unconstitutional change of government and mercenarism, however, are crimes that are difficult to categorize as international. Abass, recalling that corruption is troublesome for the economies and security of African states stated that 'it is certainly overly ambitious to elevate the vice to the level of an international crime.'¹⁰⁴⁰ Furthermore, because mercenarism could either be national or regional, it is difficult to categorize it under trans-boundary. The crime of terrorism and money laundering could also be restricted to certain locality of a country. On the other hand, the requirement of seriousness is difficult to determine. For the UN, criminal acts are serious when the offence is considered to be 'grave'. The graveness requirement of an offence is indicated under the Rome Statute so that ICC could entertain cases and the Prosecutor initiate situations.¹⁰⁴¹ Beyond the requirement of graveness, the fact that national and regional jurisdictions criminalized and made continuous efforts to prosecute certain crimes could be considered as pointing towards seriousness. In addition to the fulfillment of international and seriousness requirements, because the Malabo Protocol, upon ratification requires member states to internalize/domesticate the crimes under their national laws in which 'such congruity might well require a major rewrite of aspects of domestic criminal law.'¹⁰⁴² In this regard, due to the high number of crimes under the Statute and the controversial definitions contained therein, domestication of elements of these crimes will require more time and effort in addition to the political will of member states.¹⁰⁴³

5.8.5 Additional crimes

Although there are positive elements in including additional crimes, there are also potential problems. One definition that is in particular need of attention is that of unconstitutional change of

¹⁰³⁹ Schabas W *An Introduction to the International Criminal Court*, 2nd edition (2004) 26.

¹⁰⁴⁰ Abass A 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects' *Netherlands International Law Review* (2013) 37-46.

¹⁰⁴¹ Article 53(2)(c) of the Statute of ACJHPR.

¹⁰⁴² Abraham G 'Africas Evolving Continental Court Structures: At the Crossroads?' (2014) Occasional Paper 209 *South Africa Institute of International Affairs* 11.

¹⁰⁴³ Abass A 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects' *Netherlands International Law Review* (2013) 37-46.

government.¹⁰⁴⁴ It is an extremely broad definition that was somewhat tempered by the inclusion of an exception for ‘any act of a sovereign people peacefully exercising their inherent right’, but this exception was unfortunately removed during the drafting process. In comparison, the definition of terrorism has an exception for ‘struggle waged by peoples

according to the principles of international law for their liberation or self-determination’, which was not removed. Du Plessis stated that

‘The perverse result of these two provisions, when read together, is that any person peacefully exercising his or her rights, which results in an ‘unconstitutional change of government’ may be guilty of a crime, but a person who commits violent acts including those that cause ‘death to any number of persons’ and does so with the purpose of causing ‘general insurrection’ in a state, may be excused from criminal liability.’¹⁰⁴⁵

Secondly, the addition of so many crimes injects a level of complexity that will make the judges’ work difficult, at least to begin with. An enormous number of interpretational questions will have to be answered before the definitions will be of sufficient clarity to be applied, which will slow the progress of cases significantly. Thirdly, although the Malabo Protocol requires crimes to be ‘of sufficient gravity’ before the ACC can exercise jurisdiction,¹⁰⁴⁶ there is the potential for the court to be flooded with cases that allow it to avoid tackling sensitive cases. For example, individual terrorists and pirates could be continually hauled before the inadequately staffed ACC so as to distract the court from, say, high-level politicians orchestrating major corruption or violent conflict. This, of course, is not certain and would be avoided by (1) judges interpreting the threshold of ‘sufficient gravity’ strictly and (2) ensuring the prosecutor appointed has the necessary integrity and independence to pursue sensitive cases.

5.8.6 Lack of political will

A lack of political will is not a problem with the Malabo Protocol itself, but rather the climate in which the ACC would operate. No matter how vigorous the provisions and how qualified the staff, the ACC will fall at the first hurdle if there is no genuine commitment by states and politicians. Sincere cooperation with the ACC by governments will be crucial to ensure that witnesses and victims are protected, suspects are surrendered, evidence is collected, and sentences are properly enforced. There are already worrying indications of a lack of commitment to holding individuals to account for international crimes, particularly if that individual is a high-ranking state official.

¹⁰⁴⁴ Malabo Protocol article 28E.

¹⁰⁴⁵ Du Plessis M ‘Shambolic, shameful and symbolic: Implications of the African Union’s immunity for African leader’ available at www.issafrica.com (accessed on 14 January 2018).

¹⁰⁴⁶ Malabo Protocol article 46H.

Firstly, the injection of the immunity provision demonstrates an unwillingness of the political elite to hold themselves to the same standards as others; secondly, the AU's calls for non-cooperation with the ICC, and the subsequent finding of the ICC that Kenya was refusing to cooperate, sets a dangerous precedent that a state only has to cooperate with the court if they 'agree' with the cases before it this is also evident in the suspension of the SADC Tribunal for its ruling against Mugabe's policies; lastly, the slow rate of ratifications of the Malabo Protocol indicate most African states are reluctant to usher in the new court, perhaps due to doubts about funding or fear of accepting its jurisdiction.

Moreover, after materializing, effective functioning and enforcement of international Criminal proceedings require cooperation of member states. So that the ACC will be empowered with criminal jurisdiction.¹⁰⁴⁷ After critical observation, Abass concludes the political will of African states on ratifications of regional treaties is minimal.¹⁰⁴⁸ The rationales for this assertion, according to Abass are 1) source of a given treaty,¹⁰⁴⁹ 2) the subject matter of the treaty,¹⁰⁵⁰ 3) the perception that a treaty threatens sovereignty,¹⁰⁵¹ and 4) a concern of protest treaty.¹⁰⁵² Therefore, the off-putting political will of African states upon ratification of treaties will be an obstacle to the materialization of ACC. The Malabo Protocol entails obligations on state parties to cooperate at the time of investigation, prosecution and enforcement of sentences. For the purpose of investigation and prosecution, state parties, without prejudice to the rights of bona fide third parties are obliged to identify and locate persons; take testimony and produce evidence; serve documents; arrest, detain and extradite suspects; surrender to the Court; identify, trace, freeze or seize properties, assets and instrumentalities of crimes for the purpose of eventual forfeiture.¹⁰⁵³ For the purpose of enforcement of sentences, a state party who is selected by the Court from lists who have shown their willingness is expected to implement the imprisonment sentence. In case of fines and forfeiture measures, state party which is in the position of and capable of implementing the measures will put the measure

¹⁰⁴⁷ Article 11(1) of the Statute of ACJHPR.

¹⁰⁴⁸ Abass A 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) *European Journal of International Law* 939.

¹⁰⁴⁹ Abass A 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) *European Journal of International Law* 939. African States over the past three decades reveals that treaties that emanate from the UN stand a better chance of ratification than those from Africa

¹⁰⁵⁰ *Ibid*, with this regard Abass wrote 'the fact that the Protocol criminalizes corruption and unconstitutional changes of government, offences whose prosecution African leaders are unlikely to enthusiastically embrace, will probably affect their disposition towards the new Protocol.'

¹⁰⁵¹ *Ibid*, The probability that African States ratify a protocol that empowers an African court which prosecute African leaders (themselves), notwithstanding that the protocol emanated from their own organization is minimum.

¹⁰⁵² *Ibid*, since the main reason for empowering the African court with criminal jurisdiction is a protest treaty i.e. response to the Rome Statute in which it is 'fuelled by momentary passion rather than a thorough appreciation and genuine desire for legislation.'

¹⁰⁵³ Article 46L of the Statute of ACJHPR.

into action.¹⁰⁵⁴ However, previous experiences of African states vis-à-vis cooperation in international criminal proceedings were inadequate.

The non-cooperation of AU member states in relation to their obligations towards the ICC,¹⁰⁵⁵ and in cases involving national courts of European states cases is evidence for the prevailing stance of African states towards international cooperation. It should be noted that usually parties to international proceedings are mostly senior officials and high ranking military officers. There is therefore a high probability that African states will raise an objection that the indictment of a specific official endangers fragile peace of a state and the region as a reason for their non-cooperation. Furthermore, because of the deep-rooted principle of non-interference in internal affairs in Africa, the probability that a state party could arrest and extradite officials of other African states is minimum. Generally, the readiness of African states and leaders to prosecute high ranking government officials alleged to be involved in international crimes is doubtful.

5.9 Conclusion

The continent of Africa has been exposed to massive human rights violations. It is trite that at the root of these violations are high ranking or senior state officials who orchestrate most of the atrocities. In the midst of diverse limitations, national and supranational courts had failed to prosecute most perpetrators of grave human rights violations in Africa. Impunity is the character of the continent. Without other judicial mechanisms, the ACC could prosecute the peculiar crimes that exclusively jeopardize the peace and security of the region. Crimes that are trans-boundary and common concerns of a specific region could better be prosecuted under regional courts than national or supranational tribunals. Starting from the establishment of OAU, AU member states vowed to protect the region from gross human right violations. Various regional and international commitments in which African states who are parties are obliged to investigate, prosecute and punish individual perpetrators of gross human rights violations. The establishment of the ACC is one of the approaches where AU member states could fulfill their moral and legal obligations. Since the ACC will be situated close to the territory where the alleged crimes supposedly occurred, the ACC could be effective and could be in a better position to contribute to judicial reconstruction and restorative justice. Furthermore, the ACC will be more legitimate that co-operations from states parties and the society will be enhanced. However, despite the fact that regionalization of criminal courts is welcome development in international law, the establishment and functionality of the ACC will definitely have intense challenges.

¹⁰⁵⁴ Article 46Jbis of the Statute of ACJHPR.

¹⁰⁵⁵ Kenya, Djibouti, Malawi, Chad and recently South Africa failed to respect their obligations under the Rome Statute by failing to arrest Sudan President Omar Al-Bashir.

The response to the Malabo Protocol is a dual tale. Although there is nothing inherently wrong with an African court with jurisdiction over international crimes, critics have expressed serious doubts about the validity, efficacy, and purpose of the proposed ACC, particularly with regards to the immunity provision and the question of finance. By contrast, proponents of the court see an opportunity to add a layer of accountability that has so far been lacking on the African continent. They argue that, while there will undoubtedly be obstacles, these can be overcome, and that to simply condemn the court before it has been created is obstructive. The ACC has the potential to shift Africa's focus from constantly fighting the ICC to working towards an innovative, empowering and credible court that confronts crimes that are particularly damaging to the continent and, crucially, offers an avenue for justice for victims. A key reason for such a significant split in opinion is that, throughout the process, there has been a serious disconnect between civil society, the general public, and the AU. The drafting of the Malabo Protocol would have benefited significantly from greater involvement of both civil society and the general public.

The result has been suspicion and confusion as to the purpose and effect of the Malabo Protocol. This lack of engagement, however, is not solely the fault of the AU; CSOs have shown an unwillingness to engage in the process so far and have been criticized by the drafters as being unnecessarily dismissive. One thing is clear: the wheels are rolling, and the possibility of a regional court being established is real. The rate of ratifications may be slow, but it must be remembered that even the most enthusiastic proponents of the Rome Statute thought it would take at least a decade to come into force, if at all, and instead it took only four years. Therefore, neither a wholly confident nor wholly dismissive attitude will be constructive. If Africa is to end up with a credible, independent and effective court it so deserves, then all stakeholders particularly CSOs and the general public must engage in the process in a pragmatic and realistic manner, and work together to address the significant weaknesses and challenges before the court is born.

Chapter Six - The Malabo Protocol approach to alternative visions of regional criminal justice

6.1 Introduction

The previous chapter critically examined the rationale of creating the ACC with jurisdiction over international crimes. Furthermore an in-depth analysis of the Malabo Protocol was conducted citing the strengths and weaknesses of the establishment of the ACC. The chapter also explored the relationship between the ACC and the ICC and concluded with outlining the potential areas of concurrent jurisdiction between the ICC and the ACC. This chapter argued that the Malabo Protocol reconceptualises the idea of transitional justice mechanisms as varying approaches meant solely to address the legacy of abuse in one nation. Additionally it proposed that transitional justice mechanisms can also encompass regional and transnational efforts to respond to mass human rights violations especially in the African continent. It also drives home the point that the Malabo Protocol seeks to correct perceived biases in international criminal justice.

The chapter also shed light on the ways in which the Malabo Protocol builds on the spread of accountability systems. It provides a brief overview of the domestic, hybrid and international criminal trials in Africa that have informed the development of the ACC, and argues that the Malabo Protocol offers the continent an important, alternative vision of regional criminal justice.

The previous chapter concluded that the regional court in the form of the ACC could arguably tailor criminal accountability to the context, needs and aspirations of the continent. While the Malabo Protocol is part of the increasing resort to criminal trials to address mass violence, it also challenges the gaps in existing models of accountability. Firstly, it reconceptualises transitional justice from varying approaches meant solely to address the legacy of abuse in one nation, and instead proposes that it can also encompass regional efforts. Second, the Malabo Protocol seeks to limit the utilisation of international criminal law to advance the interests of powerful states in the west to counteract perceived biases. The Malabo Protocol allows us to think more creatively about what the spread of accountability systems throughout the world could look like the types of claims, actors covered, as well as the appropriate levels of adjudication.¹⁰⁵⁶ Proponents of the ICC view the Malabo Protocol as a negative development that works to shield human rights perpetrators from facing justice.¹⁰⁵⁷ Accordingly, some view the ACC as undermining key gains made by the ICC

¹⁰⁵⁶ Murungu C B 'Towards a Criminal Chamber in the African Court of Justice and Human Rights'(2013) 9 *Journal of International Criminal Justice* 1067 1088. Murungu contends that the Rome Statute only envisioned domestic trials for complementarity.

See Abass A 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) 24 *European Journal of International Law* 933 946.

¹⁰⁵⁷ Removed this because can't find it but I found the original article it was extracted from Sirleaf M 'Regionalism, Regime Complexes and the Crisis in International Criminal Justice' (2016) 54 *Columbia Journal of Transnational Law* 699.

through the years.¹⁰⁵⁸ This thesis argues that the Malabo Protocol offers the African continent an important, alternative vision of regional criminal justice. The remainder of this chapter provides context on the ACC before giving an overview of the domestic, hybrid and international criminal trials in Africa that have informed the emergence of the ACC.¹⁰⁵⁹ The thesis then discusses how a regional approach could arguably tailor criminal accountability to African realities. There are numerous political, financial and other obstacles that may impede the ACC's effectiveness, if it comes into existence and those have been fully addressed in chapter 5 of this thesis.

6.2 The rationale of a Regional Criminal Court

African states founded the AU with a stronger commitment to human rights.¹⁰⁶⁰ Given its many objectives and enhanced role in maintaining peace and security,¹⁰⁶¹ it is unsurprising that the AU came with the idea of forming the ACC. Regional integration in criminal matters could allow states to respond to common security threats more effectively,¹⁰⁶² because neighbouring states have a greater interest in cooperating. For example, the AU is the only institution empowered to intervene forcibly in grave violations of human rights and the only organisation that incorporates the responsibility to protect.¹⁰⁶³ Additionally, the AU adopted a treaty on democracy, which empowered it to suspend members following an unconstitutional change in government.¹⁰⁶⁴ Moreover, it provided for a court predating the ACC with the ability to prosecute alleged perpetrators.¹⁰⁶⁵

The ACC has a complex history. In 2004, the AU decided to merge the African Court of Justice and the African Court of Human and Peoples' Rights. In 2008, the AU adopted a Protocol generating the African Court of Justice and Human Rights.¹⁰⁶⁶ In 2014, the AU proposed including the ACC into the African human rights framework.¹⁰⁶⁷ Under this tripartite court, the ACC will adjudicate ICL (International Criminal Law) violations while the other two chambers will be dedicated to determining international human rights violations and issues of general international law

¹⁰⁵⁸ Rau K 'Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Right' (2012) 97 *Minnesota Law Review* 669 708.

¹⁰⁵⁹ Sirleaf M 'Regionalism, Regime Complexes and the Crisis in International Criminal Justice'(2016)54 *Columbia Journal of Transnational Law* 699.

¹⁰⁶⁰ Constitutive Act of the African Union, 2001 (2001) 2158 UNTS 3.

¹⁰⁶¹ Constitutive Act of the African Union, 2001 (2001) 2158 UNTS 3.

¹⁰⁶² Pereira R 'The Regionalization of Criminal Law: The Example of European Criminal Law,' in *The Diversification and Fragmentation of International Criminal Law* (2012) 56.

¹⁰⁶³ Constitutive Act of the African Union, 2001 (2001) 2158 UNTS 3.

Yusuf A & Ouguerouz F 'The Right of Forcible Intervention in Certain Conflicts,' in *The African Union: Legal and Institutional Framework – a Manual on the Pan-African Organization* ed. (2012) 23.

¹⁰⁶⁴ African Charter on Democracy, Elections and Governance, 2012 AU Doc. Assembly/AU/Dec.147 (VIII) (2012).

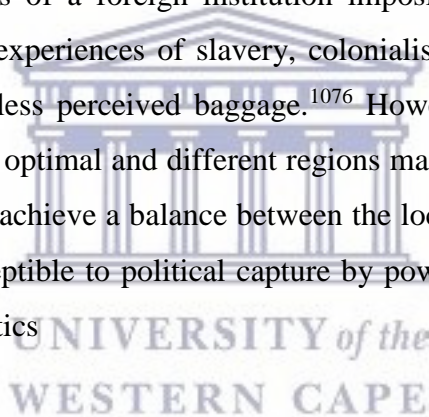
¹⁰⁶⁵ African Charter on Democracy, Elections and Governance, 2012 AU Doc. Assembly/AU/Dec.147 (VIII) (2012).

¹⁰⁶⁶ Protocol on the Statute of the African Court of Justice and Human Rights,' available at www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf (accessed on 13 December 2017)

¹⁰⁶⁷ Malabo Protocol, 1982 (1982) 21 ILM 58.

respectively.¹⁰⁶⁸ The tripartite court was proposed due to funding concerns and the proliferation of institutions. If it comes into being, the ACC will have a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.¹⁰⁶⁹

Under the tripartite structure, ICL issues may not be marginalized as states submit to judicial oversight from the other chambers and the larger Court gains credibility. Conversely, this assessment may seem sanguine given the experience of continental sub regional bodies.¹⁰⁷⁰ However, competitors like Nigeria and South Africa may impede the ability of one hegemon to capture proceedings. Nevertheless, there is always the danger of powerful states exercising undue influence.¹⁰⁷¹ Indeed, ICL courts suffer from the impression that political concerns predominate over criminality considerations.¹⁰⁷² The Malabo Protocol departs from this. Instead, the Assembly of the heads of state and Government, and the Peace and Security Council of the AU,¹⁰⁷³ as well as state parties and the independent prosecutor can submit cases to the ACC.¹⁰⁷⁴ As such, the ACC may be less likely to reproduce geopolitical hierarchies between the west and Africa. The ACC could potentially address charges of a foreign institution imposing its will. The sensitivities to Western intervention, given the experiences of slavery, colonialism and neo-colonialism,¹⁰⁷⁵ may allow the ACC to operate with less perceived baggage.¹⁰⁷⁶ However innocuous their operations, global institutions are not always optimal and different regions may have particularities that cannot be penetrated.¹⁰⁷⁷ The ACC may achieve a balance between the local and the international with the former being too close and susceptible to political capture by powerful elites, and the latter being too remote and subject to geopolitics



¹⁰⁶⁸ Merger Protocol.

¹⁰⁶⁹ Malabo Protocol, 1982 (1982) 21 ILM 58.

¹⁰⁷⁰ Alter K, Helfer L & Madsen M R *Transplanting International Courts: The Law and Politics of the Andean Tribunal of Justice* (2017) 70 ; Cowell F 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction' (2013) 13 *Human Rights Law Review* 153 166.

¹⁰⁷² Stoett P 'Justice, Peace, and Windmills: An Analysis of "Live Indictments" by the International Criminal Court' in Carey H & Mitchell (ed) *Trials and Tribulations of International Prosecution* (2012) 21.

¹⁰⁷³ Statute of the Special Court for Sierra Leone, 2002 (2002)2178 UNTS 138.

¹⁰⁷⁴ Malabo Protocol, 1982 (1982) 21 ILM 58.

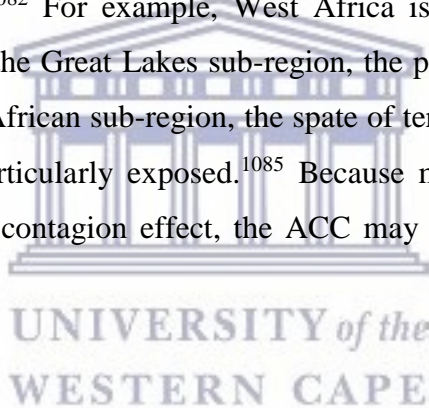
¹⁰⁷⁵ Richardson H 'African Grievances and the International Criminal Court: Issues of African Equity under International Criminal Law,' in *Africa and the Future of International Criminal Justice* (2012) The Hague: Eleven International Publishing.

¹⁰⁷⁷ Cowell F 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction' (2013) 13 *Human Rights Law Review* 153 166.

6.3 Attending to regionally relevant crimes

The Malabo Protocol disrupts this pattern. While reaffirming jurisdiction over ‘core’ international crimes (genocide, war crimes, crimes against humanity and aggression),¹⁰⁷⁸ the Malabo Protocol expands criminal liability to trafficking in humans, drugs and hazardous waste, piracy, terrorism, mercenarism and corruption, among others. By straddling quotidian and crisis crimes, the Malabo Protocol destabilizes ICL’s hierarchy, reflecting both the background and foreground of violations. It recognizes that massive atrocities do not take place in a vacuum, but instead are embedded in systems of criminality.¹⁰⁷⁹

It comes as no surprise that most of the Malabo Protocol’s provisions concern common security threats.¹⁰⁸⁰ The inclusion of security-threatening crimes responds to African realities. For example, African borders are notoriously illusory, which renders these states more susceptible to transnational crimes. Inherited colonial borders have sustained much instability in the region.¹⁰⁸¹ Furthermore, neglect of borders has contributed to criminality, making these areas susceptible to insurgents and terrorist groups.¹⁰⁸² For example, West Africa is especially vulnerable to cross-border criminal activities.¹⁰⁸³ In the Great Lakes sub-region, the proliferation of light weapons has fuelled conflicts.¹⁰⁸⁴ In the East African sub-region, the spate of terrorist attacks from neighbouring Somalia has rendered Kenya particularly exposed.¹⁰⁸⁵ Because many conflicts and transnational crimes in Africa tend to have a contagion effect, the ACC may be the best-placed institution to address this phenomenon.



¹⁰⁷⁸ Malabo Protocol, arts. 28B (genocide), 28C (crimes against humanity), 28D (war crimes), 28M (crime of aggression), with Rome Statute, art. 5 (enumerating the same crimes). For jurisdiction over genocide, crimes against humanity and war crimes, see also, ‘Statute for the International Criminal Tribunal for Rwanda,’

¹⁰⁷⁹ Waldorf L ‘Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice’ (2006) 79 *Temple Law Review* 1 87.

¹⁰⁸⁰ Malabo Protocol, 1982 (1982) 21 ILM 58, Article 28L*Bis*, criminalizing exploitation of natural resources
Porter S ‘The Exploitation of Natural Resources and Land Grabbing,’ *Africa Europe Faith and Justice Network*, available at www.aefjn.org/index.php/370/articles/the-exploitation-of-naturalresources-and-land-grabbing.html (accessed on 13 March 2017).

¹⁰⁸¹ Ikome F N ‘Africa’s International Borders as Potential Sources of Conflict and Future Threats to Peace and Security,’ (2012) *Institute for Security Studies Paper* 233.

¹⁰⁸² ‘African Union Leaders Look to Enhance Terror Fight’ *Telesur* 3 September 2014 available at www.telesurtv.net/english/news/African-Union-Leaders-Look-to-Enhance-Terror-Fight-20140903-0056.html (accessed 13 March 2018).

¹⁰⁸³ Addo P ‘Cross-Border Criminal Activities in West Africa: Options for Effective Responses,’ (2006) *Kofi Annan International Peacekeeping Training Centre Paper* 12 (2006).

¹⁰⁸⁴ Eavis P ‘SALW in the Horn of Africa and the Great Lakes Region: Challenges and Ways Forward’ (2002) 9 *Brown Journal of World Affairs* 251–260.

¹⁰⁸⁵ Meservey J ‘False Security in Kenya: When Counterterrorism Is Counterproductive,’ (2015) *Foreign Affairs* 21

In Malabo, African heads of states decided to expand the number of crimes deserving regional, if not international, attention.¹⁰⁸⁶ While not all the Malabo Protocol's provisions reflect a security connection,¹⁰⁸⁷ it certainly reproduces the trend of turning to criminal trials to resolve complex political problems. Yet, because the ACC's expansion of criminal liability could lead to greater normative consistency and perhaps deterrence of both quotidian and crisis crimes, it renders the prosecution of perpetrators more relevant to African realities.

6.4 Corporate Criminal Liability

The Malabo Protocol's provision in Article 46C for corporate criminal liability provides for the prosecution of perpetrators.. Virtually no ICL courts have jurisdiction over corporate entities.¹⁰⁸⁸ Corporate criminal liability was debated during discussions for a permanent court in the 1950s,¹⁰⁸⁹ and also mooted during ICC negotiations in 1998.¹⁰⁹⁰ Some jurisdictions allow for it, while others do not, complicating enforcement and preventing treaty making.¹⁰⁹¹ Notably, the Control Council passed laws aimed at punishing corporations after World War II.¹⁰⁹² While no corporations were actually prosecuted, nothing legally prevented such prosecutions for committing crimes.¹⁰⁹³ The Malabo Protocol permits jurisdiction over both natural persons and juristic entities on established bases of consent, territorial, nationality, passive personality and protective principles.¹⁰⁹⁴ This represents a significant advancement of ICL.¹⁰⁹⁵ The devastating impact of corporate malfeasance in Africa explains this development.¹⁰⁹⁶ The Malabo Protocol could enable African states to respond

¹⁰⁸⁶ Abass A 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) 24 *European Journal of International Law* 933-939., discusses the perception that rejected ICC crimes do not 'constitute international crimes at all,' or the perception that proffered crimes were not 'serious' enough'.

¹⁰⁸⁷ Malabo Protocol 1982 (1982) 21 ILM 58, Article 28I.

See also, Starr B 'Extraordinary Crimes at Ordinary Times: International Justice beyond Crisis Situations (2007) 101 *Northwestern University Law Review* 1257-1314.

¹⁰⁸⁸ Rome Statute 1998 (1998) 37 ILM 1002.

¹⁰⁸⁹ 'Report of the Committee on International Criminal Jurisdiction,' UN Doc. A/2136 (1952);

'Report of the 1953 Committee on International Criminal Jurisdiction,' UN Doc. A/2645 (1953).

¹⁰⁹⁰ Clapham A 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference' in *Liability of Multinational Corporations under International Law* (2000) *Kluwer Law International* 15.

¹⁰⁹¹ Kyriakakis J Article 46C: Corporate Criminal Liability at the African Criminal Court,' in *Clarke K & Jalloh C The African Court of Justice and Human and People's Rights* ed. (2017) 30.

¹⁰⁹² Control Council Law No. 57, 'Dissolution and Liquidation of Insurance Companies Connected with the German Labor Front,' in Legal Division, Office of Military Government for Germany, *Enactments and Approved Papers of the Control Council and Coordinating Committee Vol. 8* (30 August 1947);

¹⁰⁹³ Giannini T & Farbstein S 'Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights,' (2010) 52 *Harvard International Law Journal* 119-135.

¹⁰⁹⁴ Bush J A J 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said,' (2009) 109 *Columbia Law Review* 1094-1242.

¹⁰⁹⁵ Ambach P *International Criminal Responsibility of Transnational Corporate Actors Doing Business in Zones of Armed Conflict in Investment Law within International Law: Integrationist Perspectives* (2013) 22.

¹⁰⁹⁶ 'Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo,' UN Doc. S/2002/1146 (2002); 'Final Report of the Monitoring Mechanism on Angola Sanctions,' UN Doc S/2000/1225 (2000); 'Report of the Panel of Experts in Relation to Sierra Leone,' UN Doc. S/2000/1195 (2000).

more effectively to challenges posed by corporations,¹⁰⁹⁷ thereby transforming the justice pattern concerning perpetrators of core crimes.

6.5 Official Immunity

The Malabo Protocol also complicates the enthusiasm of the high ambitions set out by the ACC'S expansion. In contrast with other ICL courts,¹⁰⁹⁸ the Malabo Protocol immunises any serving AU head of state or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.¹⁰⁹⁹ This provision refers to official and functional immunities provided under customary international law (CIL). The former pertain to a limited group because of their office, while functional immunities attach to acts performed by state officials in the exercise of their functions.¹¹⁰⁰ Official immunities have been deemed necessary to maintain international peace and cooperation.¹¹⁰¹ The main judicial body of the UN, the International Court of Justice (ICJ), held in the *Arrest Warrant* decision that an official enjoyed immunity from prosecution in foreign national courts under CIL because he was then serving as a foreign minister.¹¹⁰²

The ICJ in *dictum* discussed exceptions to CIL immunity which allow for prosecution. One of these is treaty-based jurisdiction.¹¹⁰³ If a treaty-based exception to official immunities exists, then it is permissible for states to form treaties to the contrary.¹¹⁰⁴ If the prohibition on official immunities is a developing norm of CIL, then the Protocol undermines general and consistent state practice necessary for CIL to form.¹¹⁰⁵ State practice includes ICL statutes supporting the prohibition.¹¹⁰⁶ It also includes the prosecutions of former heads of states – Hissène Habré, Saddam Hussein, Slobodan Milošević and Charles Taylor. Yet, these prosecutions took place after they left office,

¹⁰⁹⁷ Kyriakakis J Article 46C: Corporate Criminal Liability at the African Criminal Court, 'in Clarke K & Jalloh C *The African Court of Justice and Human and People's Rights* ed. (2017)30.

¹⁰⁹⁸ Rome Statute, 1998 (1998) 37 ILM 1002, Article 27 (irrelevance of official capacity for criminal responsibility). See also, ICTR Statute; SCSL Statute; Mark Kersten, 'What Gives? African Union Head of State Immunity' available at <https://justiceinconflict.org/2014/07/07/what-gives-african-union-head-of-state-immunity/> (accessed on 23 May 2018).

¹⁰⁹⁹ Malabo Protocol 1982 (1982) 21 ILM 58, Article 46A

¹¹⁰⁰ Akande D & Shah S 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 4 *European Journal of International Law* 815 852.

¹¹⁰¹ Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) [2002] ICJ Rep 3.

¹¹⁰² Report of the International Law Commission on the Work of Its Sixty-Fifth Session, 2013 UN Doc. A/RES/68/112 (2013).

¹¹⁰³ Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) [2002] ICJ Rep 3.

¹¹⁰⁴ Vienna Convention on the Law of Treaties, 1969 (1969) 1155 UNTS 331, Article. 38.

¹¹⁰⁵ Restatement (Third) of Foreign Relations Law, 1987 (1987) 34 UNTS 243.

¹¹⁰⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 1945 (1945) 82 UNTS 280. Charter of the International Military Tribunal for the Far East, 1946 (1946) TIAS No. 1589.

although the latter two were indicted during their presidencies, along with Omar al-Bashir who has not yet been prosecuted.¹¹⁰⁷

The Malabo Protocol's immunity provision also challenges the second prong of CIL formation – *opinio juris*. It undermines claims that states are acting out of a sense of legal obligation in prohibiting official immunity. The provision may also represent an attempt to utilize the rules of persistent objection in CIL, which would exempt parties to the Malabo Protocol. This provision undermines the conventional idea to prosecute perpetrators, while the traditional model of immunity for states and officials retreats. While the immunity provision does not impact the jurisdiction of other ICL courts, it makes explicit the *de facto* immunity that already exists for more powerful states in ICL.¹¹⁰⁸ The drafters likely included greater protections in the Malabo Protocol due to the dramatic expansion of criminal liability. The provision has blinded commentators from considering how regionalization of ICL could potentially uniquely position regional mechanisms in the justice prosecution.

6.6 The aim for justice and the development of the ACC'S

The African continent has been prolific ground for accountability experimentation since the 1990s, with approaches ranging from judicial to non-judicial mechanisms like truth commissions, reparations and community-based processes being utilized. This section of the chapter focuses on the plethora of judicial institutions that have thrived and situates the ACC as part of the turn to criminal trials across the continent to address mass violence. The increasing resort to domestic, hybrid and international criminal trials have cultivated the ACC. This section highlights the challenges experienced in the pursuit for justice, which the ACC could potentially help address.

6.6.1 Domestic Trials

The pursuit for justice for victims of mass human rights violations in the African continent have over the years included domestic trials. The supposed benefits of national trials include providing greater accountability, restoring decimated legal systems, producing quicker results and local sentiments regarding punishment.¹¹⁰⁹ This subsection examines Rwanda's and Côte d'Ivoire's experiences with domestic trials. After the Rwandan Patriotic Front (RPF) army came to power, it arrested and detained those suspected of committing genocide and serious violations of ICL. The international community expressed concerns with the hundreds of thousands of people imprisoned

¹¹⁰⁸ Sirleaf M 'Regionalism, Regime Complexes and the Crisis in International Criminal Justice' (2016)54 *Columbia Journal of Transnational Law* 699.

¹¹⁰⁹ Alvarez JE 'Crimes of States/Crimes of Hate: Lessons from Rwanda'(1999)2 *Yale Journal of International Law* 24

while awaiting trial. Further, it considered Rwanda's trials as a way for the government to intimidate its political opponents.¹¹¹⁰

The trials exposed the weakness of the country's judicial system following the conflict. Rwanda searched for an alternative accountability process and instituted *gacaca* to alleviate prison overcrowding and to assist with societal reconstruction. *Gacaca* was a mechanism used in precolonial Rwanda to adjudicate communal disputes often linked to property issues, personal injury or inheritance problems. In the early 2000s, the Rwandan legislature adopted a modernized version, which established *gacaca* jurisdictions. Per the government, *gacaca* facilitated truth telling, promoted reconciliation, eradicated impunity and demonstrated Rwanda's ability to address its own problems. With an estimated 12,000 community-based courts and 169,000 judges,¹¹¹¹ *gacaca* accelerated trials that overwhelmed the formal judicial system.

In 2012, *gacaca* concluded with almost two million genocide related cases tried.¹¹¹² The entire process reportedly cost USA \$48.5 million,¹¹¹³ which is a fraction of the cost of the *ad hoc* tribunal for Rwanda. Many legal scholars criticized the *gacaca courts* for failing to meet international fair trial standards.¹¹¹⁴ They were concerned that *gacaca* provided inadequate guarantees for impartiality, defence and equality before the law, especially because most who were ultimately tried were ethnic Hutus or dissidents. *Gacaca* had uneven results facilitating justice and reconciliation in some communities.¹¹¹⁵ The limitations of national trials and community-based justice mechanisms in Rwanda paved the way for greater experimentation.

In Côte d'Ivoire, following the post-election violence of 2010 that left 3,000 people dead, the government established accountability mechanisms. In 2011, it created a temporary body to conduct investigations into violent crimes, economic crimes and attacks on state security.¹¹¹⁶ In 2013, this temporary body was transformed into a permanent institution the Special Investigative and Examination Cell. The investigations led to limited trials that targeted supporters of the former

¹¹¹⁰ Des Forges A & Longman T *Legal Response to Genocide in Rwanda*, in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (2004)50.

¹¹¹¹ Gacaca Community Justice, 'Achievements' available at www.gacaca.rw/about/achievements/ (accessed on 13 March 2017).

¹¹¹² Gacaca Community Justice, 'Achievements' available at www.gacaca.rw/about/achievements/ (accessed on 13 March 2017).

¹¹¹³ Gacaca Community Justice, 'Achievements' available at www.gacaca.rw/about/achievements/ (accessed 13 March 2017).

¹¹¹⁴ Thomson S 'The Darker Side of Transitional Justice: The Power Dynamics behind Rwanda's *Gacaca Courts*' *Africa* (2011) 373- 390

¹¹¹⁵ Clark P *The Rules (and Politics) of Engagement: The Gacaca Courts and Post-Genocide Justice, Healing and Reconciliation in Rwanda*, in *After Genocide: Transitional Justice, Post- Conflict Reconstruction and Reconciliation in Rwanda and beyond* (2009)36.

¹¹¹⁶ 'International Center for Transitional Justice (ICTJ), *Disappointed Hope: Judicial Handling of Post-Election Violence in Cote d'Ivoire*' available at <https://www.ictj.org/sites/default/files/ICTJ-Report-CDI-Prosecutions-2016-English.pdf> (accessed on 25 May 2018).

president, Laurent Gbagbo.¹¹¹⁷ Domestic trials in Côte d'Ivoire also experienced structural and financial issues, which hindered cases from moving forward.¹¹¹⁸ Moreover, the irregular nature of indictments focusing on one group undermined the credibility of the process. The ICC also began cases at Côte d'Ivoire's request in 2013,¹¹¹⁹ against Charles Blé Goudé, an ally of the former president, and against the former first lady, Simone Gbagbo. Yet the government has refused to transfer the latter to the ICC, preferring to prosecute her domestically until recently when President Alassane Ouattara granted her amnesty as a aim to boost national reconciliation.¹¹²⁰ Rwanda's and Côte d'Ivoire's challenges with mounting national prosecutions centred on capacity constraints and lack of political will this statement is incomplete. These experiences, especially the failure to meet international fair trial standards, indicate the key limitations of domestic trials. The national processes discussed above urged the AU to create a permanent regional court in the form the ACC as opposed to relying on the judiciaries of individual states. The success that African states had with hybrid courts also influenced this move.

6.6.2 Hybrid Courts

The desire by African leaders to end impunity against those who commit mass violations have been characterised by the utilisation of hybrid courts aimed at counteracting the culture of impunity. The hybrid courts typically have foreign and domestic judges and personnel sharing experiences. Hybrid courts also incorporate a blend of international and domestic law. They are perceived as improving on purely domestic processes because of the typically damaged state of the judiciary following a conflict or period of authoritarian rule. The additional human and material resources that accompany hybrid courts help to strengthen what might otherwise be failing national processes. This subsection examines Sierra Leone's and Senegal's experiences with hybrid courts. It also highlights the proposed courts in South Sudan and the Central African Republic (CAR). Sierra

¹¹¹⁷ 'International Center for Transitional Justice (ICTJ), *Disappointed Hope: Judicial Handling of Post-Election Violence in Cote d'Ivoire*' available at <https://www.ictj.org/sites/default/files/ICTJ-Report-CDI-Prosecutions-2016-English.pdf> (accessed on 25 May 2018).

¹¹¹⁸ 'International Center for Transitional Justice (ICTJ), *Disappointed Hope: Judicial Handling of Post-Election Violence in Cote d'Ivoire*' available at <https://www.ictj.org/sites/default/files/ICTJ-Report-CDI-Prosecutions-2016-English.pdf> (accessed on 25 May 2018).

¹¹¹⁹ *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Pre-Trial Chamber III.

¹¹²⁰ 'International Center for Transitional Justice (ICTJ), *Disappointed Hope: Judicial Handling of Post-Election Violence in Cote d'Ivoire*' available at <https://www.ictj.org/sites/default/files/ICTJ-Report-CDI-Prosecutions-2016-English.pdf> (accessed on 25 May 2018).

Leone's hybrid court followed a period of protracted civil war.¹¹²¹ The government requested the UN to create a court to try the main rebel group.¹¹²²

The UN created the Special Court for Sierra Leone (SCSL) to prosecute all persons 'who bear the greatest responsibility' for violations of ICL and Sierra Leonean law.¹¹²³ Notably, the SCSL also sat where the war crimes occurred for its proceedings to be more impactful. Of the 13 individuals initially indicted by the SCSL, nine are currently serving sentences ranging from 15 to 50 years, including the high-profile sentence of former Liberian president Charles Taylor. The SCSL's jurisprudence is notable for rendering the first judgment for the crime of recruiting and using child soldiers in hostilities,¹¹²⁴ securing the first conviction for 'forced marriage' as a crime against humanity and the first conviction treating 'attacking peacekeepers'¹¹²⁵ as a war crime.¹¹²⁶ The SCSL is also recognized for contributing to democratic consolidation, peace building and reducing the culture of impunity.¹¹²⁷

Yet, the Court's limited approach has meant that mid and lower level officials who directly and visibly perpetrated abuses have not been tried.¹¹²⁸ Additionally, commentators have criticized the SCSL for paying insufficient attention to capacity building.¹¹²⁹ Moreover, the SCSL lost an opportunity to shape national jurisprudence by failing to bring any charges under Sierra Leonean law.¹¹³⁰ Notwithstanding these limitations; Sierra Leone's experience has served as a model for others. In Senegal, the AU instituted the Extraordinary African Chambers to prosecute former Chadian president, Hissène Habré. Belgium wanted to prosecute Habré, who was exiled in Senegal, for ICL violations. Senegal originally refused to extradite him to Belgium and contended that they lacked the power to prosecute him domestically.¹¹³¹ A sub-regional court in West Africa held that Habré could only be prosecuted internationally because Senegal's courts lacked jurisdiction at the time.¹¹³²

¹¹²¹ Sirleaf M 'Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth and Reconciliation Commission for Liberia' (2009)21 *Florida Journal of International Law* 209 285.

¹¹²² 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission Vol. 3B,' 2004, <http://www.sierra-leone.org/Other-Conflict/TRCVolume3B.pdf> (accessed on 13 April 2018).

¹¹²³ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2002 (2002) 2178 UNTS 137.

¹¹²⁴ *Prosecutor v. Alex Tamba Brima et al.* SCSL-2004-16-A, Appeals Judgment (22 February 2008).

¹¹²⁵ *Prosecutor v. Issa Hassan Sesay et al.* SCSL-04-15-T, Trial Chamber Judgment (2 March 2009).

¹¹²⁶ *Prosecutor v. Issa Hassan Sesay et al* SCSL-04-15-T, Trial Chamber Judgment (2 March 2009).

¹¹²⁷ Sirleaf M 'Beyond Truth and Punishment in Transitional Justice,' (2014)54 *Virginia Journal of International Law* 223 294.

¹¹³⁰ Perriello T & Wierda M 'The Special Court for Sierra Leone under Scrutiny' (2006) *International Centre for Transitional Justice* 44-55.

¹¹³¹ Murungu CB 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067 1088.

¹¹³² Viljoen F *International Human Rights Law in Africa*, 2ed. (2012) 47.

The ICJ also ordered Senegal to extradite Habré to Belgium, if it did not try him without delay.¹¹³³ Senegal then amended its *ex post facto* laws and domesticated ICL to prosecute Habré through a special national chamber.¹¹³⁴ Habré was found guilty of all the charges against him in mid-2016, making him the first head of state to be personally convicted for rape.¹¹³⁵ Additionally, Habré is the first head of state to be convicted of crimes against humanity by the courts of another country. His trial is also the first African-led prosecution based on universal jurisdiction.¹¹³⁶ Moreover, this reaffirms the idea that the AU was not necessarily prosecuting him because they value the rule of law, but because it was embarrassing for them to have Belgium insist on prosecuting Hissene Habre in their own domestic courts.

Belgium was acting on the basis of legislation that they had themselves subsequently repealed and it is unlikely that they will in future bring another application asking the ICJ to force another state to apply universal jurisdiction. It is also only Belgium that has brought this kind of an application before.¹¹³⁷ It is clear that Senegal has been extremely reluctant to comply with its obligations in terms of the Torture Convention. If it was not for Belgium forcing them to take action it is very likely that Habré would have happily lived out his days in Senegal. At the time of writing the prosecution had still not started in Senegal but has been scheduled to start in 2015 and Habré has since been arrested.¹¹³⁸ The Court did not refer to any other states that have actually prosecuted torturers in terms of universal jurisdiction and in a sense Senegal might feel aggrieved that they were the one state singled out to be made an example of. The Senegalese example confirms the interpretation provided of states' general and often extreme reluctance to apply the universal jurisdiction provisions contained in the Torture Convention. In light of the decision we see that the duties are for states in terms of universal jurisdiction to implement legislation that enables it to investigate and prosecute foreign torturers when they are present in any territory under its jurisdiction. It however doesn't go so far as to allow states with no link to the offence to ask for extradition of the offender in order to prosecute him. Furthermore, African states have also considered the hybrid model in other contexts. For example, the peace agreement in South Sudan

¹¹³³ Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), (Summary of the Judgment) [2012] ICJ Rep 4.

¹¹³⁴ Murungu CB 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067.

¹¹³⁵ Maclean R 'Chad's Hissène Habré Found Guilty of Crimes against Humanity' *The Guardian* 30 May 2016 available at <https://www.theguardian.com/world/2016/may/30/chad-hissene-habre-guilty-crimes-against-humanity-senegal> (accessed on 25 May 2018)..

¹¹³⁶ Maclean R 'Chad's Hissène Habré Found Guilty of Crimes against Humanity' *The Guardian* 30 May 2016 available at <https://www.theguardian.com/world/2016/may/30/chad-hissene-habre-guilty-crimes-against-humanity-senegal> (accessed on 25 May 2018).

¹¹³⁷ *Separate Opinion* of Judge Abraham at paragraph 30.

¹¹³⁸ Habré lawyers say war crimes trial 'political' *News24* (2014/04/11) available at <http://www.news24.com/Africa/News/Habre-lawyers-say-war-crimes-trial-political-20140410> (accessed on 15 June 2017)

contains provision for a court to investigate ICL violations committed by both parties to the conflict.¹¹³⁹ The AU is similarly supporting this move. At the time of writing, efforts to establish the court in South Sudan had stalled. Political leaders expressed a desire to focus on a truth and reconciliation process modelled after South Africa instead.¹¹⁴⁰

Additionally, the transitional government in the CAR passed legislation creating a hybrid court to adjudicate ICL crimes.¹¹⁴¹ It would be integrated in the national judiciary and would apply the law and criminal procedure of the CAR. The hybrid court would also be composed of national and international judges and staff. This was the first hybrid court created where the ICC has ongoing investigations. Early 2017, the move to establish the court was taking place in fits and starts.¹¹⁴² There are real concerns about capacity, ongoing insecurity, the court's relationship with the ICC and ensuring the court's effectiveness. Notwithstanding these concerns, African hybrid courts have proven to be more promising than purely domestic trials. Yet, the hybrid processes have also faced issues of inadequate capacity and insufficient political will. African states' experiences with these trials spurred the AU to create a permanent regional court as opposed to relying on the international community to create a hybrid institution or supporting separate institutions across the Continent. The experience with ICL trials also influenced the AU's decision to create the ACC.

6.6.3 Rationalizing the establishing the ACC

The idea of a regional criminal justice court in the African continent adds a greater significance to the prosecution discourse in ICL. Regional systems benefit from states with greater socio-economic, environmental and security interdependence, because this encourages greater compliance with the decisions of regional bodies such as the AU.¹¹⁴³ This section discusses the possible benefits of forming a regional approach at a theoretical level, the void that the ACC will fill, potential context-specific remedies and procedure, as well as the prospects for norm promotion.

¹¹³⁹ BBC News, 'African Union Announces South Sudan War Crimes Court' *BBC News* 29 September 2015 available at <http://www.bbc.com/news/world-africa-34393329> (accessed on 25 May 2018).

¹¹⁴⁰ Kiir S& Machar R 'South Sudan Needs Truth, Not Trials,' *New York Times* 7 June 2016. First Vice-President Machar disavowed the contents post-publication, but President Kiir stated that Machar was consulted.

¹¹⁴¹ Mattioli-Zeltner G 'Taking Justice to a New Level: The Special Criminal Court in the Central African Republic,' *Jurist* 9 July 2015 3

¹¹⁴² Amnesty International, *South Sudan: Looking for Justice: Recommendations for the Establishment of the Hybrid Court for South Sudan* (13 October 2016).

¹¹⁴³ Mugwanya G W 'Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System' (1999) 10 *Indiana International and Comparative Law Review* 35 50.

6.6.3.1 Regional approach

Regional problems of criminality deserve regional approaches as it is common knowledge that they are certain matters that are unique to the African continent.¹¹⁴⁴ A regional approach is useful where regional conflicts and insecurity tend to spread.¹¹⁴⁵ A regional approach recognizes the interconnectedness of states, and that regional institutions can be created with mandates which do not ignore these dynamics. A regional court's jurisdiction could be based on the reality of conflict lines, both territorially and temporally. Prosecutions could examine all aspects of criminality including the transnational nature of abuses, perhaps limiting problems posed by lopsided investigations. A regional approach makes sense because the peace and security implications are often greatest within the region where massive crimes occur. Moreover, a regional approach could also limit the difficulties of determining competing claims. A regional body could try to avoid situations where several states have a keen interest in exercising jurisdiction, and where one state's exercise of jurisdiction inevitably frustrates the aspiration of other state(s).¹¹⁴⁶ It also enhances victims' rights by not attempting to adjudicate which society has the most valid claim.¹¹⁴⁷ A regional approach could also restructure double-jeopardy concerns raised by the possibility of multiple prosecutions from different states. In sum, there are numerous theoretical benefits to regional criminal justice.

The AU's decision to create the ACC was influenced by the desire to improve upon the continent's experience with ICL trials. The ACC could help to serve as an intermediary between domestic institutions which violate or fail to enforce human rights, and the international system which alone cannot provide redress to individuals. The creation of the ACC may allow the ICC to concentrate on the most severe situations. This would allow the ICC to dedicate its limited resources more effectively. The ICC will certainly not be able to deal with all situations involving ICL. Moreover, where the ICC does operate, the issuance of irregular indictments means that a criminality gap will persist. Further, while the ACC cannot compensate for failures in domestic capacity, it is nonsensical to forego action at the regional level until or unless domestic or hybrid institutions are strengthened or created.¹¹⁴⁸ The ACC could theoretically help to fill this gap by prosecuting situations that the ICC and national and hybrid institutions are not able to persecute by investigating

¹¹⁴⁴ Jalloh CC 'Regionalizing International Criminal Law?' (2009)9 *International Criminal Law Review* 445 499

¹¹⁴⁵ Schabas WA 'Regions, Regionalism and International Criminal Law' (2007) 4 *New Zealand Yearbook of International Law* 3 23.

¹¹⁴⁶ Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) [2002] ICJ Rep 3.

¹¹⁴⁷ Mégret F 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice' (2005)38 *Cornell International Law Journal* 725 751.

quodidian crimes these institutions do not cover and by indicting individuals and entities that these institutions have not or cannot.

There are numerous ways the ACC could fill the justice gap in international law. Firstly, due to the existence of geographic, historical and cultural bonds among states, decisions of regional bodies may be met with less resistance than global bodies.¹¹⁴⁹ Because the court is linked to the regional political bodies of the AU, this may facilitate stricter oversight. For example, the AU has intervened in Darfur, Sudan, in Burundi and in Somalia. The AU has also suspended Mauritania and Togo from membership for unconstitutional changes of government.¹¹⁵⁰ While intervention and suspension of membership are not synonymous with ICL accountability, they prove that in theory and in practice the AU can challenge sovereignty and the principle of non-interference when sufficient political will exists. Other relevant regional bodies that may assist with compliance include the Panel of the Wise and the Peace and Security Council.

Yet, regional structures will not fully address issues of non-compliance.¹¹⁵¹ For example, the AU has been notoriously silent about violations taking place in countries with influential or revered leaders. The ACC could be subject to the same criticisms that are levelled against the ICC for lack of sufficient independence from the UNSC with respect to AU political bodies. Yet cooperation, even if *de minimus*, would not be insignificant because the lack of global or regional police power necessitates that supranational institutions use shaming and moral persuasion to change the behaviour of nonconforming states. These strategies may be more effective regionally where states are in constant contact.¹¹⁵²

6.6.3.2 Restorative measures and procedure under the ACC

The ACC as a regional body may also be better placed to respond to ICL violations because of its ability to develop more familiar systems of redress. In addition to imposing sentences and forfeiture of any property following a conviction, the ACC is empowered to provide compensation and reparation to victims.¹¹⁵³ The Malabo Protocol also provides a trust fund for victims for legal aid

¹¹⁴⁹ Beyani C Reconstituting the Universal: Human Rights as a Regional Idea: in *the Cambridge Companion to Human Rights Law* (2012) 69.

¹¹⁵⁰ Sarkin J 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect' (2009) 53 *Journal of African Law* 1 33.

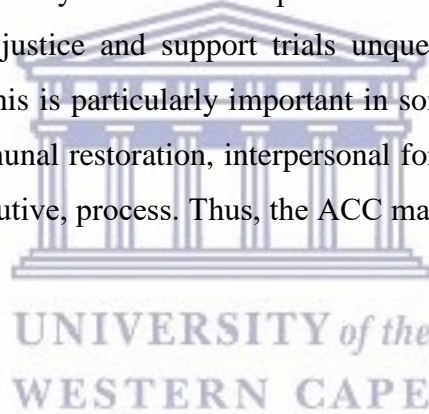
¹¹⁵¹ For a discussion of difficulties securing cooperation with the ICTR and SCSL, see, Mugwanya GW & Ssenyonjo M 'International Criminal Tribunals in Africa' (2012) in *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights*.

¹¹⁵² Mugwanya G W 'Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System' (1999) 10 *Indiana International and Comparative Law Review* 35 50.

¹¹⁵³ Malabo Protocol 1982 (1982) 21 ILM 58

and assistance. While the ICC has similar provisions,¹¹⁵⁴ the ACC may be better placed to fashion remedies that resonate with the victims. For instance, if the ACC follows the lead of the Inter-American Court of Human Rights in fashioning remedies, it might order communal reparations,¹¹⁵⁵ or formulate broad reparative measures.¹¹⁵⁶

The ACC could also require that states end violations through formulating specific policies and programs.¹¹⁵⁷ The ACC might also develop something akin to the margin of appreciation doctrine used by the European Court of Human Rights,¹¹⁵⁸ to avoid determining issues where there is regional diversity on ICL issues.¹¹⁵⁹ Additionally, the ACC could seek to work with other structures in the AU, such as the Peace Fund or the Post-Conflict Reconstruction and Development Framework, to provide redress. Moreover, the ACC may be better equipped to account for variations in procedural traditions.¹¹⁶⁰ For example, the Court might even require a convicted defendant to participate in local reconciliatory procedures akin to *gacaca* as a means of securing reparations to victims. It is premature to determine how broadly the ACC will interpret its provisions. Yet the potential flexibility could be an improvement on the ‘imagined victims’ of ICL that always demand retributive justice and support trials unquestionably. Instead, victims have diverse desires for redress.¹¹⁶¹ This is particularly important in some communities where justice is conceptualized in terms of communal restoration, interpersonal forgiveness and reconciliation, and a redistributive, rather than retributive, process. Thus, the ACC may embody the mantra of ‘African solutions to African problems.’



¹¹⁵⁴ Rome Statute 1998 (1998) 37 ILM 1002, Article 68 (victim’s representatives), 75 (reparations for victims), 79 (trust fund for victims).

¹¹⁵⁵ *Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 146 .

¹¹⁵⁶ Antkowiak TM ‘An Emerging Mandate for International Courts: Victim-Centred Remedies and Restorative Justice’ (2011)47 *Stanford Journal of International Law* 279 332.

¹¹⁵⁷ *Miguel Castro Prison v. Peru, Merits, Reparations and Costs Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 160.

¹¹⁵⁸ McKaskle P L ‘The European Court of Human Rights: What It Is, How It Works, and Its Future’ (2005) 40 *University of San Francisco Law Review* 1 84.

¹¹⁵⁹ Schabas WA ‘Regions, Regionalism and International Criminal Law’ (2007) 4 *New Zealand Yearbook of International Law* 3 23.

¹¹⁶⁰ Schabas WA ‘Regions, Regionalism and International Criminal Law’ (2007) 4 *New Zealand Yearbook of International Law* 3 23.

¹¹⁶¹ Fletcher LE & De Vos K *Refracted Justice: The Imagined Victim and the International Criminal Court,* in *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (2014) 42.

6.6.3.3 Regionalization as a form of Standard Elevation

Like the hybrid courts, the ACC's proximity to those affected could increase the likelihood of norm promotion.¹¹⁶² It is also conceivable that the ACC may be similarly remote from impacted communities like the ICTR or the ICC and this could influence its effectiveness and perceived legitimacy and credibility. However, the ACC may serve as a platform for positive complementarity as a resource for hybrid and domestic efforts at prosecuting ICL violations in Africa. The ACC could provide guidelines for regional best practices and help to strengthen domestic and hybrid efforts aimed at adjudicating ICL. Yet, regionalization of ICL could result in a 'race to the bottom,' with countries seeking lower barriers to entry. That is, instead of states deciding to bind themselves to higher obligations, they can seek to lower their obligations.¹¹⁶³ For example, irrespective of what CIL provides as a background norm,¹¹⁶⁴ the immunities provision is in stark contrast to the trend for ICL tribunals not to grant official immunity. As such, it may be that the flexibility provided by regionalization is undesirable, given the need to maintain certain baselines in the justice fight against the core crimes.

6.4 Conclusion

As explained in chapter 5, the notion of immunity remains as a significant trait of state sovereignty. However, since the growth in the incidence of human rights violations, such immunity has been restricted in accordance with the desire to insist on the accountability of those who breach *jus cogens* norms. Contemporary international law now affirms that no form of immunity will attach to any individual, irrespective of that person's capacity, if indicted before an international court with respect to international customary law crimes. Consequently, the notion of non-immunity for perpetrators has been embedded in international customary law and was accordingly adopted by the Rome Statute. Even though settled practice and international conformity with respect to qualified immunity has been reaffirmed in international law, African states have displayed an immense amount of resistance towards this norm.

Consequently Africa has declared, contrary to international law, that no African sitting head of state or senior government official will be held accountable before any international court or tribunal. This declaration has subsequently been incorporated in the Malabo Protocol as well. Since the ACC will be considered as a regional court but having the same powers as an international criminal court, it is compelled to follow the international norm of stripping immunity from any person,

¹¹⁶² Williams P D & Zaum D Regional and Global Legitimacy Dynamics: The United Nations and Regional Arrangements, in *Legitimizing International Organization*. (2013) 55.

¹¹⁶⁴ Sirleaf M 'Regionalism, Regime Complexes and the Crisis in International Criminal Justice' (2016) 54 *Columbia Journal of Transnational Law* 699.

regardless of that person's official capacity, which includes sitting heads of state and senior government officials. On the other hand, the ACC removes immunity from those accused of unaccustomed crimes, which removal of immunity does not appear in any other international court. The Malabo Protocol deviates significantly from international law, a fact which deepens concerns regarding its relationship with the ICC and its anticipated ability to deliver satisfactory criminal justice.

On an optimistic note the Malabo Protocol provides potentially more contextually tailored solutions than previously provided at the international level. It does this by criminalising conduct that is regionally salient and expanding the actors that can be held liable to include corporations. The Malabo Protocol also seeks to improve upon inefficiencies in the justice saga that exist from relying on the domestic judiciary of member states, or the creation of hybrid courts. The Malabo Protocol's provision for official immunity, while allowed under CIL, may still be an undesirable retraction to the fight against impunity if established. The ACC may face familiar challenges in trying to organise political will and resources to carry out prosecutions. Yet with all its imperfections, it represents an attempt by African states to offer an alternative vision of regional criminal justice that perhaps is better suited to Africa's realities and aspirations.



Chapter Seven - Conclusion and recommendations

7.1 Conclusion

From the onset, this study aimed to demonstrate the possible impact of the introduction of the ACC in the complementarity principle in respect of the three core crimes only, namely genocide, war crimes and crimes against humanity, presenting an unprecedented dimension in international criminal law. As a new international legal institution, the ICC aimed to establish universal legal norms in an increasingly diverse global order in which a larger variety of states shape the discourse and as such, multi-faceted challenges are inevitable. The most intriguing element of those challenges, however, is the places and timing in which they have often appeared. As this study has laid out, there were substantively different reactions to the four situations before the ICC, and to individual cases within those situations. In Uganda, DRC, CAR and Kenya, the opposition came more from civil society than it did from African governments.

Adam Branch pointed out in reference to Uganda, 'for perhaps the first time in the history of international law... those opposing the enforcement of humanitarian and human rights law were not self-interested government officials or rebel leaders' but 'the Ugandan human rights community itself, from activists, lawyers, and civil-society organizations working for peace in the North.'¹¹⁶⁵ When attention was turned to Al Bashir of Sudan, however, the ICC's involvement in the continent became a matter of great contention.

One therefore wonders why there was such a significant shift and why the Al Bashir case elicited such a response. It also becomes interesting to find out why the Al Bashir case prompted a response from the various characters across the continent. As has been discussed throughout this study, the answer is complex, and can only be partially understood. To begin to understand the various dimensions of this question the micro and macro political issues must be examined. In Chapter four, the examination of the relationship between the AU and the ICC was analysed and the root causes of the animosity between the two institutions was fully scrutinized. In addition the chapter also analysed matters of state referrals, Africa's numerical legacy within the ICC and the connection between Africa and the Rome Statute. The ICC could be considered to be the judicial benchmark with respect to international criminal prosecution. Unlike its predecessors, the ICC's jurisdictional reach is not geographically or temporarily limited and extends not only over its member states but over non-state parties as well, pursuant to UNSC referral. The ICC is committed to prosecute only the most severe international crimes, namely genocide, war crimes, crimes against humanity and aggression, within a complementarity framework which provides states with the opportunity of first

¹¹⁶⁵ Adam B *International Justice, Local Injustice: The International Criminal Court in Northern Uganda* (2004)22.

recourse to deliver appropriate justice. Africa had participated intensively in the creation of the Rome Statute, after engaging in significant preparatory regional efforts towards establishing such an entity. Following the Statute's enactment Africa's support was evident, as can be judged from the great number of African states which ratified the Statute, and from the fact that four out of the eight situations before the court are state referrals from Africa. In addition, the continent is well represented throughout The Hague-based court on all major stages.¹¹⁶⁶

However, the ICC's and the UNSC's application of the Rome Statute has severely disgruntled the AU and African states' supporters over time. Specific reference should be made to the Al Bashir indictment, and the indictments of Kenyan President, Uhuru Kenyatta and his vice William Ruto. These indictments were firmly condemned by the AU which condemnation eventually formed the underlying rationale behind Africa's hostile attitude towards the ICC and the UNSC. This fragile relationship was further weakened by the immense amount of opposition the AU faced from the UNSC and ICC with respect to the continent's requests for the suspension of the indictments and to its proposal to amend the Rome Statute accordingly. In response, Africa accused the ICC of being a hegemonic instrument of western powers, which was undermining the continent in its efforts to achieve peace. These continuing adverse occurrences undoubtedly formed the contextual basis upon which the continent is creating its own international African criminal court, the ACC.¹¹⁶⁷ In addition to the ACC's ambition to prosecute international core crimes, the court is also determined to try six crimes that have not achieved the status of international customary law. This venture could be considered as a notable and honourable attempt by Africa to address contemporary social ills which trouble the continent repeatedly. However, the Malabo Protocol fails to adequately address the difficulties this ambitious proposition presents with regard to the introduction and domestication of these crimes in a concerned state's national legislation as cited in chapter four of the study.

The Malabo Protocol demonstrates its complementarity nature towards its member states but grossly neglects to address its relationship with the ICC. Even though there rests no legal obligation upon the Malabo Protocol to make any reference to the Rome Statute, it would surely have assisted to clarify relations between the two courts, considering that thirty-four African states were members to the ICC at the time of the adoption of the draft of the Malabo Protocol. Like the Rome Statute, the Malabo Protocol stresses the importance of the legal obligation imposed upon member states to

¹¹⁶⁶ Du Plessis *International Criminal Court* 5-7. Du Plessis M 'Bringing the International Criminal Court home & the implementation of the Rome Statute of the International Criminal Court Act 2002' (2003) 16 *South African Journal of Criminal Justice* 1 5-7.

¹¹⁶⁷ The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights available at https://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf (accessed on 26 May 2018).

fulfil their responsibilities towards the ACC. However, the Malabo Protocol's silence on the ICC causes further ambiguity with respect to which court would receive primacy in this regard.

Chapter two brought out that the true rationale behind the establishment of any international criminal court is embodied in the CIMT, the CIMTFE, the Statute of the ICTY, the Statute of the ICTR, the Statute of the SCSL and the Rome Statute. All of the above statutes have the purpose of prosecuting perpetrators who commit international customary law crimes regardless of their official capacity. To achieve this objective a court or tribunal should be adequately equipped with sufficient personnel and financial resources. In Chapter two this thesis provided an analysis of the origin of the concept of the complementarity. The chapter went on to give a detailed examination of the evolution and current understanding of the principle of complementarity in relation to national and international jurisdiction. As demonstrated in chapter 2, the ICC lacks the primacy given to the ICTY and ICTR. The application of the complementarity principle is strictly distinctive to the ICC and the Rome Statute. The establishment of ICTY and ICTR as *ad hoc* institutions was a brilliant step towards minimizing the occurrence of the three core crimes, yet it should be noted that the tribunals were limited in territory, crimes and duration. Notwithstanding this, its creators limited the primacy of the ICTY and the ICTR. It is for this reason that when the ICC was finally established its creators omitted the primacy over national courts. This was intended to protect state sovereignty. It was essential for many states that national jurisdictions would have primacy over the ICC. In the final days before formulating the ICC the creators had to find a way that the ICC could relate to national jurisdictions and the answer was complementarity.

Although the ACC generally satisfies the criterion of being regarded as an international court, its challenges are vast. The Malabo Protocol not only contradicts international law by granting immunity to heads of state and other senior government officials but is also subjected to immense personnel and financial shortages. All of these flaws will undoubtedly diminish the new African's court chances of achieving timely and impartial justice and will therefore diminish the prospects of an effective relationship with the ICC.

It should be envisaged that at first glance the ACC could be considered as an honourable attempt by Africa to prosecute not only international crimes but also six unaccustomed crimes, which include unconstitutional changes of government, mercenarism, corruption, the trafficking of drugs, the trafficking of hazardous waste and the illicit exploitation of natural resources. Although the ACC aims to prosecute offences from which African states suffer repeatedly, the Malabo Protocol's reluctance to properly define these crimes leaves member states with the daunting task of having to domesticate these crimes in their national legislation. In addition, the Malabo Protocol fails to provide states with the appropriate legislative support to incorporate and implement the necessary

legal provisions to investigate and adjudicate the offences concerned. This gap only weakens member states' prosecutorial ability, which is contradictory to the underlying principle of complementarity and further hampers the ACC's chances of success.

With respect to the ten additional crimes which fall under the jurisdiction of the ACC, it could be regarded as self-explanatory that no relationship between the ICC and ACC will be conceivable. However, focus should be directed to the crimes of genocide, war crimes and crimes against humanity, which are covered by both the Rome Statute and the Malabo Protocol. The description and admissibility criteria of these crimes are largely similar, which improves the possibility of a relationship between the two courts on the mutual legal assistance basis. However, if the person indicted for these crimes holds an official capacity such as a serving head of state or senior government official, as determined by article 46*Abis*,¹¹⁶⁸ no relationship will be conceivable between the two judicial entities. The Malabo Protocol should be amended in accordance with international law, which requires the revocation of article 46 *Abis*, if any mutual legal assistance relationship is to be possible.

The Rome Statute's deferral clause is envisaged as a significant provision to ensure the ICC's impartiality. The inclusion of a provision which empowers an independent entity to review, and if necessary, defer a situation is consistent with the *Purposes and Principles of the UN* and the universal desire to ensure and maintain international peace and security.¹¹⁶⁹ The Malabo Protocol fails to deliver such a provision, an absence which will surely cast serious doubt on the ACC's impartiality. Consequently, this study recommends the inclusion of a deferral clause in the Malabo Protocol, regulated by the AU with respect to its collective and transparent decision-making structure. This amendment will prevent the ACC from becoming an unregulated entity of power, thus ensuring the court's impartiality and its adherence to international law standards.

Neither the Rome Statute nor the Malabo Protocol makes any reference to the other in its complementarity structure. Since the ICC and the ACC will occupy the same jurisdictional sphere with respect to their shared African member states and the adjudication of their common offences, this study proposes a harmonisation of both jurisdictions on the basis of the progressive interpretation of positive complementarity. Even though the Rome Statute does not explicitly include regional judicial mechanisms in its complementarity framework, the *travaux prepratoires* surrounding the Rome Statute and the UN Charter not only welcomes the implementation of regional judicial prosecution entities but endorses it.¹¹⁷⁰ This proposal provides, firstly, that in terms

¹¹⁶⁸Malabo Protocol, 1985 (1985) 21 ILM 58, Article 46*Abis*

¹¹⁶⁹Charter of the United Nations, 1945 (1945) 1 UNTS XVI.

¹¹⁷⁰ *Travaux prepratoires of the Rome Statute available at <http://www.icc-cpi.int/legatools/>. The United Nations has published the 'official Records' of the Rome Conference, in three volumes and they are the core of the travaux.*

of referral by a member state, the concerned state party will have the discretion to choose either court. Secondly, if a situation is deemed appropriate for a UNSC referral on the one hand, and a referral by the AU Assembly of heads of state and Government or the Peace and Security Council on the other, the ACC may endorse its preference on the basis of Article 17 and 19 of the Rome Statute.¹¹⁷¹ Thirdly, if the prosecutors of both entities are entitled to initiate an investigation and prosecution in a situation, the prosecutor of the ICC may determine that a case should rather be tried before the ACC if that serves the interests of justice. Considering that there exists no such thing as a hierarchy of international courts, this study stresses that any contest regarding the admissibility of a case before any two courts should be unbiased and based upon the common desire to achieve international justice thus, filling the impunity gap.

Article 46*Abis* of the Malabo Protocol represents a major set-back for international law. By excluding sitting Heads of state and senior government officials from any form of accountability, this provision is not only in conflict with established customary international law but renders any effective relationship with the ICC inconceivable. The only possible way to achieve a favourable relationship with the ICC would be the revocation of Article 46*Abis*.

Article 46B of the Malabo Protocol is also problematic. It is accepted in international law that immunity still remains a significant trait of sovereignty and that it acts as an effective bar to criminal prosecution from unaccustomed crimes. Thus, Article 46B needs to be revised in adherence with international law and to grant immunity to individuals of a particular status from prosecution for crimes not yet vested with international customary law status.

Chapter three of the study focused on the discussion of issues of admissibility of a case by the ICC and various points for admissibility, namely complementarity, double jeopardy (*ne bis in idem*) and gravity. The chapter proceeded to cite preliminary rulings regarding admissibility and challenges to jurisdiction and admissibility. The chapter then concluded by analysing the rationale for implementing legislation and how specifically South Africa adopted its implementing legislation. As demonstrated in chapter four, the ICC does not have universal jurisdiction. It has jurisdiction only in cases when a crime is committed by a state party's national or when the crime is committed on a state party's territory or when a non-party state makes a declaration that it accepts the ICC's jurisdiction with respect to the crime in question. The overwhelming view is that the ICC does not

¹¹⁷¹ Article 17 of the Rome Statute states that the admissibility inquiry encompasses both complementarity (requiring that the Court act only in the face of domestic inaction or unwillingness or incapacity to act) and gravity. Article 19 states that challenges to the jurisdiction of the Court or the admissibility of a case. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

exercise UJ.¹¹⁷² However, this stance do not take into account the fact that the exercise of jurisdiction by the ICC in cases referred by the UNSC constitutes an exception to the territorial and nationality requirement. Moreover, even though the Rome Statute outlines territoriality and nationality as the only two forms of jurisdiction, Article 13(b) allows the UNSC to avoid these two requirements in the interests of international peace and security. The UNSC referral is not a form of jurisdiction; hence, the ICC's connection with matters referred to it in this manner can be explained only on the basis of the universality principle.¹¹⁷³

At times some commentators are of the view that the ICC does not exercise UJ,¹¹⁷⁴ there are instances where ICC prosecutions fall directly within the universality principle.¹¹⁷⁵ Further, in relation to the domestic legislative enactments aimed at implementing the ICC obligations of states under the Rome Statute, Dugard highlights that the opinion that such laws do confer upon the courts of a particular state some form of UJ. This is the power of domestic courts to try the international law crimes recognised by the Rome Statute, based on the principle of universality.¹¹⁷⁶ The interventions of the ICC and those of the domestic courts of foreign states resulted in African and some non-African states uniting to denounce what they perceived as the abuse of the principle, mainly by Western states,¹¹⁷⁷ which were allegedly pursuing a neo-colonial agenda against African states. To ensure that its reservations were placed in the international arena the AU decided to request African state parties to the Rome Statute to inscribe on the agenda of the forthcoming sessions of the Assembly of state parties the issue of the indictment of African sitting heads of state; and to highlight the consequences of such actions on peace, stability and reconciliation in AU member states.¹¹⁷⁸

¹¹⁷² Akande D 'The Jurisdiction of the ICC over Nationals of Non-parties: Legal Basis and Limits' (2003) *JICJ* 618-650.

¹¹⁷³ Dube A *Universal Jurisdiction in Respect of International Crimes: Theory and Practice in Africa* (LLD-thesis University of the Western Cape 2015).

¹¹⁷⁴ Ryngaert C *The International Criminal Court and Universal Jurisdiction* (Centre for Global Governance Studies, Katholieke Universiteit Leuven 2010).

¹¹⁷⁵ Dugard J *International Law* 155. Even though Dugard agrees with the position that the ICC does exercise limited UJ, he also points out that other commentators hold a contrary view.

¹¹⁷⁶ Dugard J *International Law A South African Perspective* (2005) 155.

¹¹⁷⁷ See Delegates Cite Abuse of Universal Jurisdiction, Lip Service to Fight against Impunity: Sixth Committee Debate Sixty-Eighth General Assembly, 14th Meeting, GA/L/3462 (2013). During the debate many state representatives voiced their concerns about the manner in which the principle of universality was being used by what they termed 'police states' in violation of international law. Their major concern was that this legal avenue was being politicised, and used in disregard of state sovereignty and the jurisdictional immunities that state officials enjoy under international law. Non-African States also raised similar concerns about the misuse of UJ. These include Iran (which raised concerns about the violation of the jurisdictional immunities of heads of state), Azerbaijan (whose concerns included selectivity and politically motivated prosecutions), Cuba (which raised concerns about UJ's being used to undermine the integrity of various legal systems).

¹¹⁷⁸ Decision on Africa's Relationship with the International Criminal Court Ext/Assembly/AU/Dec.1-2(Oct.2013) (2013) para 10(vii).

Chapter five of the thesis focused on the rationale of creating the ACC with jurisdiction over international crimes. Furthermore an in-depth analysis of the Malabo Protocol was conducted citing the strengths and weaknesses of the establishment of the ACC. The chapter also explored the relationship between the ACC and the ICC and concluded with outlining the potential areas of concurrent jurisdiction between the ICC and the ACC. The response to the Malabo Protocol is a dual tale. Although there is nothing inherently wrong with an African court with jurisdiction over international crimes, critics have expressed serious doubts about the validity, efficacy, and purpose of the proposed ACC, particularly with regards to the immunity provision and the question of finance. By contrast, proponents of the court see an opportunity to add a layer of accountability that has so far been lacking on the African continent. They argue that, while there will undoubtedly be obstacles, these can be overcome, and that to simply condemn the court before it has been created is obstructive. The ACC has the potential to shift Africa's focus from constantly fighting the ICC to working towards an innovative, empowering and credible court that confronts crimes that are particularly damaging to the continent and, crucially, offers an avenue of justice for victims.

Chapter six of the study argued that the Malabo Protocol reconceptualizes the idea of transitional justice mechanisms as varying approaches meant solely to address the legacy of abuse in one nation, and proposes that transitional justice mechanisms can also encompass regional and transnational efforts to respond to mass human rights violations especially in the African continent. It also highlighted the fact that the Malabo Protocol seeks to correct perceived biases in international criminal justice. The chapter also provided a brief overview of the domestic, hybrid and international criminal trials in Africa that have informed the development of the ACC. The chapter also contends that the Malabo Protocol offers the Continent an important, alternative vision of regional criminal justice. Another problematic issue arises when member states of both the ICC and ACC are obliged to comply with requests issued respectively from each constitutional treaty. Since both the Rome Statute and the Malabo Protocol fail to address the concern of competing obligations, member states are left unassisted in this regard to navigate through this complexity. Opposing requests to member states from the AU and ICC regarding the surrender of Al-Bashir exemplified this dilemma and forced African states to decide which court they would adhere to. Consequently, Al-Bashir remains at large and the African continent remains in turmoil.

7.2 Recommendations

The Malabo Protocol's recognition of the ICC in its jurisdictional framework may go a long way towards displaying the AU's intention to assist the ICC in its objective of eradicating impunity on the continent. It may also contribute to preventing similar situations from arising in the future. Since the AU was undoubtedly aware of the vast number of African states which are already parties to the Rome Statute, the responsibility for resolving this issue rests on the concerned regional entity. The AU would therefore be responsible for providing the appropriate guidelines for African states to follow, keeping in mind that the AU is *de facto* prohibited from prioritising any decisions which will ultimately result in member states ignoring their obligations to the ICC.¹¹⁷⁹

Thus, for an effective relationship to exist between the ICC and the ACC this thesis proposes the following: the amendment of article 17 of the Rome Statute to explicitly include regional judicial entities such as the ACC in its complementarity structure; the revision of article 46H of the Malabo Protocol to include the ICC in its complementarity framework; and the deletion of article 46A*bis* of the Malabo Protocol so that the ACC would be able to act in accordance with the standards of international law. In addition, the issue of competing requests needs to be addressed in the Malabo Protocol and the Rome Statute to assist member states in navigating through their obligations and to prevent future discrepancies.

That said, the immense number of procedural and substantive complexities that the Malabo Protocol faces suggests that it is highly unlikely that the ACC will deliver impartial and satisfactory international criminal justice. On the basis of the true rationale behind the ACC's establishment, it also remains doubtful that any meaningful relationship will exist between the new African court and the ICC. Thus, considering the Malabo Protocol in its current state, the existence of ACC would probably only undermine the ICC's current operations and the development of international criminal justice. Africa's controversial approach towards the establishment of its first international criminal court may be derived from its unfortunate colonial past considering that the attainment of independence is still a relatively recent phenomenon for the continent.¹¹⁸⁰ This is because of the fact that formal European political control had only given way by the year 1990.

Thus, the indictment of Africa's sitting heads of states in the continent's early stages of the development of liberation does, evidently, not sit well with the African community. These judicial

¹¹⁷⁹ Du Plessis M 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes' available at www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/ (accessed on 15 April 2018). See also; Abassa 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) 24 *European Journal of International Law* 933 946.; Janssens *A New Star on the Stage* 19.

¹¹⁸⁰ Maqungo S 'The Implications of African States Withdrawing from the ICC' (Unpublished paper presented by the Institute for Security Studies in Pretoria, 2013.).

interventions may prompt underlying fears of destabilisation which may have largely contributed towards Africa's hostile attitude towards the ICC and UNSC. These international entities therefore need to be more attentive to the needs of their African members, as in such matters as the various appeals issued from the continent following the Sudan and Kenyan indictments.¹¹⁸¹ On the other hand, Africa should also recognise the fundamental role it plays within the international community, which ultimately requires the continent to act in accordance with settled international practice.

7.2.1 Consideration of Immunity clause in the Malabo Protocol

Article 46Abis of the Malabo Protocol states that ; ‘No charges shall be commenced or continued before the court against any serving AU head of state or Government, or anybody acting or entitled to act in such a capacity, or other senior state officials based on their functions, during their tenure in office.’

It is undeniable that the immunity clause will definitely undermine the legitimacy of the ACC and its attempt to fight impunity. The preamble of the AU’s decision on Africa’s relationship with the ICC re-iterates the organizations ‘unflinching commitment to fight impunity, promote human rights and democracy and good governance in the continent.’¹¹⁸² Despite these sentiments, the AU has failed to consider the victims of core crimes in the continent for example the 2007 post election Violence in Kenya. Article 4(h) provides for the right of the AU to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances,¹¹⁸³ specifically war crimes, genocide and crimes against humanity. The final decision to intervene ultimately lies with Assembly of states. African states have however, proven to refrain from intervening in other member states based on the notion of sovereignty, even when gross human rights violations have taken place. Instead, the AU has shielded those who are responsible for crimes against humanity to evade prosecution without due regard for the victims of those violations. The actions of the AU, and in particular Kenya, can be deemed to be unlawful because they promote impunity.

The ICC could still investigate and prosecute sitting heads of state and government officials in Africa in accordance with the Rome Statute. However, the proceedings brought against Kenyatta and Ruto highlighted the lack of cooperation from African states who have ratified the Rome statute and how they could limit the ICC’s ability to investigate and prosecute these officials. A

¹¹⁸¹Maqungo S ‘The Implications of African States Withdrawing from the ICC’ (Unpublished paper presented by the Institute for Security Studies in Pretoria,2013).

¹¹⁸² Preamble of the Decision on Africa’s Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1(Oct.2013), Extraordinary Session of the Assembly of the African Union, 12 October 2013 para 2

¹¹⁸³ African Union Constitutive Act, Article 4(h).

lack of cooperation with the ICC and a provision that allows for the immunity of heads of state will further limit avenues for victims of human rights violations to access justice and redress. The immunity clause is therefore a betrayal of victims of human rights violations. The AU's actions are also violation of Article 4 of the Constitutive Act and its own human rights provisions.¹¹⁸⁴ On a continent where impunity is widespread, the immunity clause will undoubtedly encourage heads of state and government officials to hold on to power as a way of avoiding prosecution. It has been argued that heads of states and government officials are most likely to be the perpetrators of mass human rights atrocities, specifically genocide, crimes against humanity and war crimes. The immunity clause will demonstrate to African leaders that they can commit gross human rights violations without any consequences or repercussions. It is therefore crucial that African states demonstrate political courage and resist the pressure to shield leaders by denouncing the immunity clause outlined in the Malabo Protocol

7.2.2 Amendments provision in the Malabo Protocol

The Malabo Protocol includes a provision for amendments to be adopted by simple majority of the Assembly, upon recommendation by a state party or the Court Article 12. All state parties would do well to use this provision to introduce amendments to the Malabo Protocol before it enters into force, so as to strengthen its effectiveness, efficacy, and legitimacy. The following amendments are recommended: Article 46A *bis* should be removed entirely.¹¹⁸⁵ No immunity should be provided to any individual, regardless of their official position. This would place the Malabo Protocol more in line with both the AU Constitutive Act's rejection of impunity and the policy of international criminal tribunals around the world. To allow the Malabo Protocol to operate within the AU's policy of sequencing peace and justice, a provision can be added to the Malabo Protocol that allows the Peace and Security Council of the AU to request the ICC to defer a trial for a year if it was in the interest of peace and stability.

7.2.3 Massive ratification of Malabo Protocol at country level

It is critical that AU states are urged to ratify the Malabo Protocol in large numbers since this , would be vital in strengthening the engagement of non-state actors, association of lawyers, and to the sensitization of the judiciary on the complementarity between national courts and the future ACC. The role of the legislature (Parliament) should not be underestimated as they play a key role in proposing bills and amendment to laws. They should be informed on the need to domesticate laws criminalizing international crimes. For international partners, this poses the challenges of linking engagement strategies at the different levels (national, regional and international). Country-

¹¹⁸⁴ African Union Constitutive Act, Article 4.

¹¹⁸⁵ Malabo Protocol, Article 46A.

level actors, including civil organizations, especially in countries where the constitutional framework is particularly favorable to transitional justice (e.g., Kenya, South Africa, etc.), could play a critical role in ensuring that their respective governments continue to engage. The success of the ACC will also depend on the engagement of local actors in ensuring the speedy ratification of instruments and monitoring of their implementation.

7.2.4 Political will

There is definitely no lackluster political will displayed by the Malabo Protocol itself, but rather the atmosphere in which the ACC will operate in. Despite how vigorous the provisions and how qualified the staff of the court are, the ACC will fail dismally at its first attempts if there is no genuine commitment by African member states and politicians. Sincere cooperation with the ACC by governments will be crucial to ensure that witnesses and victims are protected, suspects are surrendered, evidence is collected, and sentences are properly enforced. There are already disturbing indications of a lack of commitment to holding individuals to account for international crimes, predominantly if that individual is a high-ranking state official.

First of all the introduction of the immunity provision demonstrates an unwillingness of the political elite in the African continent to hold themselves to the similar standards as others; secondly, the AU's calls for non-cooperation with the ICC, and the subsequent finding of the ICC that Kenya was refusing to cooperate, sets a treacherous precedent that a state only has to cooperate with the court if they 'agree' with the cases before it.

7.2.5 A complementarity relationship between the ACC and ICC

A noticeable omission in the Malabo Protocol, which has received strong criticism, is that nowhere in the complementarity provisions is the ICC or Rome Statute mentioned. As Du Plessis cites :

'It is unfathomable that the draft protocol nowhere mentions the ICC Either this is a sign that the AU hopes its members will sidestep the ICC, or it is a case of irresponsible treaty making – forcing signatories to become party to an instrument that willfully or negligently ignores the complicated relationship that will exist for states parties to the Rome Statute.'¹¹⁸⁶

¹¹⁸⁶ Du Plessis M. Implications of the AU decision to give the African Court jurisdiction over international crimes available at page 10. < <https://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf>>(accessed on 17 June 2018).

It can be questioned whether complementarity under the Rome Statute extends to regional courts, such as the ACC, or it is only intended to only apply to national courts.¹¹⁸⁷

If the latter were true, it would create serious tension between the two institutions, as the ICC could refuse to accept that an individual they wished to try could be tried by the ACC instead. It is highly recommended that in the spirit of 'positive' complementarity the ICC would allow, an added layer of regional courts, even if this required the Assembly of state parties to the Rome Statute to amend the wording of the Rome Statute accordingly. This would of course be subject to the condition that the purpose of the said regional court was not simply to shield certain individuals from prosecution an accusation that the ACC may face due to the addition of the immunity provision. Cooperation would benefit both institutions greatly.

It would allow the caseload to be shared, with the ICC focusing on the highest- level perpetrators of core international crimes, while the ACC concentrated on perpetrators of crimes solely in the African region. A good working relationship with the ACC could also be an opportunity for the ICC to re-legitimise its image in Africa and re-establish the strong relationship it once had with the AU. Article 46H of the Malabo Protocol on 'complementary jurisdiction' should be amended to cement the ACC commitment to work with the ICC and make clear to African states that being a member of the AU does not mean abandoning their obligations under the Rome Statute. This could simply require the amendment of section 1 of the Rome Statute to state: 'The jurisdiction of the Court shall be complementary to that of the National Courts, the Courts of the Regional Economic Communities where specifically provided for by the Communities, and to the ICC.' In the spirit of positive complementarity, the ICC should allow regional courts such as the ACC a place in the framework of institutions that are complementary to the ICC. This would of course be subject to such courts working genuinely alongside the ICC, rather than defending individuals from prosecution.

It can be said that proximity is essential for successful prosecution; having international crimes tried by an African court, in that it allows trials to be conducted where possible in, or at least closer to, the region in which the atrocities were committed. This has clear benefits for investigations by the prosecution, who will arguably have easier access to evidence and witnesses. More importantly, however, it gives victims and citizens a greater sense of 'ownership' over the trial and would likely facilitate greater interest, participation and reconciliation. This is combined with a sense of empowerment that African institutions are capable of handling trials, rather than relying on

¹¹⁸⁷ Murungu C 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) JICL 9 1067-1081.

international tribunals, and hopefully eliminates the toxic debates around neo-imperialism and bias that have plagued the ICC trials.

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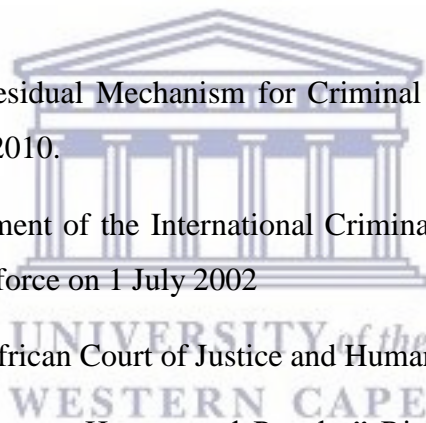
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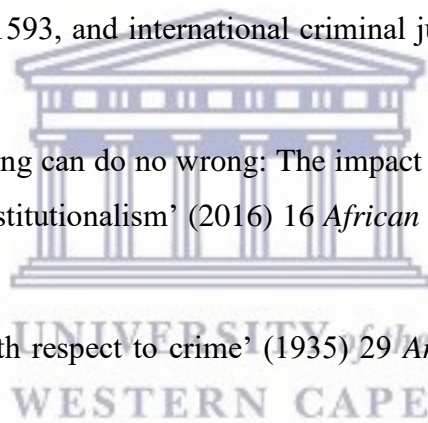
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