The Principle of Complementarity: A Critical Analysis of Article 17 of the Rome Statute from an African Perspective

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By

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DECLARATION

I, **Thapelo Mohami (Ms)**, declare that the work presented in this thesis is my own and has not been presented for degree or examination purposes at any other University. Where other people's works have been used, complete references have been provided.

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Signature……………………………………………………………

Date………………………………………………………………….

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ABSTRACT

This thesis attempts to address perennial concerns, mostly raised in some quarters in Africa, pertaining to the development of the complementarity regime established by the Rome Statute of the International Criminal Court. It grapples with a very important question, whether the principle of complementarity, embodied in article 17 of the Rome Statute, was formulated and is being applied by the ICC in a manner that upholds the ideals and theories upon which the regime was founded. The principle of complementarity is designed to mediate the imperatives of State sovereignty and a legitimate international criminal justice system. Essentially, complementarity gives States latitude to try genocide, crimes against humanity, war crimes and aggression nationally, with the ICC only intervening where States are either unable or unwilling to prosecute genuinely. Africa constitutes the biggest regional block of membership to the Rome Statute, however, over the years; support for the ICC on the African continent has waned. It has been argued in some quarters that the ICC is anti-African and that it has interpreted and applied complementarity in a manner that diminishes State sovereignty. The thesis argues that this tension may also be due to textual deficiencies inherent within the Rome Statute, in the provisions that embody this principle. It therefore examines complementarity from a theoretical perspective to provide a comprehensive account of the system contemplated by the drafters of the Rome Statute. In this regard, the thesis argues for expansion of States' ability at the national level to deal with international crimes without compromising international criminal justice processes or threatening State sovereignty. This is suggested as a way of relieving the tension that has characterised the relationship between African States and the ICC. The thesis further sketches out some of the complexities inherent in the modalities through which the Court may exercise its complementary jurisdiction, particularly within the African continent, given that legal systems in most African countries are particularly weak. It thus dissects the provisions that outline the principle of complementarity in tandem with the Court's interpretation and application of complementarity in practice. Furthermore, through an exploratory survey of the referral of the Situation in Uganda, and the ICC Prosecutor's *proprio motu* investigation of the Situation in Kenya, the thesis illustrates how a positive approach to complementarity can help establish a healthy cooperative synergy between the ICC and States, thereby promoting a functional expeditious criminal justice system. This will go a long way towards assuaging State's fears that the ICC merely pays lip service to complementarity and arbitrarily supersedes national jurisdiction.

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Vienna Convention on the Law of Treaties (entered into force on 27 January 1980) UN Doc. A/CONF. 39/27.

LIST OF ABBREVIATIONS

AJIL.	American Journal of International Law
AOS.	The Organization of American States
ASAARC.	Association of South Asian Association for Regional Cooperation
AU.	African Union
CAR.	The Central African Republic
CARICOM.	The Caribbean Community
CCC.	Criminal Code of Canada
DRC.	The Democratic republic of Congo
ECHR.	European Court of Human Rights
EHRR.	European Human Rights Report
EJIL.	European Journal of International Law
EU.	The European Union
FPRI.	Force de Resistance Patriotique en Ituri
Geneva Conventions.	The Geneva Conventions on the Laws of Treaties
ICC.	International Criminal Court
ICCPR.	International Covenant on Civil and Political Rights
ICJ.	The International Court of Justice
ICTR.	International Criminal Tribunal for Rwanda
ICTY.	International Criminal Tribunal for the Former Yugoslavia
ILC.	International Law Commission
IMT.	International Military Tribunal
LRA.	The Lord's Resistance Army

OTP.	Office of the Prosecutor
PIF.	Pacific Islands Forum
SADC.	Southern African Development Community
Treaty of Neuilly-sur-Seine.	Treaty of Peace Between the Allied and Associated Powers and Bulgaria
Treaty of Sevres.	The Treaty of Peace Between the Allied and Associated Powers and the Ottoman Empire
Treaty of St. Germain-en-Laye.	Treaty of Peace between the Allied and Associated Powers and Austria
Treaty of Trianon.	Treaty of Peace Between the Allied and Associated Powers and Hungary
U.N.T.S.	United Nations Treaty Series.
UN.	United Nations
UN Charter.	United Nations Charter (1945), 59 Stat 1031, Treaty Set No 993 (1945).

Chapter One

GENERAL INTRODUCTION

1.0 Introduction

The basic understanding of the principle of complementarity[1] is that the International Criminal Court (hereinafter "the ICC") is supplementary to national jurisdiction in prosecuting core international crimes set out in article 5 of the Rome Statute of the International Criminal Court (the "Rome Statute").[2] The legal framework that embodies this principle is in Article 17 of the Rome Statute. The regime established by article 17 is commonly referred to as the complementarity regime. Article 17 provides rules governing the admissibility of cases before the Court. The principle requires that the ICC defer to national judiciaries when crimes against humanity, genocide, aggression and war crimes have been committed and a Member State has asserted its criminal jurisdiction over those crimes.[3] Significantly, article 17 links the admissibility criteria to the complementarity regime by laying down conditions under which the ICC may defer jurisdiction to national courts. [4]

Pursuant to article 17, the ICC may deem a case inadmissible before it when it has been or is being investigated or prosecuted in a State with territorial or nationality jurisdiction; or where such a State has investigated the matter and has decided not to prosecute.[5] "Unwillingness" and "inability" to prosecute genuinely are trigger mechanisms through which the ICC may exercise its complementary jurisdiction.[6] Therefore, the core of the admissibility criteria is whether the State that has jurisdiction shows "unwillingness" or "inability" to genuinely

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[1] The principle of complementarity is enshrined in the 10th preambular paragraph of the Rome Statute in which States Parties to the Rome Statute were "emphasizing that the international criminal court established under this statute shall be *complementary* to national jurisdictions." Article 1 also provides: "An international criminal court (the Court) is hereby established...and shall be *complementary* to national criminal jurisdictions." [Emphasis added]. The principle is also embodied in article 17 (rules of admissibility) which refers to article 1 and para10 of the preamble of the Rome Statute and gives States primary jurisdiction. See The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S. 90.

[2] The crimes listed under article 5 of the Rome Statute are aggression, war crimes, crimes against humanity and the crime of genocide. Article 17 of the Rome Statute essentially gives States latitude to try these crimes nationally. See JT Holmes "Complementarity: National Courts Versus the International Criminal Court" in A Cassese, P Gaeta and J Jones (eds.) *The Rome Statute of the International Criminal Court: A Complex Interplay* (2002) 667; L Yang "On the Principle of Complementarity of the Rome Statute of the International Criminal Court" (2005) 4 *Chinese Journal of International Law* 121 at 122.

[3] See article 17 of the Rome Statute.

[4] Article 17 deliberately refers to article 1 and paragraph 10 of the preamble of the Statute, which introduces the principle, thereby creating a link between the admissibility criteria and the ICC's exercise of its complementary jurisdiction.

[5] See article17 (1) of the Rome Statute.

[6] See M Politi and F Gioia "The Criminal Procedure Before the International Criminal Court: Main Features" (2006) 5 *The Law and Practice of International Courts and Tribunals* 106.

investigate and/or prosecute the Rome Statute crimes.[7] In addition, a case is inadmissible before the ICC where the suspect has been tried for the conduct which is the subject of the complaint before the Court (*ne bis in idem).*[8] The Court may also not entertain a case if it is not of sufficient gravity to warrant further action, given the fact that the ICC has the mandate to try only perpetrators of the most serious crimes.[9] Since the ICC became operational, it has opened cases against individuals from eight African countries.[10] However, some African countries, under the aegis of the African Union (hereinafter the "AU"), have voiced concerns about the Court's fairness. The interpretation and application of the principle of complementarity by the ICC in these cases has, largely contributed to the tension that has built up between the Court and the AU and this issue merits examination.[11]

1.2. Description and Context of the Research

The principle of complementarity is a unique and pivotal concept of international law, which delineates prosecutorial prerogatives between national courts and international judicial institutions. With the evolution and development of the principle, authors of the worst atrocities can no longer hide behind the veil of State sovereignty. However, as complementarity was set in motion, voices of concern over the Court's independence and its prioritization of African were heard across the continent.[12] This has strained the relationship between the Court and some African States and as a result, the formidable support that

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[7] See Article 17 of the Rome Statute.

[8] See article 20(3) of the Rome Statute. This rule is sometimes referred to as the double jeopardy rule, if a person has already been tried for conduct that is the subject of a complaint before a court of law, he cannot be tried for the same conduct again if he was convicted or acquitted.

[9] The Rome Statute requires that the Court only hear cases that meet the gravity threshold – heinous crimes which are systematic and large scale as opposed to crimes of a lesser magnitude, which could be dealt with municipally.

[10] The ICC docket comprises of cases from African countries. The Court is currently investigating cases against individuals from Uganda, The DRC, The Central African Republic, Sudan, Kenya, Ivory Coast, Libya and Mali.

[11] See M du Plessis *The International Criminal Court that Africa Wants* (2010) 13. From a healthy relationship of support for the ICC to declarations of non-cooperation, the ICC-AU relationship remains strained after the ICC indicted of sitting heads of African States. An arrest warrant was issued against the Sudanese President Omar Hassan al Bashir in 2009 for war crimes and crimes against humanity in Darfur. The Kenyan President Uhuru Kenyatta and his Vice-President William Ruto are due to stand trial in 2014 for crimes against humanity and war crimes which are alleged to have been committed during the 2007 post-election violence.

[12] It has been argued that the ICC is a post-colonial conspiracy tool used by the Western Powers against weak African States. Also, that the Security Council has ignored African States' plea for peace over justice in its resolution of conflicts within the Continent. Moreover, that the ICC's indictment of a sitting head of a non-member State to the Rome Statute is an affront to that State (Sudan's) sovereignty. See "Rwanda's Kagame Says ICC Targeting Poor, African Countries" *AFP* 31 July 2008. See also C Murungu and J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 155. See M du Plessis *The International Criminal Court that Africa Wants* (2010) 13-14 for a general discussion.

African States once showed for the ICC has waned.[13] To voice their displeasure, African States, under the aegis of the African Union, have adopted a declaration of non-cooperation with the ICC.[14] Instead of cooperating with the ICC, the AU has decided to vest the African Court of Justice and Human Rights (hereinafter "the African Court")[15] with complementary jurisdiction to try the crimes, among others, listed under article 5 of the Rome Statute.[16] This move by the AU raises interesting questions: whether the Complementarity regime envisages a situation where regional quasi-judicial bodies or tribunals have a complementary role within the international criminal justice system. Another issue is whether their involvement will not undermine the Court's quest for accountability or its relevance in Africa. For instance, most recently, the Kenyan government has been lobbying for withdrawal from the ICC after unsuccessful attempts to challenge the Court's jurisdiction over the cases against six high-ranking Kenyan officials.[17]

Although there seems to be a general concern that the ICC is targeting African heads of State, the chaotic and dangerous aspirations of African governments, and the consequent suffering of their citizenry show that there is a need for the ICC's intervention.

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[13] Africa has been known for its support for the ICC since the negotiations for the establishment of the Court, and African States form the largest regional block of membership to the Rome Statute. As a matter of fact, the first State Party to sign the Rome Statute, Senegal is from Africa. See du Plessis *The International Criminal Court that Africa Wants* (2010) 13.

[14] See Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII) Assembly/AU/Dec.245 (XIII) Rev.1 (adopted at Sirte Libya on 3 July 2009). Page 2 para 10 provides: "… 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 El Bashir of The Sudan" adopted at Sirte Libya on 3 July 2009.

[15] The African Court was established by the *Draft* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Exp/Min/IV/Rev.7 which merges the African Human and Peoples Rights Court with the African Court of Justice.

[16] The *Draft* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights which establishes the International Criminal Section of the African Court was adopted at a Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters on 7 to 11 and 14 to 15 May 2012 Addis Ababa, Ethiopia Exp/Min/IV/Rev.7 Original: English.

[17] See "Kenya's Threat to Withdraw from the ICC: What Will SA Do?" *Daily Maverick* 29 November 2013. Available at http://www.dailymaverick.co.za/article/2013-10-08-kenyas-threat-to-withdraw-from-the-icc-what-will-sa-do/#.Uphni9IW1FU (accessed 29 November 2013). Subsequent to Kenya's passage of a motion in parliament to withdraw membership to the Rome Statute, the AU held the 15th Extraordinary Session of the Assembly of the African Union included among others, Decision on Africa's Relations with the ICC. See Decision on Africa's Relations with the International Criminal Court Ext/Assembly/AU/Dec.1-2 (Oct.2013). The AU adopted a decision to call for deferment or postponement of the cases against the Kenyan vice-president and President Uhuru Kenyatta. See "Africa to Request Deferment of Indictments against Kenyan President and Vice President" Press Release No 177/2013 Addis Ababa (12 October 2013). The ICC finally postponed the case against Kenyatta to February 2014. See "ICC Postpones Kenya President Kenyatta's Trial Date" *13th Forum Ecomonique International Sur L'Afrique* 29 November 2013. Available at http://www.panapress.com/iCC-postpones-Kenya-President-Kenyatta-s-trial-date--15-885721-32-lang2-index.html (accessed 29 July 2013).

This thesis therefore sets out to investigate whether the ICC interpretes and applies complementarity in a manner that upholds the ideals and theories upon which the regime established by article 17 was founded. The thesis will therefore advance theoretical constructs underpinning complementarity and use these as the framework upon which it will critically analyse the interplay between the ICC and national judiciaries. Moreover, while the African audience is not oblivious to the need for ICC intervention, the mixed legal, political and social nature of the concerns raised against the ICC, necessitates a holistic assessment of the complementary regime. Three major points are therefore noteworthy. Firstly, that complementarity is only invoked where national justice systems are incompetent or inoperative (unavailable). Secondly, legal systems in most African countries are particularly weak and "African solutions to African problems" avenues have, in the past, failed to resolve disputes in conflict torn societies in Africa. Lastly, although African States perceive the ICC as a threat to their sovereignty, they have a lot to gain from the regime of complementarity, its flaws notwithstanding.

1.2.1 Complementarity and Modern Notions of State Sovereignty

African States have shown formidable support for the ICC since the idea to establish such a court was first formulated. The relationship between African States and the ICC however, worsened soon after the indictment of an incumbent head of State, President Omar al-Bashir of Sudan in 2009. Some of the concerns that African States have raised are that the ICC undermines State sovereignty and is a mechanism of neo-colonial policy used by the West against free and weak countries;[18] and that it takes advantage of African countries because national legal systems in Africa are particularly weak.[19] The Court's involvement in on-going

[18] This was the argument advanced by the Arab League's Foreign Ministers at their meeting in Cairo on July 19, 2008 in response to ICC's involvement in Sudan. They called the ICC's move a dangerous precedent which undermines Sudan's sovereignty. The 22 Member States made a joint resolution declaring "solidarity with the President of Sudan in confronting schemes that undermine its sovereignty, unity and stability and their non-acceptance of the unbalanced, not objective position of the Prosecutor of the ICC". See K Aning S Atuobi "Responsibility to Protect Africa: An Analysis of the African Union's Peace and Security Architecture" *Global Responsibility to Protect* (2009) 274 in this regard. See also A Alexis *et al* "International Criminal Court Cases in Africa: Status and Policy Issues" (2009) *Congressional Research Service* 13. Available at http://fpc.state.gov/documents/organization/128346.pdf (Accessed 22 March 2012).

[19] See Alexis *et al* "International Criminal Court Cases in Africa: Status and Policy Issues" *Congressional Research Service* 27. See also P Mckeon "An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands of International Justice (2009) 12 *St. John's Journal of Legal Commentary* 535 at 555. See also S Odero "Politics of International Criminal Justice, the International Criminal Court's Arrest Warrant for Al Bashir and the African Union's Neo-colonial Conspirator Thesis" in C Murungu and J Biegon (eds.) *Prosecuting International Crimes in Africa* (2011) 145 at 156.

conflicts has also been seen as an obstruction to peace and reconciliation efforts.[20] Some critics also argue that the ICC may also be used for political ends, for instance, in order to eliminate opponents.[21] Some of these issues form the core of the African Union's opposition to the ICC's involvement in Uganda, after President Yoweri Museveni referred the situation in northern Uganda concerning mass atrocities committed by the Lord's Resistance Army (LRA) to the Court. For the most part, the AU's anti-ICC behaviour intensified soon after the indictment of President Omar Hassan al-Bashir, pursuant to the United Nations Security Council Resolution 1593 (2005).[22] This particular case has been controversial because Sudan is not a party to the Rome Statute and this was considered an affront to Sudan's sovereignty.

The principle of complementarity was an attempt to strike a balance between State sovereignty and repression of international crimes. However, with the culmination of the tension between these competing interests in the context of Africa, it may be useful to investigate whether the Rome Statute provides States with appropriate tools to maintain this delicate balance. It is also imperative to determine the extent to which membership to the Rome Statute fundamentally challenges State sovereignty. This requires a brief overview of the evolution and development of the notion of sovereignty of States. Criminal jurisdiction is one of the traditional bases of State sovereignty but due to the changing landscape of international relations, classical notions of State sovereignty no longer apply in international law.[23] The Nuremberg trials lifted the veil of sovereignty.[24] This principle is therefore no longer an absolute right. History has proved that uncontrolled notions of State sovereignty aggravated the culture of impunity for the most heinous crimes.

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[20] This was the argument advanced by, among others, the Acholi Religious Leaders' Peace initiative, that the ICC should stop further investigations and prosecutions in northern Uganda as its involvement could deter protagonists from joining peace talks. See also A du Plessis and A Louw 'The ICC that Africa Wants,' Symposium on International Crime in Africa Programme (2009) *International Security Studies* 1 at 6.

[21] Some scholars have argued that the ICC was used to settle political scores in Uganda as charges were only brought against the Lord Resistance Army and not President Musevini's militia when there was evidence that they also committed heinous crimes during the conflict. See Souare 2009 *Review of African Political Economy* 377 (noting that "the whole story of referring the LRA to the ICC was a political strategy by the Ugandan government to achieve international criminalization of the group and to gain foreign support for its military operations against the rebels").

[22] One of the trigger mechanisms for the ICC to assert its jurisdiction is by a Security Council referral acting under Chapter VII of the Charter of United Nations. See article 16 of the Rome Statute.

[23] During the negotiations for an international tribunal for punishment of international crimes, the proposals brought forward made a distinction between internal and external sovereignty, in a way, this goes to show that strict concepts of sovereignty do not apply in international law; a state no longer has the power to do as it pleases within its territory, it has to be in line with the rule of law and the law of nations. See also "The Relationship Between State Sovereignty and the Enforcement of International Criminal Law Under the Rome Statute (1998): A complex Interplay" *International Criminal Law Review* (2009) 9 531 at 538.

[24] The Nuremberg trials set out the principles of International criminal law and emphasized that war criminals cannot hide behind the veil of state sovereignty. See Brand R A "External Sovereignty and International Law" (1995) 18 *Fordham International Law Journal* 1685, 1690.

State sovereignty is a customary international law concept embedded in article 2 of the United Nations Charter, which emphasises that every sovereign State must be able to manage its own internal affairs without undue interference from other States, except for humanitarian intervention. For instance, in cases where the Security Council enforces its Chapter VII powers.[25] The traditional understanding of sovereignty is that the State has political independence and must handle its internal affairs free from interference by the international community.[26] However, this posed problems after the World War I because States invoked the concept to block attempts to bring those responsible for atrocities to book and to stall the establishment of an international criminal tribunal.[27] However, under the current international order, sovereignty is subject to limitations.[28] In the words of Boutros, the former UN Secretary General "[t]he time of absolute and exclusive sovereignty…has passed; [because] its theory was never matched by reality."[29]

This radical shift from the traditional State-centred view of international personality came after the incorporation of the concept of individual criminal responsibility into international criminal law after the World War II.[30] The most fundamental of these in-roads on sovereignty of States is the complementarity regime. The ICC may be described as an intrusive institution as far as it may fundamentally curtails State sovereignty, in that it prosecutes States' nationals should States not satisfy the complementarity criterion set out in article 17 of the Rome Statute.[31] Although States have jurisdictional priority over crimes set out in the Statute, their

[25] See article 2(7) of the United Nations Charter (1945), 59 Stat 1031, Treaty Set No 993 (1945). It provides: "Nothing contained in this present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state…but this principle shall not prejudice the application of enforcement measures under Chapter VII"

[26] See GB Helman and SR Ratner "Saving Failed States" *Foreign Policy* (1992-1993) 89 3 at 9.

[27] M Newton "Comparative complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court" *Military Law Review* (2001) 20 at 24 opines that the concept of sovereignty did not only hamper attempts to establish an international criminal court but also restricted the application of the rule of law of nations. Powerful perpetrators escaped criminal liability for their actions under the guise of state sovereignty. Germany was against its nationals being prosecuted in an international tribunal (set up by the Allied Powers) for war crimes after World War I because they would infringe their sovereignty rights. It seems this was one of the impunity manoeuvres that have been put in place by most powerful leaders

[28] See P McKeon "An International Criminal Court: Balancing the Principle of Sovereignty against the Demands for International Justice (2009) *St. John's Journal of Legal Commentary* 535 at 541.

[29] See Boutros B *An Agenda for Peace: Preventive Diplomacy, Peace-making and Peace Keeping* (1992) 9. He goes further to state that world leaders have a duty to understand that classical notions of State sovereignty no longer have a place in international law and urges them to "find a balance between the needs of good internal governance and the requirements of an ever more interdependent world".

[30] See JN Maogoto *War Crimes and Realpolitik: International Justice from World War I to the 21st Century* (2004) 5.

[31] The Rome Statute has made significant breakthroughs to the concept of state sovereignty by endowing the ICC with complementary jurisdiction: classical notions of unconstrained sovereignty no longer apply in international criminal law since the Court has the power to wrest cases from national jurisdiction where states fail to prosecute in terms of the Statute. See A Cassese "The Statute of the International Criminal

sovereignty is limited in the sense that whenever crimes have been committed within their territory, the ICC's watchful eye exerts pressure on the State to perform its international law duties and prosecute, failing which the Court exercises its complementary jurisdiction.

Additionally, in cases where a State decides not to prosecute, its entire legal and judicial system is scrutinized in terms of article 17, to determine the genuineness of the decision to or not to prosecute.[32] The act of ratifying the Rome Statute therefore constitutes a sovereign act in itself; this is because a sovereign nation State of its own volition gives the international tribunal power to intervene where it is unable to meet its treaty obligations.[33] The fact that the Court can still intervene in matters involving third States through the Security Council also curtails sovereignty of third States. This is exemplified by the Court's involvement in the situation in Sudan concerning mass atrocities allegedly committed by, among others, the sitting head of State, President al Bashir. The case was referred to the Court through the Security Council Resolution 1593 of 2005.[34]

The Court would not have jurisdiction over the situation in Darfur but for the resolution. Sudan is not a party to the Rome Statute and does not accept the Court's jurisdiction. This implies that failure to ratify the Rome Statute does not absolve the State of its international law duties. A Security Council resolution extends the Court's jurisdictional reach to non-member States, an approach that is quite unorthodox in international relations.[35] This raises an important question, to what extent does membership to the Rome Statute constitute a fundamental challenge to sovereignty of Member States to the Rome Statute? The ICC is envisioned as the court of last resort, with States' national courts being the prime *fora.* Thus,

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Court: Some Preliminary Reflections" (1999) 10 *EJIL* 144 at 145, he notes that the ICC is a "…very revolutionary institution that intrudes into state sovereignty by subjecting states' nationals to an international criminal jurisdiction".

32 See A Ioana *The ICC: Starting with Africa?* (PhD dissertation, Peter Paizmany Catholic University, 2008) 42.

33 See M Melandri "The Relationship Between State Sovereignty and the Enforcement of International Criminal Law under the Rome Statute (1998): A Complex Interplay" (2009) 9(3) *Criminal Law Review* 531 at 536. He notes that the act of ratifying the Rome Statute is considered a sovereign act by a state, since it affirms its commitment to international criminal justice and gives a supranational judicial body powers to supplement any deficiencies in its judicial system.

34 See Security Council Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting, on 31 March 2005 S/RES/1593 (2005).

35 See article 26 of the Vienna Convention on the Law of Treaties (entered into force on 27 January 1980) UN Doc. A/CONF. 39/27. *International Legal Materials*, (1969) 679-735 (hereafter cited as Vienna Convention on the Law of Treaties). It provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". The third preambular paragraph of the Vienna Convention on the Law of Treaties also emphasizes the principles of free consent and of good faith and the *pacta sunt servanda* rule.

by vesting primary jurisdiction in States, the complementarity regime attempts to preserve sovereignty. However, this applies only in cases where States prosecute genuinely.

Furthermore, while the complementarity regime endows States with primary jurisdiction to try serious international crimes, article 12(1) of the Rome Statute gives the Court inherent jurisdiction. It provides that once a State ratifies the Statute, such a State (automatically) accepts the Court's jurisdiction with respect to the crimes listed in article 5. Additionally, Article 12 recognises the sovereignty of States that are not party to the Rome Statute as far as their consent is a prerequisite to the Court's exercise of jurisdiction over their nationals. It is however, noteworthy that the ICC may still have jurisdiction over nationals of a non-state party where the alleged crimes have been committed within the territory of a Member State, even if such a State has not accepted the Court's jurisdiction.

1.2.2 Textual Deficiencies in Article 17 of the Rome Statute

Although concerns about the Court's independence are mixed political-legal in nature, some of these issues seem to stem from questions regarding the proper interpretation and application of the principle of complementarity in practice given, the textual deficiencies in article 17. The regime of complementarity may be considered vague to the extent that it fails to define a standard criminal policy for prosecution of core international crimes. Furthermore, the article fails to establish standard methods for assessing when a State has taken an unjustified delay to bring the perpetrator to justice.[36]

Generally, article 17 does not clearly define the standard of proof that must before the ICC Prosecutor to finds a particular State genuinely unwilling or unable to carry out its investigatory or prosecutorial functions.[37] In terms of article 17(2), to determine unwillingness to prosecute, the ICC considers whether the proceedings were or are being undertaken or the decision not to prosecute was made to protect the perpetrator from criminal responsibility for the core international crimes.[38] Additionally, the prosecutor has to determine whether there has been an unjustified delay in the proceedings showing reluctance

[36] See D Scheffer "The International Criminal Court: The Challenge to Jurisdiction" (26 March 1999) *Address at the Annual Meeting of the American Society of International Law*, Washington DC" 237. Available at http://www.iccnow.org/documents/DavidSchefferAddressOnICC.pdf (accessed 27 August 2012).

[37] The criterion for unwillingness set out in article 17 is not objective; the Court has to determine a State's unwillingness to prosecute "genuinely". The subjective nature of this test renders it significantly vague. See A Cassese *The Statute of the International Criminal Court: Some Preliminary Reflections* (1999) 537.

[38] See Article 17(2) (a) of the Rome Statute.

on the part of domestic authorities to bring the perpetrator to justice[39] or whether the proceedings are not conducted independently or impartially.[40] Article 17 does not specify what constitutes unjust delay; the decision is left to the ICC.[41] In this regard, the thesis argues that in any legal system there is potential for delays despite the prosecutor's willingness to prosecute timeously,[42] especially if there is an on-going conflict. It is therefore imperative to arrive at a clear definition in order to remove these ambiguities, because the greatest concern of States is arbitrary decision-making regarding the availability and effectiveness of their own courts. [43]

1.3 Problem Statement

The question that this thesis will examine is whether the complementarity regime established under article 17 provides States with appropriate tools to balance their rights of sovereignty with their commitment to an independent international criminal justice system. In all the eight situations that the ICC is currently investigating, questions have arisen whether the quest for justice and accountability for the most serious crimes of international concern should necessarily limit States' sovereignty.[44] However, given that under the Statute, States have

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[39] See Article 17(2) (b) of the Rome Statute.

[40] This was one of the reasons for investing absolute jurisdictional powers in the predecessors of the ICC, the *(ad hoc) International Criminal Tribunal for Former Yugoslavia* (*ICTY) and* the *International Criminal Tribunal for Rwanda (ICTR)* respectively. They had primary jurisdiction over national judiciaries because it became apparent that national courts would be unwilling to bring criminals to book or that the courts would have been biased owing to the nature of the conflict. See A Cassese *International Criminal Law* (2003) 349.

[41] The ICC is the sole *arbiter* in cases of admissibility and states' willingness to prosecute. Article 119 also gives the ICC power to rule out any dispute concerning its judicial functions. This gives the ICC arbitrary review powers over national judicial systems and threatens national sovereignty of states. See J Gurule "United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?" (2002) 35 *Cornell International Law Review* 1.

[42] See Scheffer "The International Criminal Court: The Challenge to Jurisdiction" Address at the Annual Meeting of the American Society of International Law, Washington DC (26 March 1999) 237. Available at http://www.iccnow.org/documents/DavidSchefferAddressOnICC.pdf (accessed 27 August 2012).

[43] See P McKeon "An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands of International Justice (2009) 12 *St. John's Journal of Legal Commentary* 535.

[44] State Parties to the Statute have referred three situations to the Court since it became operational: in December 2003, the President of Uganda referred the situation in northern Uganda concerning mass atrocities committed by the Lord's Resistance Army, to the Prosecutor. The Democratic Republic of Congo also referred the situation in the Ituri region of the country to the Prosecutor in April 2004, an investigation was opened on 23 June 2004. The government of the Central African Republic also referred the situation in CAR to the ICC on 22 December 2004 and an investigation was opened on 22 May 2007. Additionally, the prosecutor of the ICC officially opened an investigation into the situation in Darfur, Sudan on 6 June 2005, pursuant to the United Nations Security Council's Resolution 1593 (2005). In March 2009, a warrant of arrest was issued against the Sudanese president Omar Hassan al-Bashir for war crimes and crimes against humanity in the Darfur region of the country. The Prosecutor also commenced an investigation into the situation in Libya as a result of the situation in the country as a result of which arrest warrants were issued on 27 June 2011 against the Libyan leader Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi for crimes against humanity committed in Libya in February 2011. The ICC Prosecutor also

latitude to try these same offences, it may be useful to investigate ways in which they could do so without necessarily compromising international criminal justice processes. This thesis aims to demonstrate that by expanding the ability of States to deal with international crimes, the tension that is currently developing between States and the ICC may be relieved.

This analysis requires the thesis to dissect articles that outline the principle of complementarity. Scrutiny of articles 17, 18, 19 and 20 will therefore take centre stage. These will be analysed in tandem with the Court's interpretation and application of the principle of complementarity in practice. In the end of it all, the question that this thesis will grapple with is whether the complementarity regime provides States with appropriate tools to balance their treaty obligations with their political rights. Does the regime constitute a balance conducive to a viable international criminal justice system as envisioned by the drafters of the Rome Statute or does it have prospects of undermining the Court's integrity? Part of this investigation will entail a review of the Court's jurisprudence on questions of admissibility of cases and assess how the decisions affect States' perspectives about the independence of the Court, particularly within the African continent. This will also include a discussion on whether the complementarity regime has catered for regional bodies. This is motivated by the AU's recent anti-ICC declarations and the subsequent establishment of the Africa Criminal Court to complement national courts of its Member States in prosecuting the crimes under the jurisdiction of the ICC.

1.3.1 The Working Hypotheses

The research to be undertaken is based on two assumptions. The first is that by expanding the ability of States to deal with international crimes, the tension that is currently developing between States and the International Criminal Court may be relieved. As noted above, there have been concerns about the Court's respect for State sovereignty and its selection of cases.[45] This thesis will therefore argue that encouraging national prosecutions and helping build the capacity of national courts, the ICC will be playing its complementary role. The second assumption is the thesis will effectively address flaws and shortcomings of the regime and that this will pave a way for a functional international criminal justice system. Although

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commenced an investigation into the post presidential election violence that erupted in Cote D'Ivoire (Ivory Coast) during which war crimes and crimes against humanity were allegedly committed. The ICC prosecutor also initiated an investigation into Kenya in relation to the post 2007 elections violence in which mass atrocities were committed

[45] M du Plessis *The International Criminal Court that Africa Wants* (2010) 13-15.

the system may be dogged by an array of problems common to domestic judicial systems, the thesis will argue that putting a monitoring system in place will exert pressure on the domestic authorities and encourage them to show greater zeal in ending impunity. This, the thesis further argues, will ensure regular functioning of the complementarity regime.

1.4 Purpose of Study

As noted above, an array of criticisms have been levelled against the ICC since it became operational. Some of these concerns outline the issues that the ICC will have to deal with to ensure its future viability. For instance, the lacuna in article 17 have to be filled in order to assuage State's fears about the Court's alleged arbitrary application of the principle of complementarity in practice. If these concerns remain unattended, they could dissuade other African and less developed countries, from ratifying the Statute and this could undermine the quest for international criminal justice and further cripple the Court. Considering that of the 108 members to the Rome Statute, 30 are from Africa,[46] this makes Africa the biggest regional supporter of the ICC. With some African States threatening to rescind their membership to the Rome Statute, the relevance of the Court in conflict-torn societies will be undermined and this has roots that run back to impunity. Therefore, the purpose of this study is to put the principle of complementarity in a theoretical perspective and help provide a better understanding of the modalities through which it is applied. A critical examination of the provisions that embody this organising principle and the jurisprudence of the Court also help address the deficiencies therein, with the aim of finding solutions that can bring the Court and States into a healthy cooperative partnership that will not only safeguard the future of international criminal justice but will also deter authors of atrocious crimes.

1.5 Significance of Study

The principle of complementarity has always been a subject of fierce debate in international criminal law since its inception after World War I. The establishment of the ICC was stalled, among other reasons, by lack of consensus between member States on issues of jurisdiction, the very issues that were glossed over during the negotiations at the Plenipotentiaries Conference in The Hague in 1998. These issues have however surfaced in practice and could potentially undermine the future of the ICC. The hasty adoption of the Rome Statute has left

[46] The following 30 African states have ratified the Rome Statute and these are: Benin, Botswana, Burkina Faso, Burundi, Central African republic, Chad, Comoros, Congo (Brazzaville), DR Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda, and Zambia, available at www.iccnow.org/countryinfo/RATIFICATIONSbyUNGroups.pdf (accessed 17 February 2012).

gaps that could threaten the future viability of this milestone institution. These gaps have in part led to concerns over the Court's interpretation and application of complementarity in practice. Moreover, confidence in the Court has waned in Africa and the African Union seems to have adopted a hostile attitude towards the Court.[47] This calls for a careful analysis of the problem at hand and solutions that will steer the course of international criminal justice in the right direction and ensure that the relevance of the ICC in Africa is not overshadowed by regional politics.

1.6 Goals of the Research

The overarching objective of this research is to investigate whether the Rome Statute provides States with appropriate tools to balance the need for a credible international criminal justice system with their political interests. Other aims of this thesis are:

a) To ascertain the extent to which the Court constitutes a fundamental challenge to State sovereignty.

b) To provide an account of how the ICC has applied complementarity in the eight situations currently under its investigation.

c) To establish how to improve complementarity and strike a balance between the need for accountability and State's sovereignty powers, with a view to lessen the tension that has developed between the ICC and African States.

d) To offer recommendations and suggestions of ways in which the international criminal justice system, through a complementary process, can be enhanced and strengthened in order to effectively deal with impunity for serious international crimes, while still preserving the sovereignty of States that are party to the Statute.

1.7 Limitations of the Study

Although this study offers a broad discussion of the work of the ICC in Africa, due to time constraints, it focuses more on intricate issues pertaining to the interpretation and application of complementarity in the cases the Court is currently investigating. As complementarity keeps evolving, the time within which this research was undertaken was limited and as such, some facts required a little more deliberation. Suffice it to say, this area will need to be further developed in future as the fledgling Court continues to engage in a system of trial and error, to

[47] See JD van der Vyver "Prosecuting the President of Sudan: A Dispute between the African Union and the International Criminal Court" (2011) 11 *African Human Rights Journal* 683 at 684.

help States mould their legal systems so that they are competent to deal with the crimes in the Rome Statute. The interaction between an international judicial institution and national courts of sovereign States will possibly be dogged with challenges. Similarly, the ICC is caught in a maze of regional politics and it is believed that this research will help relieve the tension between the ICC and Africa.

1.8 Research Methodology

This research is mainly desk based, library research. A wide range of relevant primary and secondary sources will be relied on. Primary sources will include original versions of treaties and conventions, official government documents, judgements of international tribunals, United Nations' Resolutions and other documents from the international institutions such as the United Nations' organs. Secondary sources will include books, international reports, journal articles and other publications. The sources identified above will be used to establish the existing position and identify the shortfalls of the provisions of the Rome Statute embodying the principle in question. A critical analysis of the articles of the Rome Statute will reveal the flaws and shortcomings that cripple international criminal justice processes. The study will further explore the relationship between States and the ICC under the complementarity regime and investigate whether the regime does strike a balance between sovereignty of States and the need for an independent international criminal justice system.

1.9 Structure of the Thesis

This study is divided into five (5) chapters. The first chapter is a general introduction of the research to be carried out. Chapter two gives a historical overview of the principle of complementarity and explores the normative aspects of the complementarity regime. The nature of the relationship between the ICC and member States to the Rome Statute requires a critical examination of the background of the principle of complementarity. A brief history of the development of the principle provides a useful context that will bridge the gap between the theoretical underpinnings of the principle and its practical implications. This provides a better understanding of the current tension surrounding the Rome Statute complementarity regime and the issues raised by the possible repercussions the conflict between African States and the ICC may have on the Court's future viability.

After considering the historical, legal, political, philosophical and practical bases for the principle of complementarity, the thesis shifts its focus to the practical aspects of

complementarity. It goes on to analyse the provisions that embody the principle of complementarity in chapter three. This chapter analyses the interplay between national judiciaries and the ICC. It significantly focuses on the salient issues in the interpretation and implementation of the principle in practice. The jurisprudence of the Court will be used to illustrate the interplay between national judiciaries and the ICC and comments will be made on the status of African courts and the AU's attempt to establish a court with a similar mandate to that of the ICC. The discussion in the penultimate chapter will be centred on a collective and positive approach to complementarity. The chapter will define a policy of positive complementarity that can better solve the challenges the ICC is currently facing in practice. A demonstrative excursion of the Court's first State party referral, of the situation in Northern Uganda will be carried out. The chapter will also analyse the Prosecutor's *proprio motu* investigations. In so doing, the chapter will investigate ways in which the power of the Prosecutor may be used to help strengthen the Rome Statute system at the national level in each case. This will help resolve the current jurisdictional clashes between States and the ICC.

The fifth and last chapter of this thesis will make findings and offer recommendations on ways in which the international criminal justice system, through a positive complementary process, can be enhanced and strengthened in order to effectively deal with impunity for serious international crimes. It will identify conclusions established from the preceding four chapters. The chapter will tie up the ends by offering possible solutions to the perceived threats to independence and impartiality of the ICC in Africa. These recommendations will be mindful of the challenges African States currently face pertaining to weak judicial systems, which have in the past been regarded as "incompetent", particularly in the face of conflicts. Suggesting a positive approach to the principle of complementarity seems to be the viable option as it will assist hamstrung developing States to be better equipped to deal with international crimes within their own systems, thereby establishing a functional international criminal justice system. These suggestions will in turn relieve the Court of the burden of cases from all over the world, without necessarily compromising criminal justice system processes.

Chapter Two

OVERVIEW OF THE PRINCIPLE OF COMPLEMENTARITY

2.0 Introduction

This chapter will explore the historical, philosophical, legal and practical development of complementarity, and the normative aspects that underpin the complementarity regime. It will trace its evolution from as far back as the twentieth century, in the aftermath of World War I, in the Peace Treaties, the Nuremberg Trials, and the *Ad hoc* Tribunals up to the Rome Statute. This analysis puts these developments in perspective, helps provide a better understanding of the Rome Statute complementarity principle, and how it has developed over the years since the Court became operational. After this analysis, the chapter will then compare the different models of complementarity of each era with the Rome Statute complementarity model. This is imperative, as the models that preceded it have inspired the Rome Statute complementarity model.

Essentially, this analysis will bridge the gap between the theoretical underpinnings of the principle of complementarity and its practical implications, and help ameliorate the conflict between States and the ICC, regarding its application and interpretation. The chapter will then identify and analyse four models of complementarity: optional complementarity; the Nuremberg discretionary complementarity; the International Law Committee complementarity model and the Rome Statute model.[48] These will be compared and the chapter will argue that the principle has emerged in different phases and that it has developed and been remodelled into the 'final' Rome Statute model. An intelligible appraisal of the normative aspects of the principle must therefore begin with definitive discussion of complementarity jurisdiction and the nature thereof.

2.1 What is Complementarity? The Nature of the ICC's Complementary Jurisdiction

For purposes of this inquiry, the general understanding of the principle of complementarity is that it is a set of rules that govern the relationship between international and national courts.[49]

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[48] See M El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 6-7. He opines that these are the four major complementarity models, namely optional complementarity, the Nuremberg discretionary complementarity; the International Law Committee complementarity model and the Rome Statute model .

[49] See M Benzing *et al* "The Criminal Procedure Before the International Criminal Court: Main Features" (2006) 5 *The Law and Practice of International Courts and Tribunals* 103 at 104.

It endows the latter with investigative and prosecutorial prerogatives over international crimes, with the former only intervening in the event of inaction by municipal courts.[50] The Rome Statute does not define complementarity, but provides that the ICC shall be complementary to national jurisdiction in paragraph 10 of the preamble to the Statute and in article 1 and links this principle to the admissibility criterion laid down in article 17 of the Statute.[51] Although the drafters of the Rome Statute have uniquely designed article 17 to suit the demands impressed upon the international criminal justice system, the principle of complementarity is not necessarily a new phenomenon in international law. It was embedded in international law generally and has the same philosophical denominator as the notion of exhaustion of domestic remedies in international humanitarian law and the principle of conditional transfer of national jurisdiction. In essence, these principles require that the State be the prime *fora*, with the international tribunal being the court of last resort and having power to intervene only in situations where the State in question has failed to act or has not diligently prosecuted the matter. The complementarity scheme is an allocation of powers between the courts, through a division of tasks. States have jurisdiction over ordinary crimes and primacy to adjudicate the most serious international crimes first hand, failing which the Court will take over. The Rome Statute has guidelines that clearly define the scale of atrocity that elevates ordinary crimes to core international crimes, ensuring that these meet the Statute's gravity threshold before the Court entertains them.

The ICC has temporal[52] subject-matter jurisdiction over the crimes listed in article 5 of the Rome Statute.[53] The basis for the Court's subject-matter jurisdiction is the atrocious nature of the crimes; these crimes constitute grave breaches of international law. These crimes must also be large scale and systematic and as such have a widespread impact: the scale of atrocity

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[50] In terms of article 17 of the Rome Statute, the ICC has the mandate to complement inability or unwillingness to genuinely investigate the crimes proscribed by the Rome Statute.

[51] Paragraph 10 of the preamble to the Rome Statute provides: "*Emphasizing* that the International criminal Court established under this Statute shall be *complementary* to national criminal jurisdictions." [Emphasis added]. Article 1 goes further to say: "An international criminal court is hereby established ... it shall be *complementary* to national jurisdictions…" [Emphasis added].

[52] In accordance with well-established concepts of international law (non-retrospective application of law), the jurisdiction of the ICC is *ratione temporis:* the Court's jurisdictional reach only extends to the crimes committed after the coming into operation of the Rome Statute, that is, crimes committed before July, 1 2002 fall outside the ambit of the Court's jurisdiction. The Court also has jurisdiction on state nationals only after the date on which state became a member to the Statute. This provision therefore properly renders the application of the statute not retroactive.

[53] The ICC's jurisdiction extends to war crimes; crimes against humanity; genocide and aggression. See article 5(2) of the Rome Statute ("…The court has jurisdiction…with respect to these crimes: the crime of genocide; crimes against humanity; war crimes; the crime of aggression."

must be such that it elevates ordinary crimes to the core international crimes. There is a moral ground for the Court's jurisdiction; it is the quest for accountability for these crimes that motivated the creation of the ICC. If the ICC did not exercise jurisdiction over these crimes, this would undermine the Court's integrity and credibility and its future viability would be at stake. The jurisdiction of the ICC is also in line with the customary international law concept of universal jurisdiction. As a supranational institution, the ICC may exercise its jurisdiction over the core crimes without any territorial linkages. However, the Court can only assert its jurisdiction where national courts have failed to prosecute diligently. Therefore, the Court's jurisdiction may be said to be "conditional" upon the State realising its international law duty to prosecute nationally. This way, complementarity works as an implicit restriction on States so that they are remain active. State actors may also be "forced" to show greater zeal when prosecuting international crimes in order to avoid an ICC prosecution.

2.2 The Theoretical Framework behind Complementarity

2.2.1 The Duty of States to Prosecute International Crimes and the *Aut Dedere Aut Judicare* Rule

The principle of complementarity is premised on international law principles with somewhat similar philosophical foundations. The theoretical underpinning of the complementarity regime is that international law is subsidiary to domestic law. This principle evinces the theoretical assumptions that no State or organisation is allowed to interfere in the affairs of a sovereign State. This right however has a corresponding duty: the State's duty to manage internal matters that arise from its territory in a way that conforms to the world order. To safeguard this right, complementarity may only be invoked where national judicial systems are unavailable or incompetent.

The essence of complementarity was to encourage States to prosecute international crimes within their judicial systems, thereby ensuring that the ICC does not arbitrarily supersede States' jurisdiction. However, as noted above, this will only be the case where the State carries out its prosecutorial functions. It is an established rule of customary international law that States have a duty to prosecute international crimes. This phenomenon dates as far back as Grotius and was embraced by the ceasefire agreements during the First World War, between the Victors and the enemy countries. The Rome Statute also imposes an absolute duty on States to adjudicate crimes against humanity, war crimes, genocide and aggression.

Conversely, under the Rome Statute other States are not at liberty to prosecute when the State with jurisdiction fails to do so, the ICC has to assert its complementary jurisdiction.

The duty to prosecute or extradite (*aut dedere aut judicare)* is also an absolute duty and the Rome Statute affirms it by vesting the right to primary jurisdiction in States.[54] Pursuant to this duty, States are required to either prosecute nationally or refer cases to the Court.[55] Additionally, the Rome Statute also requires that States take the necessary measures at the national level to ensure the effective prosecution of those who hold the greatest responsibility for genocide, aggression, crimes against humanity and war crimes.[56] If the State, for some reason, does not wish to prosecute nationally, it has the duty to refer the case to the Court. However, the power of the Court goes over and above the dichotomy of these rights and duties. Where the State fails to prosecute or refer the case to the Court, the Court will nonetheless take over and prosecute.

2.2.2 Obligations *Erga Omnes* and *Jus Cogens*

The obligation to prosecute the crimes proscribed by the Rome Statute derives from treaties and customary international law. The Rome Statute not only reiterates State's duty to prosecute nationally but the crimes proscribed by the Statute have attained the *jus cogens* status. All States have an international obligation to prosecute a certain category of crimes, that is, those crimes that violate "peremptory norms of international law… from which no derogation is permitted, known as *jus cogens.*"[57] The *jus cogens* status of these crimes imposes a legal duty on every state to prosecute them, whether or not they are party to the particular treaty that proscribes them.[58] The definition of this concept by article 53 of the Vienna convention seems to give it more weight than treaty law and custom.[59] Most of the treaties that proscribe certain conduct require all States to either prosecute the offender or

54 See S.C. Res. 1456, U.N. SCOR, 58th Sess., 4688th mtg. U.N. Doc. S/RES/1456 (2003), it provides that "States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to extradite or prosecute".

55 The fact that the Rome Statute provides for State Party referrals under article 14 connotes the *aut dedere aut judicare* principle.

56 See the 4th Preambular paragraph to the Rome Statute: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."

57 This definition of *jus cogens* was set out in Article 53 of the Vienna Convention on the Law of Treaties 23 May 1969 UN Doc A/CONF39/27 (hereafter The Vienna Convention).

58 See K Obura "Duty to Prosecute International Crimes under International Law" in C Murungu and J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 13.

59 See article 53 of the Vienna Convention. See also PA McKeon "An International Criminal Court: Balancing the Principle of State Sovereignty Against the Demands of International Justice" (2009) *St. John's Journal of Legal Commentary* 535 at 537.

extradite him to a "concerned" State or to a State that is willing to prosecute.[60] Conduct that falls within the ambit of these treaties imposed an enforceable legal obligation on the State involved to prosecute; this is known as the *erga omnes* duty. Because the conduct complained of violates established norms of international law, failure by the State to prosecute constitutes a breach of the state's treaty obligations.[61] The Rome Statute similarly requires States to prosecute crimes of the same profile and requires a State to punish perpetrators of such, failing which the State will be in breach of its treaty obligations.

2.2.3 *Pacta Sunt Servanda*

It is important to note that the Rome Statute, like other treaties, is subject to the principles that underpin treaty law. The ICC, contrary to its counterparts, the ICTY and the ICTR, which were created through UN Security Council Resolutions, is a creature of a treaty and this is an indication that States that are members to the Statute did so voluntarily. The principle of complementarity in article 17 of the Rome Statute mirrors the well-established international law concept that parties who freely entered into agreements should honour their obligations thereunder, the *pacta sunt servanda* principle.[62] As noted above, the crimes proscribed by the Rome Statute are subjects of various other treaties, and have attained *jus cogens* status.[63] This means that obligations that flow from those treaties also extend to members to the Rome Statute. Thus, complementarity places a duty on States to prosecute these crimes according to established standards, in good faith. The Vienna Convention on the Law of Treaties clearly describes the extent to which the notion of good faith applies in a given case.[64] Article 27 of the Vienna Convention specifically prohibits a State from invoking its domestic laws to justify its failure to honour its international treaty law duties.[65]

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[60] Conduct that fell within the ambit of these treaties imposed an enforceable legal obligation on the State involved to prosecute

[61] Article 27 of the Vienna Convention prohibits a State from invoking its domestic laws to justify its failure to honour its international treaty law duties.

[62] See M Melandri "The Relationship Between State Sovereignty and the Enforcement of International Criminal Law under the Rome Statute (1998): A Complex Interplay" (2009) 9(3) *Criminal Law Review* 531 at 536. He notes that the act of ratifying the Rome Statute is considered a sovereign act by a state, since it affirms its commitment to international criminal justice and gives a supranational judicial body powers to supplement any deficiencies in its judicial system.

[63] See for instance, genocide under the Convention on the Prevention and Punishment of the Crime of Genocide, GA Res 260 A (III) of 9 December 1948 and war crimes and crimes against humanity under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc A/39/51 (1984).

[64] See Vienna Convention on the Law of Treaties (entered into force on 27 January 1980) UN Doc. A/CONF. 39/27.

[65] See Article 27 of the Vienna Convention.

Article 120 of the Rome Statute connotes this principle by deliberately disallowing reservations from any provision of the Statute.[66] This provision evinces the theoretical assumption that a State that has freely entered into a treaty cannot derogate from its treaty obligation for political convenience. In the same vein, because a sovereign nation State of its own volition gives the ICC power to intervene where it is unable to meet its treaty obligations through ratification of the Rome Statute, States have an obligation to honour their obligations under the Statute. Moreover, since States have conditionally ceded their Sovereign powers (criminal jurisdiction) to the Court, they cannot challenge the involvement of the Court because of sovereignty, unless the Court's involvement is not in line with the guidelines articulated in article 17 of the Statute. The *pacta sunt servanda* rule also requires that States take all measures at the national level to enable them to act as required under treaties they freely entered into. The Rome Statute also requires that States incorporate provisions of the Rome Statute into their legal systems, for instance, through implementation legislation. This prevents situations where States cite their national laws as excuses for their inability or unwillingness to discharge their treaty obligations.

2.2.4 The Principle of Self-determination of Peoples and Nations

The principle of self-determination of peoples and nations is an overarching guiding principle of international law that seeks to judge the legitimacy of power in international relations.[67] Articles 1(2) and 55 of the UN Charter provide that one of its purposes is to establish friendly relations between States, based on respect for the right to self-determination.[68] Self-determination was entrenched into the corpus of international law through a UN General Assembly resolution, the Right of Peoples and Nations to Self-determination General Assembly Resolution 637 (VII) of 16 December 1952.[69] Additionally, the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the United Nations General Assembly in 1960, also codifies the right to self-determination.[70] The Declaration

[66] See article 120 of the Rome Statute: "No reservations may be made to this Statute."

[67] See A Cassese *International Law* 2 ed (2005) 60. The right to self-determination first appeared in an international legal instrument in the Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the United Nations General Assembly in 1960**.**

[68] See articles 2(1) and 55 of the UN Charter. See also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. 28, U.N. Doc. A/8028 (1970).

[69] See The Right of Peoples and Nations to Self-determination General Assembly Resolution 637 (VII) of 16 December 1952 GA Res. 637 ABC, 7 UN GAOR Supp. 20 UN Doc.

[70] See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16 U.N. Doc. A/4684 (1960).

provides that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development".[71]

This notion is based on a number of postulates. It serves as an anti-colonialist rule: it prohibits all forms of colonialism by giving peoples or nations the right to independence and sovereignty.[72] The principle also bans foreign military occupation of a sovereign State.[73] The right to self-determination also seeks to end racial discrimination. It requires that all racial groups have full access to the government.[74] In contrast with to principles of Westphalian sovereignty, the right to self-determination seeks to curtail the power of domestic political authorities, on one hand, by protecting the interests of the population concerned.[75] On the other hand, it protects sovereign States from external power, for instance, colonialism. Although this principle erodes classical notions of sovereignty, it enhances legal protection of peoples and nations from abuse of power.[76] In principle, the development of the principle of complementarity was informed by the fundamental premise on which the right to self-determination rests: giving a sovereign State a chance to manage its internal affairs without external pressure. In the same vein, a State loses its jurisdictional prerogative under the complementarity regime, and cannot eschew international involvement if it fails to protect its citizenry.

As a democratic principle, the right to self-determination condemns colonial rule, thereby preserving the independence and sovereignty of States. Complementarity also seeks to preserve sovereignty of States by entrusting the prosecution of Rome Statutes crime to national courts. It follows from the foregoing that the right to self-determination is part of the theoretical framework upon which the principle of complementarity was founded. It has

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[71] See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16 67.

[72] A Cassese *International law* 2 ed (2005) 61. See also CG Berkey "International Law Domestic Courts: Enhancing Self-determination for Indigenous Peoples" (1992) 5 *Harvard Human Rights Journal* 65 at 76-78 for a detailed discussion on the condemnation of colonialism. See Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights, G.A. Res. 2787, 26 U.N. GAOR Supp.29, U.N. Doc. A/8429 (1971).

[73] See Cassese *International law* 2005 61.

[74] See Cassese *International law* 2005 61

[75] See Cassese *International law* 2005 60 (noting that sovereign States cannot dispose of its population as it pleases, for instance, by ceding or annexing territories without taking into considerations, the wishes of their people).

[76] See Berkey 1992 *Harvard Human Rights Journal* 78.

however, been argued in some quarters that the ICC merely pays lip service to complementarity and that the ICC is a tool of neo-colonialism due to its selection of cases. The evidentiary basis of this claim is weak because most African legal and judicial systems are weak, which makes them candidates for ICC intervention.

In the eight cases that the Court is currently investigating, no concrete legal proceedings were underway in national courts when the Court stepped in. Lack of domestic proceedings, coupled with the fact that it is almost impossible to have functional judicial organs in most hamstrung African States during conflicts, refutes claims that the principle of complementarity is a neo-colonial policy. In principle, complementarity, like its antecedents, (sovereignty of states and the right to self-determination), seeks to preserve independence of States, by giving a State an opportunity to apply domestic means of redress before the ICC intervenes.

2.2.5 The Subsidiarity of International Law

The international criminal justice system has at its centre, mutually overlapping spheres of operation, the domestic legal order and the international legal order. The issue of when one order takes precedence over the other is a complex issue ad depends on the circumstances of each case. It is however, worth noting that in terms of the concept of sovereign equality of States, the bridge upon which international relations rest,[77] the domestic legal order takes precedence over international law. This is based on certain theoretical conceptions, monist and dualist theories. These theories delineate the hierarchy of laws in a given case.

The monist theory postulates the primacy of international law. According to this theory, international law is the supreme law of the land and validates all other laws.[78] Thus, where a national law is in conflict with a duly signed and ratified treaty, that treaty will take precedence. A monist State incorporates international law, for instance, treaties, into its legal system though the act of ratification, so that it becomes part of its body of law, together with national laws.[79] The primacy of international law in this case is such that a monist State is bound to execute its international law duties regardless of whether they are in conflict with its

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[77] See A Cassese *International Law* (2005) 48.

[78] Monism postulates that all treaties duly signed and ratifies by a State form part of the State's legal order. If any of the domestic laws is in conflict with International law, international law will take precedence.

[79] See J Crawford *Brownlie's Principle of International Law* 8th Ed. (2012) 48 (noting that once a Monist State has ratified a particular treaty, it applies it directly with its national laws).

national laws. Article 27 of the Vienna Convention connotes the assumption that international law is primary to national law because it prohibits a State from using its national laws as bases for breach of its treaty obligations.[80]

The dualist theory on the other hand, is predicated on the notion that international law is subsidiary to national law. This theory is based on a number of postulates. The Dualist State, as a sovereign being, voluntarily chooses to be bound by certain rules, as long as they conform to its national legal system. The theory is also based on the idea that two distinct legal systems can exist within one umbrella system. This notion proposes that whenever there is a conflict between the two sub-systems, national law will take precedence. In contrast to the monist theory, this notion evinces the presumption that International law is subsidiary to national law. Before international law applies in a Dualist State, it has to be incorporated into the domestic legal system through specific implementation legislation.[81] However, should these laws be in conflict, domestic law prevails. This way, international laws may apply in part of as a whole. An example of a dualist State is the Kingdom of Lesotho. Section 2 of the Constitution of Lesotho, 1993 provides that the constitution is the supreme law of the land and invalidates any law that is inconsistent with any part of the constitution, to the extent of its inconsistency.[82]

It is evident from the above exposition that although some theories assume the primacy of international law, the cumulative effect of most international law principles such as the exhaustion of domestic remedies, the duty to prosecute or extradite (the *aut dedere aut judicare* rule) is to maintain the primacy of national law. The lesson here is these legal orders exist in mutually overlapping spheres and that one may be lawfully seized in the right circumstances. This means that the primacy of national laws is not absolute in modern international relations. International law is in principle, subsidiary to national law, unless there are countervailing reasons for the application of international norms. This could be for human intervention reasons or in the case of the ICC, due to a State's failure to prosecute genueinely.

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[80] See article 27 of the Vienna Convention on the Law of Treaties (22 May 1969) 1115 U.N.T.S 331, it provides that a State cannot cite provisions of its domestic laws or deficiencies therein as excuses for breach of its reaty obligations).

[81] See Crawford *Brownlie's Principle of International Law* 2012 48.

[82] See section 2 of the Constitution of Lesotho Act No 5 of 1993(as amended): "This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void".

Complementarity is the linchpin of the Rome Statute regime since it defines the relationship between the International Criminal Court and Member States to the Rome Statute.[83] The philosophical foundation underlying complementarity is the distribution of powers between the national and international judiciaries. Since the principle prioritises national jurisdiction, it affirms the well-established principle of international law, that national laws of a sovereign State take precedence over international law. However, this applies only when the State in question observes international norms. The philosophy behind the subsidiarity of international law is to preserve sovereignty of States and to limit the jurisdiction of tribunals like the ICC only to clearly defined special cases, given their limited resources.

Proponents of the complementarity regime were also mindful of the fact that international legal systems lack an integral aspect of every judicial system, the executive. Therefore, they entrusted the effective prosecution of the most serious crimes of international law to States through the principle of complementarity. The fact that national authorities have the primary responsibility to oversee prosecution, with the Court only being seized with the matter where States fail to prosecute genuinely confirms that international law is subsidiary to international law and as such must only be resorted to where the latter is inoperative or ineffective.

2.2.6 The Exhaustion of Domestic Remedies Rule

The requirement that one must have exhausted all available and effective local remedies before one seeks similar remedies from an international tribunal is a well-established international principle.[84] The principle applies in international humanitarian law to protect individuals against the wrongdoing of their own States. This rule is premised on the idea that the State in question must have an opportunity to redress the wrong complained of before the matter is taken to an international court. The claim before the international court must however constitute an international wrong, thus, the injury complained of must be a result of for instance, an alleged violation of human rights.[85] The principle appears to be firmly

[83] MA Newton "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court (2001) 167 *Military Law Review* 20 at 29 refers to complementarity as the bridge that carries the weight of the Rome Statute.

[84] See A Amerasinghe *Local Remedies in International Law* 2 ed (2004) 13.

[85] See A Amerasinghe *Local Remedies in International Law* 2 ed (2004) 17 (noting that the primary purpose of this rule is the "settling an international dispute by giving one party to it, a sovereign State, to apply its own means of redress").

entrenched in international through a number of human rights conventions.[86] There are many aspects of this principle and applications of it that may have informed on the development of the principle of complementarity. According to this rule, a sovereign State must have a chance to apply its own rules and other policy considerations before a matter concerning its internal affairs is taken to the international plane. The principle of complementarity also requires the ICC to prosecute only in the right circumstances: where the domestic courts in question fail to prosecute diligently or are inoperative. The principle of exhaustion of local remedies is based on the philosophical notion that it brings justice closer to the population that host victims of international wrongs. Similarly, complementarity values perceptions of the domestic populations that host victims of these crimes in the Rome Statute. Therefore, it seeks to bring justice closer to the victims, so that justice is not only done, but is seen to be done.

Moreover, the rationale behind both principles is that municipal courts are better placed to appraise the facts of these cases than international courts because they have a closer link to the cases and can expedite the trial process. In contrast, international litigation may be expensive and time-consuming. The exhaustion of local remedies rule, like complementarity, is a tiered allocation of functions between a national and an international court. They both uphold the primacy of domestic law by giving States latitude to handle matters first hand, while detracting as little as possible sovereignty, should a State fail to act genuinely. Thus, if a State fails to prosecute in all the right circumstances, then the relevant international tribunal will intervene the relief sought is either unavailable or ineffective at the municipal level. The foregoing account shows that the primary responsibility to act rests with national courts. However, circumstances may require conditional transfer of jurisdiction to an international judicial body. In such cases, failure by the national court in question to handle the matter in accordance with international norms legitimises the jurisdiction of the relevant international body.

2.2.7 The Principle of Conditional Ouster of National Jurisdiction

One of the basic precepts of State sovereignty is the right to exercise territorial authority, including criminal jurisdiction over internal matters and persons within its territory. Nevertheless, with recent developments in international law, this right is not absolute. Thus, there are situations where a State may have to relinquish its judicial powers in favour of an

[86] See article 41 (c) of the ICCPR; article 26 of the ECHR; article 46 of the American Convention on Human Rights; article 11(3) on the International Convention on the Elimination of all Forms or Racial Discretion.

international tribunal that has powers over the same matter. In such cases, the international tribunal is normally required to defer to national courts and only act where the latter fails to act accordingly. The theory of conditional transfer of national jurisdiction mirrors certain aspects of the principle of complementarity. Conditional transfer of jurisdiction is predicated on conditional primacy of national jurisdiction, with an international tribunal intervening where the former fails to redress the matter in a manner in line with established standards.[87] Certain theoretical conceptions of this principle, for instance, humanitarian intervention, may throw some light on the manner in which complementarity applies.

The concept of conditional transfer of jurisdiction only applies where a State party to a treaty fails to meet certain standards provided for in the treaty. For instance, article 17 has preconditions to the transfer of national jurisdiction to the ICC. Before the Court could exercise its jurisdiction, the State must have shown unwillingness or inability to prosecute genuinely. This way, complementarity is a matter of prioritising domestic jurisdiction, and conditionally transferring it to the ICC when States fail to meet the criteria in article 17. The rationale behind the principle of conditional ouster of national jurisdiction is that the primary responsibility to prosecute international crimes rests with national courts. Similarly, under the complementarity regime, States have a primary duty to prosecute nationally, and failure to prosecute conditionally transfers jurisdiction to the ICC.

Within the Rome Statute system, the ICC has default complementary jurisdiction and has the mandate to intervene when States fail to prosecute. This arrangement conditionally transfers the jurisdiction of States to the ICC when the criteria in article 17 have been satisfied. This notwithstanding, criminal jurisdiction is one of the traditional bases of State sovereignty and as such, States have a duty to preserve it and not to let others usurp it.[88] The cumulative effect of the principles discussed above is to vest primary jurisdiction in national courts.[89] The foregoing accounts necessitate an analysis of the historical overview of the principle of complementarity. This will shed some light on the different ideologies, political leanings and circumstances within which the principle of complementarity evolved.

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[87] See M Bohlander (ed) *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (2007) 315.

[88] See M Bohlander (Ed) *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (2007) 314 (noting that domestic jurisdiction takes precedence over international law in terms of hierarchical superiority rules and that States have a duty to protect and preserve it).

[89] See BS Brown "Traditional Bases of Jurisdiction over International Law Crimes" (1998) 23 *Yale Law Review* 383 for a detailed account.

2.3 The Historical Evolution of Complementarity

2.3.1 The Post World War I Era

The first traces of the principle of complementarity emerged in the aftermath of World War I where the idea of international adjudication of cross-border crimes was first mooted. A series of peace treaties that advocated for punishment of the authors of the war for violations of the laws and customs of war and principles of humanity were concluded between the Allied Powers and each of the defeated countries.[90] Although States have primary jurisdiction over their nationals by virtue of the customary international law concept of State sovereignty, there was a general observation that domestic courts alone could not properly administer the ends of justice where their citizens are involved in war crimes.[91] States appreciated the need for international intervention but were reluctant to relinquish their sovereign powers to an international institution, hence they suggested optional complementarity model.

It must be noted at this point that the complementarity model in the peace treaties was more default than optional as the Allied Powers had the power to review and take over prosecutions if the State Parties to the treaties did not meet the expected prosecutorial standards. In the end, traces of the principle of complementarity in the peace treaties merely set precedent for the future models of the principle. The first major optional complementarity was suggested by the League of Nations in the Draft Convention for the Creation of an International criminal Court in 1937.[92] Events leading to the adoption of the 1937 Draft Convention on the Creation of the International Criminal Court, which mirrors optional complementarity, will be discussed in detail below.

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[90] The Treaty of Versailles was concluded between the Allied (United States, Great Britain, France, and Italy) and Associated Powers of Germany on 28 June 1919. Other peace treaties were also concluded between the Allied Powers and the enemy countries: St. Germaine-En-Laye (with Austria on September 10, 1919); Neuillty-sur-siene (with Bulgaria on November 27, 1919); Trianon (with Hungary on June 4, 1920) and Sèvres, (with Turkey on August 10, 1920). See the *Holocaust Encyclopaedia* available at http://www.ushmm.org/wlc/en/article.php?ModuleId=10007428 (Accessed 10 November 2012). See also the Carnegie Endowment for International Peace: *Report on Commission of Responsibilities of the Conference of Paris on the Violations of the Laws and Customs of War 1919* Pamphlet no.32 *American Journal of International Law* 98.

[91] This was mainly due to the fact that those who were responsible for war and the heinous acts committed therein were still in power and could manipulate the system. Also, notions of sovereignty were invoked so as to shield criminals from prosecution. See WA Schabas *An Introduction to the International Criminal Court* (2011) 1.

[92] See *Report to the Council on the First Session of the Committee* League of Nations document C.184.M.102.1935V.

2.3.2 The Peace Treaties: Setting Precedent for Complementarity

Towards the end of World War I a series of ceasefire agreements were concluded and during the negotiation stages of the treaties, the idea of establishing an international judicial body to punish authors of the war was proposed. However, most States saw the idea of an international tribunal for punishing war criminals as legally premature.[93] Nonetheless, at the preliminary Peace Conference in Versailles in 1919, the Allies created a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties whose function was mainly to investigate who bore responsibility for the world war and to punish them accordingly.[94] A sub-commission was formed and it proposed the establishment of a supranational institution, the High Tribunal, for punishing those war criminals identified by the Commission.[95] The United States of America and Japan, members of the Commission, argued that resort to an international criminal tribunal would be impractical since there was no precedent for a tribunal of that nature.[96] Instead, the American delegate proposed the trying of the accused in the military Tribunals of the Allied and Associated Powers.[97]

Germany was also opposed to the idea of its nationals being prosecuted by any tribunal other than German courts, arguing that this would infringe upon its sovereignty rights.[98] The Allies

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93 At the time, international criminal prosecution for these crimes was unprecedented; there were no international institutions and instruments set up for purposes of punishing these international crimes, it was argued that this rendered the idea of international adjudication legally premature. Rather, the American delegate proposed that recourse be had to the existing system of military tribunals. See the Carnegie Endowment for International Peace, *Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities*: *Conference of Paris 1919* Pamphlet no.32 *American Journal of International Law* 97-98.

94 These would be the ex-Kaiser and any other person who was involved in the ordering of the commission of criminal acts during the hostilities and those who failed to stop them. For a general discussion, see M El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 11; See C Bassiouni "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court" (1997) 10 *Harvard Human Rights Journal* 15 and BB Ferencz "International Criminal Courts: the Nuremberg Legacy" (1998) 10 *Pace International Law Review* 203 at 207.

95 This tribunal was to be composed of 22 judges from the Allied Powers and its mandate was to try those who committed criminal as during World War 1. See El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 11. See also, the Carnegie Endowment for International Peace: *Report on Commission of Responsibilities of the Conference of Paris on the Violations of the Laws and Customs of War 1919* Pamphlet no.32 *American Journal of International Law* 98.

96 See the Carnegie Endowment for International Peace, *Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities*: *Conference of Paris 1919* Pamphlet no.32 *American Journal of International Law* 97-98. [Hereinafter the Commission of Responsibilities Report] 1-3. See also Schabas *An Introduction to the International Criminal Court* 4 ed. (2011) 3 (noting that the United States hostility to the idea of an international tribunal was based on the argument that it would be *ex post facto* justice since there was no legal precedent for such a tribunal then).

97 See the Carnegie Endowment for International Peace, *Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities*: *Conference of Paris 1919* Pamphlet no.32 *American Journal of International Law* 97-98.

98 Some of the German military officials (such as General Tirpitz and Admiral Lundendoff) accused of criminal acts during the war issued declarations to the effect that they would not stand trial before a foreign

adopted a compromise approach and decided that Germany could prosecute her nationals in her own Supreme Court, the *Reichsgericht*, in Leipzig.[99] Basically, the Allies came to the conclusion that the offer of the German Government was "compatible with the execution of Article 228" and accordingly decided "to leave full and complete responsibility with the German Government" to proceed with the prosecution and judgement of her nationals.[100]

However, the Allied Powers were to review these proceedings to determine the genuineness of the German government to administer justice. If these Leipzig trials were found to be unsatisfactory[101] pursuant to article 228 of the Treaty of Versailles the Allies would try the accused in their own military Tribunals.[102] Article 228 of Versailles provides:

> "The German Government recognises the right of the Allied and Associated Powers to bring before military Tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishment laid down by law. This provision will apply not withstanding any proceedings or prosecution before a Tribunal in Germany or in the territories of one of her allies..."[103]

This provision is the first of the peace treaties after World War I to set precedent for the principle of complementarity.[104] The language of the provision in question, on the face of it, reflects the Allied military Tribunals' review powers over the proceedings. It nonetheless reflects a complementary arrangement. This facet of complementarity gave Germany primary jurisdiction to try her nationals, with the Allied Tribunals only intervening to offset incompetence at the Leipzig trials. The fact that the Allies decided to concede to the Leipzig trials and yet reserved the power to wrest specific cases from their jurisdiction upon finding that they were not conducted in good faith, mirrors a complementary arrangement between

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tribunal, German officials also announced that no German national would be surrendered to a foreign tribunal. For a discussion of the reason behind the complementarity compromise in the Treaty of the Versailles, see El Zeidy *The Principle of Complementarity: Origin, Development and Practice (*2008) 15. He concludes that the Allies' adoption of a complementary scheme, which required that they defer jurisdiction to Germany was a "*de facto* result of respect for German sovereignty".

[99] See article 227 and 228 of the Treaty of Peace Between the Allied and Associated Powers of Germany, (*Concluded at Versailles*), Jun. 28, 1919, reprinted in 2 BEVANS 43 (hereinafter, "Treaty of Versailles").

[100] See H Patzig *et al* German *War Trials. Reports of the Proceedings Before the Supreme Court in Leipzig. With Appendices* [hereinafter "the Leipzig Report"] (1921) 17-18.

[101] See *German War Trials. Report of the Proceedings Before the Supreme Court in Liepzig. With Appendices* (1921) 17-18. See also Mohammed (2008) 16. If the Allies were of the Leipzig trial did not mete out just judgements, they had a right to try the accused in their tribunal.

[102] See Bassiouni 1997 *Harvard Human Rights Journal* 14. See also El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 17. He notes that although the principle was never really invoked in practice, the notion of complementarity began "to crystallize when the Allies demanded the surrender of a large number of German war criminal" pursuant to Articles 228 and 229 of the Treaty of Versailles.

[103] Article 228 of the Treaty of Versailles.

[104] See D Thiam "Draft Code of Crimes Against the Peace and Security of Mankind Part II (Including the Draft Statute for an International Criminal Court" (1983) II *Yearbook of the International Law Commission* A/CN.4/364 138. Available at http://wwww.un.org/law/icl/index.htm (accessed 25 February 2013). See also Mohammed *The Principle of Complementarity: Origin, Development and Practice* (2008) 18.

the *Reichsgericht* and the Allied Governments' Military Tribunals. Despite this complementary arrangement, only a small number of perpetrators were tried in the Leipzig trials[105] and the Allies did not review the proceedings.[106]

Meanwhile, other peace treaties that included the St. Germaine-En-Laye;[107] Neuilly-sur-siene;[108] Trianon[109] and Serves[110] were concluded between the Allied Powers and the enemy countries, Austria, Hungary, Bulgaria and Turkey.[111] These treaties had common penalty clauses copied from article 228 of the Treaty of the Versailles.[112] A complementary arrangement is replicated in these treaties as well since the spirit of article 228 from which these common articles were copied mirrored a complementary scenario. Arguably, these articles also advocated for a complementary arrangement between State parties to each of the treaties and the Allies because these common provisions give the Allies a right to intervene in case the State Parties fail to prosecute their own nationals.[113] However, commitment to international prosecution had waned and the Allies never tried any of the cases or reviewed national court's proceedings.

This is how complementarity emerged in the form of restrictive complementarity where the Allied Tribunals were not to intervene unless and until national (German) courts failed to conduct satisfactory trials.[114] This model was based on strict notions of complementarity in the sense that complementarity would apply by default should the Allies find the trials in

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105 See JN Maogoto *War Crimes and Realpolitik: International Justice from World War I to the 21st Century* (excerpt) (2004), (he argues that these constituted 'sham trial' as only a handful of perpetrators were tried, and they got off with minor sentences ranging from six months to four year's imprisonment). Mohammed *(*2008) 15 also notes that out of a list of 895 offenders, only 45 stood trial in Germany. See also Bassiouni 1997 *Harvard Human Rights Journal* 19-20.

106 See El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 18.

107 Treaty of Peace between the Allied and Associated Powers and Austria (St. Germain-en-Laye, 10 September 1919) entered into force 16 July 1920 *Australian Treaty Series* 1920 No. 3.

108 Treaty of Peace Between the Allied and Associated Powers and Bulgaria, and Protocol and Declaration signed (Neuilly-sur-Seine, 27 November 1919).

109 Treaty of Peace Between the Allied and Associated Powers and Hungary and Protocol and Declaration (signed at Trianon June 14 1920) *WWI Document Archive.*

110 The Treaty of Peace Between the Allied and Associated Powers and the Ottoman Empire *UK Treaty Series* No. 11 of 1920.

111 These treaties were also concluded between the Allied Powers and the enemy countries: St. Germaine-En-Laye (with Austria on September 10, 1919); Neuillty-sur-siene (with Bulgaria on November 27, 1919); Trianon (with Hungary on June 4, 1920) and Sèvres, (with Turkey on August 10, 1920). See the *Holocaust Encyclopaedia* available at http://www.ushmm.org/wlc/en/article.php?ModuleId=10007428 (accessed 27 August 2012).

112 Article 173 of St Germaine; article 154 of Trianon' article 118 of Nueilly and article226 of Sevres reproduced article 228 of the Treaty of Versailles word for word. See El Zeidy *The Principle of Complementarity: Origin, Development and Practice (*2008) 18 in this regard.

113 See El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 17.

114 See generally El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008).

German courts not to be in good faith, and once this determination was made, it did not matter that the accused in question had already faced trial in Germany or elsewhere.[115] Although the text of Article 228 mirrors a strict primacy of the Allied military tribunals, by giving the Allied Powers rights to wrest specific unsatisfactory cases from the *Reichsgericht*, there is a shift to a more complementary approach when the Allies defer to the *Reichsgericht*. Essentially, the fact that the Allies had the power to intervene whenever national proceedings seemed to be not in good faith reflects the spirit of complementarity.[116] Even though the Allies took no action to implement this proposal, it marked an important step in the intellectual elaboration of the concept of complementarity in the international criminal justice system.

Similarly, in this complementary approach to prosecution of war criminals features the idea of implementation legislation. Germany amended its laws specifically for purposes of prosecuting the accused war criminals according to the Allied powers' constitution of acceptable proceedings.[117] This as will be seen later in the chapter, is a requirement of the Rome Statute that Member States implement provisions of the Rome Statute in their legal system in order to conform to the Rome Statute's criminal justice system. The principle further develops into another version after the peace treaties, namely, optional complementarity under which formal consent of the complaint State was required before an international tribunal could hear a case.[118] This is the model mirrored in the 1937 draft Convention for the International Criminal Court and in the 1951 and 1953 Draft Statutes of the Committees on International Criminal Jurisdiction.

2.3.3 Optional Complementarity

The first major model of optional complementarity, which requires a State to either prosecute international crimes nationally or opt for international prosecution of its nationals, surfaced during in the 1937 Convention for the International Criminal Court and this was mirrored in subsequent drafts. Although this model took form in the 1937 Convention for an International Criminal Court, a series of events paved way for it. For instances, negotiations for an

[115] See Article 228 of Treaty of Versailles Jun. 28, 1919, reprinted in 2 BEVANS 43.
[116] See H Patzig *et al* German *War Trials. Reports of the Proceedings before the Supreme Court in Leipzig. With Appendices* [hereinafter "the Leipzig Report"] (1921) 17-18.
[117] See M El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 16.
[118] This form of complementarity featured in the 1937 Convention for the Creation of an international criminal court and in the 1951 and 1953 Draft Statutes of the Committees on International Criminal Jurisdiction: this type of complementarity was based on state consent and the subsequent relinquishment of jurisdiction to the international tribunal. See El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 5.

international criminal court and proposals tabled at various meetings, first by the 1920 Advisory Committee of Jurists and the subsequent International Law Association Conferences that also discussed the idea of establishing the said court.

2.3.4 The 1920 Advisory Committee of Jurists

Pursuant to article 14 of the Covenant of the League of Nations (Treaty of Versailles), [119] that endowed the Council of the League of Nations with the power to compose and distribute amongst members for adoption, a draft Statute establishing the permanent court of justice. The Council appointed an Advisory Committee of Jurists in 1920, to draw a plan for the establishment of the proposed court. According to the proposals presented by delegates, the proposed court would have jurisdiction to prosecute and punish crimes against international public order and the universal law of nations.[120] States would still have jurisdiction over other crimes but a special arm of the Court, a High Court of International Justice, would prosecute those that are against the universal law of nations.[121] This mirrored a complementary scheme; both tribunals would have concurrent and complementary jurisdiction. However, States were not ready to cede their criminal jurisdiction to such a forum and due to time constraints and disagreements between delegates; and never drew up the draft.[122]

2.3.5 The International Law Association Conferences

Another facet of the complementarity principle surfaced during the International Law Association conferences between 1922 and 1924. This also had attributes of optional complementarity because its implementation depended on State's consent to its nationals being tried by a tribunal of an international character. At the 31st subsequent conference in Buenos Aries in 1922, Professor Hugh H.L. Bellot presented a paper emphasizing the urgent need to establish a permanent international court. After much deliberation, Professor Bellot was tasked with drafting and submitting to the International Law Association committee, a draft statute for the creation of the said court. At a subsequent meeting in Stockholm, Professor Bellot presented the draft statute.[123] According to Article 25 of the draft, the court would have jurisdiction over any citizen of any State provided the relevant authorities from

[119] The article provides that "Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice."

[120] See BB Ferencz "International Criminal Courts: the Nuremberg Legacy" (1998) 10 *Pace International Law Review* 203 at 208

[121] See El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 27.

[122] El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 27.

[123] See HL Bellot, *"La Cour Permanente Internationale Criminelle"* 3 *Reuce Internationale de Droit Penal, 335* in El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 33.

the complainant's country have consented to the case being heard by the court.[124] Some committee members argued that the court should act as an appellate court with the power to determine whether justice had been properly administered by the national courts, however, most members objected, arguing that this would give the court too much power.[125]

From the draft statute, the proposed court's jurisdiction would be complementary although it was dependent upon formal consent from the territorial or national State. This would however, only be the case where the complainant furnished evidence of consent from his/her State. The court's complementary jurisdiction would therefore be *optional.*[126] Moreover, upon cessation of the hostilities, since the military courts were *ad hoc* and would cease to have jurisdiction, the proposed international court would then have jurisdiction over war criminals.[127] Accordingly, the court would play a complementary role although this was only possible after obtaining State consent. These early proposals indicate how the principle of complementarity evolved and developed through its different facets, even though the court did not materialise since States were still reluctant to relinquish their sovereignty. These forums laid a theoretical foundation for the principle of complementarity.

In 1925, there was an Inter-parliamentary Union Conference for discussing ways of criminalizing aggression and international repression of other international crimes committed by individuals in Washington DC and Ottawa. A number of problems were identified, for instance, reconciliation of State sovereignty with international repression of crimes committed by individuals from sovereign states, or crimes committed within the territory of those

[124] See ILA Draft Statute for the Permanent International Criminal Court "Historical survey of the question of international criminal jurisdiction*" Memorandum by the Secretary-General* (Sales No. 1949. Vol 8) Appendix 4 61. Article 25 provides:
"The jurisdiction of the court embraces all complaints or charges of violations of the laws and customs of generally accepted as binding or contained in International Conventions or in Treaties in force between states of which the complainants and defendants are subjects or citizens respectively. The court shall also have jurisdiction over all the offences committed contrary to the laws to the laws of humanity and the dictates of conscience."

[125] See D Thiam "Draft Code of Crimes Against the Peace and Security of Mankind Part II (Including the Draft Statute for an International Criminal Court" *First report on the draft code of offences against the peace and security of mankind, by Mr. D. Thiam, Special Rapporteur* A/CN.4/364 139. Available at http://legal.un.org/ilc/documentation/english/a_cn4_364.pdf (accessed 25 February 2013).

[126] See D Thiam "Draft Code of Crimes Against the Peace and Security of Mankind Part II (Including the Draft Statute for an International Criminal Court. See also Article 24 of the ILA Draft Statute for the Permanent International Criminal Court. It provides that the court would only exercise its jurisdiction where the complainant had "first obtained the *fiat* or formal **consent** of the Law Officers, Public Prosecutor or Minister of Justice…of his own state". [Emphasis added].

[127] See El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 33.

states.[128] These issues were the result of the earlier Union's general meeting in Berne in 1924 regarding the criminalization of the war of aggression. The discussions made a distinction between internal and external sovereignty to address this problem since most States were not prepared to relinquish their sovereignty powers (criminal jurisdiction over their own nationals and over crimes committed on their soil) to an international forum.[129] Professor Vespasian V. Pella, on behalf of the Permanent Committee to Study Questions of the Union on the Criminality of Wars of Aggression and the Organisation of International Repressive Measures,[130] presented a report to address this issue. According to Professor Pella's report, external sovereignty was not absolute and was limited by the very nature of international relations and the necessity of harmonious relations between States. [131]

At the end of the conference, issues of jurisdiction of the proposed permanent Court of International Justice were addressed and it was agreed that the said court would have jurisdiction over all international offences committed by individuals and those that by their nature preclude the jurisdiction of national courts. Although it appears the proposal seeks to give the proposed court exclusive jurisdiction, it may be argued that national authorities would also have a hand in the prosecutions, thereby reflecting a complementary scheme between the permanent international court of justice and domestic courts. This was apparent in the wording of the proposal that although the international tribunal would enjoy exclusive rights to jurisdiction over certain crimes - where national courts had no jurisdiction. There were other cases over which national courts would have jurisdiction, and these would be tried municipally.

Proposals for an international criminal court continued on an informal basis, for instance, in Brussels in 1926 the International Association of Penal Law held a conference for purposes of discussing among others, the jurisdiction of the court. It was proposed that the court should

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[128] The draft statute was adopted by the International Association for Penal Law in 1926. See "Historical Survey of the Question of International Criminal Jurisdiction" *Memorandum by the Secretary-General* (Sales No. 1949. Vol 8) appendix 7 75. See also Ferencz 19980 *Pace International Law Review* 208 for a general discussion of the nature and extent of the jurisdiction of the proposed court.

[129] P Mackeron "An International Criminal Court: Balancing the Principle of State Sovereignty Against the Demands of International Justice" (1996-97) 12 *St. John's Journal of Legal Commentary* 536 at 541.

[130] This committee was appointed at an earlier 22nd Inter-Parliamentary Union conference in Berne in 1924, to provide answers to the questions raised regarding the criminalization of the wars of aggression and the appropriate internationals repressive measures to be undertaken.

[131] Report of the 1925 Inter-Parliamentary Union, XXIII Conference Washington and Ottawa 1-13 October 1925 "Historical Survey of the Question of International Criminal Jurisdiction" *UN Publications* Sales No. 1949(8) 100.

prosecute among others, prostitution, drug trafficking, counterfeiting of currency and crimes of national security. However, most states emphasised their reluctance to renounce their sovereignty rights.[132] The congress therefore agreed that in cases where an accused person could not be prosecuted by domestic authorities, because of uncertainties[133] over the territory on which the crimes were perpetrated, they would be subject to the jurisdiction of the international court. In essence, the court would be complementary to national courts in this case because it would only intercede where no state can prosecute due to lack of jurisdiction.[134] The complementary jurisdiction of this court would be to offset lack of jurisdiction by municipal systems in specific cases.

2.3.6 The 1937 League of Nations for the Creation of an International Criminal Court

In response to political crimes that were committed between 1931 and 1934 that culminated in the assassinations of King Alexander of Yugoslavia and French Foreign Minister, the French government addressed a letter to the Secretary General of the League of Nations regarding the need to establish an international criminal court. This was after failed attempts to extradite those implicated in the assassins to France so that they could stand trial for the assassination of King Alexander.[135] The League of Nations passed a resolution in December 1934 that established a Committee of Experts for the International Repression of Terrorism.[136] The Committee was tasked with drafting a convention pertaining to the crime of terrorism and for establishing an international court with jurisdiction to punish terrorists.[137] The committee convened in Geneva in 1935 to consider the proposal of the French government that was submitted to the League of Nations, as well as other governments' suggestions.[138]

The French proposal favoured a complementary arrangement; it proposed that national courts be given primary jurisdiction, with the international court only intervening where those accused of the crimes in the Terrorism Convention have taken refuge in a country which does

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[132] See El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 35.

[133] This could be either because the territory on which the crime was committed is unknown or because there is a dispute as to the sovereignty over the territory where the crimes took place. See El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 33.

[134] See C Bassiouni 1997 *Harvard Human Rights Journal* 14. The principle of complementarity was reflected in these proposals; however, the tribunal's materialisation was undermined by political ideologies.

[135] El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 44.

[136] See *Report to the Council on the First Session of the Committee* (held April 30 to May 8 1938) League of Nations document C.184.M.102.1935V 2.

[137] See *Report to the Council on the First Session of the Committee* (held April 30 to May 8 1938) League of Nations document C.184.M.102.1935V 2.

[138] The Committee of Experts comprised of 11 members from United Kingdom, Chile, Belgium, France, Hungary, Italy, Poland, Roumania, the USSR, Spain and Switzerland,

not wish to prosecute them. France also suggested that the court's jurisdiction also extend to cases where the custodial State refuses to extradite the suspect but wishes to defer to the international tribunal.[139] The court would also have jurisdiction where the State with territorial jurisdiction over the case waives jurisdiction before its domestic courts.[140] The Romanian delegate, Professor Vespasian V. Pella, supported the French suggestion but put emphasis on priority of national jurisdiction. He argued that whole idea of an international criminal court would only be 'conceivable' "if the custodial voluntarily renounces its right" to prosecute,[141] but also expressed his government's scepticism about the court's future viability because its jurisdiction was optional as there was no obligation on member States to defer to the court's jurisdiction.[142]

The committee adopted the report comprising the draft Convention for Creation of an International Criminal Court and the draft Convention for the Repression of Terrorism and presented them to the League.[143] However, the delegates were divided on the issue of establishing the court, the Hungarian delegate considered the establishment of an international criminal court at the time to be in retrospect.[144] The United Kingdom representative argued that his government had the resources to efficiently deal with terrorism internally.[145] The Polish delegate also stated that his government "sees no need for the creation of the court".[146]

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139 See *Report to the Council on the First Session of the Committee* League of Nations document C.184.M.102.1935V. 19.

140 See *Report to the Council on the First Session of the Committee* League of Nations document C.184.M.102.1935V. 19. The French delegate proposed concurrent jurisdiction between the proposed court and national judiciaries to cater for situations where the accused has taken refuge in a country that lacks political will to punish him. See El Zeidy *The Principle of Complementarity: Origin, Development and practice* (2008) 47. He states that the proposed international criminal court "was intended as a default jurisdiction that was triggered when the criteria….is satisfied".

141 See *Report to the Council on the First Session of the Committee* League of Nations document C.184.M.102.1935V. 19.

142 See *Observations by Governments on the Draft Convention for the Prevention and Punishment of Terrorism and Draft Convention for the Creation of the International Criminal Court* Series I League of Nations document A.24.1936V 1-3.

143 See *Report to the Council Adopted by the Commission for the Repression of Terrorism* on January 15, 1936 League of Nations document A.7.1938.V. [C.36 (1) 1936.V 2.

144 See *Observations by Governments on the Draft Convention for the Prevention and Punishment of Terrorism and Draft Convention for the Creation of the International Criminal Court* Series II League of Nations document A.24 (a).1936V 5-8.

145 See *Observations by Governments on the Draft Convention for the Prevention and Punishment of Terrorism and Draft Convention for the Creation of the International Criminal Court* Series II League of Nations document A.24 (a).1936V 5-8. The United Kingdom and India did not support the proposals for an international court because they argued that they could deal with terrorism within their national legal systems. See El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 48 noting that the delegates were "divided on to the desirability of creating the court in principle and on the 'timelines' of its creation."

146 See *Observations by Governments on the Draft Convention for the Prevention and Punishment of Terrorism and Draft Convention for the Creation of the International Criminal Court* Series II League of Nations document A.24 (a).1936V 1-3.

Despite the division between States, the draft statutes were adopted in 1937 at a conference in Geneva after revision, to accommodate concerns aired at earlier conferences.[147] Under Article 3 of the Draft Convention for the Creation of an International Criminal Court, a State party could try the accused before its national courts; extradite him to another State party to the convention; or remit him to the proposed international criminal court.[148] Article 10 of the Draft Convention on Prevention and Punishment of the Crime of Terrorism also provides:

> "where in virtue of the present Convention a High Contracting Party has to bring to trial a person accused of one of the offences provided for by article 2 and 3, the law of that High Contracting Party *shall determine what court shall have jurisdiction* to try such person."[149]

Both these conventions mirrored *optional complementarity* as the international court could only supplement national jurisdictions if the State concerned chose to submit the accused to the court. This implied serious practicality issues for the proposed court; consequently, the convention was only ratified by India.[150]

The post-World War I era saw the principle of complementarity evolve into different facets, from optional complementarity to more strict notions in the Nuremberg Tribunals and the compromise approach model in the Rome Statute. Each of these models has been influenced by the theoretical, historical, practical, political and legal notions of its time. For instance, in the peace treaties, due to States' reluctance to relinquish their sovereignty, the proposed international tribunal would only exercise its jurisdiction upon finding the German trials unsatisfactory.[151] Although the Article 228 of the Versailles and the common treaties of St. Germaine-En-Laye;[152] Neuilly-sur-siene;[153] Trianon[154] and Serves[155] echoed primacy of the

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[147] See *Observations by Governments on the Draft Convention for the Prevention and Punishment of Terrorism and Draft Convention for the Creation of the International Criminal Court* Series I League of Nations document A.24.1936V.

[148] See *Report to the Council Adopted by the Commission for the Repression of Terrorism* on January 15, 1936 League of Nations document A.7.1938.V. [C.36 (1) 1936.V Appendix II 8. This provision laid down the criteria for admission of cases before the proposed tribunal.

[149] *Report to the Council Adopted by the Commission for the Repression of Terrorism* on January 15, 1936 League of Nations document A.7.1938.V. [C.36 (1) 1936.V Appendix II 8.

[150] El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 56.

[151] See generally El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 29. He notes that the notion of complementarity in the peace treaties was basically a presupposition of Germany's failure to hold satisfactory trials, and the Allies would invoke the penalty clauses in the peace treaties and thereby play a complementary role, if Germany failed to administer justice in good faith.

[152] Treaty of Peace between the Allied and Associated Powers and Austria (St. Germain-en-Laye, 10 September 1919) entered into force 16 July 1920 *Australian Treaty Series* 1920 No. 3.

[153] Treaty of Peace Between the Allied and Associated Powers and Bulgaria, and Protocol and Declaration signed (Neuilly-sur-Seine, 27 November 1919).

[154] Treaty of Peace Between the Allied and Associated Powers and Hungary and Protocol and Declaration (signed at Trianon June 14 1920) *WWI Document Archive.*

Allied military courts, the fact that the Allies gave Germany and other parties a chance to try their nationals in their domestic courts gives the Allied tribunals a supplementary role. This scenario provided a theoretical background for the principle of complementarity. However, the Allied governments never invoked provisions of the common articles that complete the complementarity regime between the Allied Tribunals and the courts of the Member States to the peace treaties despite Germany and Turkey holding sham trials meting out minor judgements and only trying a handful of the offenders.[156] .

Traces of optional complementarity can also be found in the International Law Association proposals for an international tribunal. According to these proposals, the said court would only have jurisdiction where the States concerned gave formal consent.[157] The court's jurisdiction would also extend to cases where the territory on which the crimes were committed was unclear or no State has jurisdiction over the crimes in question[158]. Furthermore, optional complementarity is reflected in the 1937 League of Nations draft conventions on the creation of an International Criminal Court and the prevention and punishment of terrorism. The draft conventions advocated for State's primary jurisdiction, with the tribunal only intervening where the State that had jurisdiction would not wish to prosecute or where the offender had refugee status in such a State, and the State in question refused to extradite him[159]. However, in the turmoil of the post-war period, the provisions that mirror the principle of complementarity were never really invoked and its practicality never tested.

2.4 Complementarity in the Post World War II Era

The Allied Powers' attempts to prosecute war criminals after the First World War did not yield the desired results as only minor sentences were meted out at the Leipzig trials and other

[155] The Treaty of Peace Between the Allied and Associated Powers and the Ottoman Empire *UK Treaty Series* No. 11 of 1920.

[156] See J Mogoto *War Crimes and Real Politik: International Justice from World War I to the 21st Century* (2004) 4-5. See also C Bassiouni 1997 *Harvard Human Rights Journal* 15.

[157] See ILA Draft Statute for the Permanent International Criminal Court "Historical survey of the question of international criminal jurisdiction" *Memorandum by the Secretary-General* (Sales No. 1949. Vol 8) Appendix 4 61, Article 25.

[158] See ILA Draft Statute for the Permanent International Criminal Court "Historical survey of the question of international criminal jurisdiction" *Memorandum by the Secretary-General* (Sales No. 1949. Vol 8) Appendix 4 61.

[159] For the full text of the 1937 League of Nations Draft Convention for the Creation of an International Criminal Court and the Draft Terrorism Convention see *Report to the Council Adopted by the Commission for the Repression of Terrorism* on January 15, 1936 League of Nations document A.7.1938.V. [C.36 (1) 1936.V.

war criminals were not prosecuted.[160] War criminals were therefore not deterred from committing crimes in the future, and a series of crimes led to the Second World War[161]. During the course of the war, in 1941 the League of Nations Union created the London International Assembly and representatives of the Allied Governments made recommendations for a court that would effectively punish those who were responsible for war crimes committed during the war.[162] Proposals for an international forum to punish authors of the atrocities were presented.

However, the issue of the competence of the proposed forum was debated.[163] The Belgian delegate, M de Baer, proposed that States be given latitude to try war criminals in their own courts (except for Germany) with the international criminal court only handling the most serious of these crimes, because the court alone could not possibly handle all the cases alone.[164] In subsequent meetings, it was agreed that the proposed court should intervene only when the Allied courts have no jurisdiction or it is 'impossible' or 'inconvenient' to prosecute in national courts.[165] In addition, the said court would prosecute where the State that has jurisdiction on the matter decides to refer the case to the international criminal court.[166] This proposed some kind of a complementary scheme between national courts and the international

[160] For instance, the Kaiser was never tried since Germany refused to honour the peace treaty. Holland also refused to extradite Kaiser arguing that there was no international court at the time try and punish aggression by a sovereign, and this would also mean that the treaty was being applied *ex post facto* as the alleged aggression was perpetrated before its coming into force. See, B Ferencza "International Criminal Courts: The Legacy of Nuremberg (1998) 10 *Pace International Law Review* 203 at 207.

[161] The Second World War was triggered by assassinations of King Alexander of Yugoslavia and the French Foreign Minister in 1934, the affected nations resorted to war, Germany against Europe; Japan invaded Manchuria, and India invaded Ethiopia, there was a series of invasion and acts of aggression going on around the world up until 1941. See B Ferencza "International Criminal Courts: The Legacy of Nuremberg (1998) 10 *Pace International Law Review* 203 at 209.

[162] See *Historical Survey of the Question of International Criminal Jurisdiction* U.N. Doc. A/CN.4/7/Rev. 1 UN Sales no 1949.v.8 (1949) 11.

[163] See *London International Assembly – Commission II on the Trial of War Criminals* TS 26/873 232.

[164] *London International Assembly – Commission II on the Trial of War Criminals* TS 26/873 234. Mr Baer appreciated the necessity of the International criminal court but argued that the court would not be competent to handle all cases from across the world alone. He proposed a division of tasks between the two for a, municipal authorities were to continue trying cases that they could handle, with the proposed court dealing with the most serious crimes.

[165] *London International Assembly – Commission II on the Trial of War Criminals* TS 26/873 228-9.

[166] See *London International Assembly – Commission II on the Trial of War Criminals* TS 26/873 282-3. Before the international criminal court could have jurisdiction the following criteria had to be met:

1. The accused must have committed crimes in several jurisdictions rendering it impractical to try him separately in each of the countries.
2. The crimes in question must have been of an international character.
3. The accused must be a head of state which implies the gravity of the case.
4. National courts must be unable to prosecute the accused due to difficulties in obtaining the necessary evidence or the accused.
5. National courts could also waive jurisdiction in the interests of justice, viz., if the political situation in the country is still unsettled post- war and it would be desirable to try elsewhere to avoid suspicions of bias.

court, national courts were to prosecute where they had jurisdiction or where it was convenient or in the interests of justice to do so.[167] The international criminal would also have supplementary jurisdiction where the State with jurisdiction is 'unable' to prosecute due to an unfavourable post-war environment. The complementarity model proposed here was also *optional* in as far as, the State with jurisdiction could opt not to prosecute and rather refer the case to the proposed court. In this manner, the proposed court would be complementary where the State decides, among others, to defer jurisdiction.

In the revised Draft Convention for The Creation of the International Criminal Court prepared by M de Baer in 1943, Article 3(1) provided that "…no case shall be brought before the Court when a domestic court of any of the United Nations has jurisdiction to try the accused and it is in a position and willing to exercise such jurisdiction."[168] It is conclusive from this provision that the jurisdiction of the said court would be triggered by "inability" on the part of the municipal system to prosecute, for instance, where the State is still unsettled after the war, or an unwillingness to pursue the case. This criterion features in the Rome Statute complementarity model, where the ICC has complementary jurisdiction to try the most serious crimes of international concern, where a State show 'inability' or "unwillingness" to genuinely prosecute.[169]

Generally, proposals for an international criminal tribunal during and after World War II were more inclined towards a division of tasks between the proposed tribunal and municipal courts, and these put more weight on the importance of national courts, as the *prima fora* for prosecution of war criminals.[170] These proposals for an international criminal tribunal culminated in the establishment of the International Military Tribunal at Nuremberg for punishment of those who were responsible for the war and for crimes against peace and crimes against humanity

[167] The Allied powers favoured a division of labour scenario between the two courts. The rationale behind this was that it was more convenient for these cases to be dealt with internally, and to avoid flooding the international court with cases that could be prosecuted by national courts, only serious crimes had to be tried by the proposed court. See El Zeidy *The Principle of Complementarity: Origin, Development and practice* (2008) 62.

[168] For the text of the draft convention for the creation of the international criminal court that deals with issues of jurisdiction (Articles 3 and 4(1)), see *London International Assembly – Commission II on the Trial of War Criminals* TS 26/873 324-325.

[169] See Article 17 of the Rome Statute of the International Criminal Court.

[170] See El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 61-62 (noting that the proposals established *optional* concurrent and complementary jurisdiction between the two fora. He further notes that the philosophy behind opting for complementarity jurisdiction was among others, to avoid a backlog of cases in the international criminal court, and also because national judiciaries were seen as the "*forum conveniens").*

2.4.1The Nuremberg International Military Tribunal – *Discretionary* Complementarity

The four victors of the Second World War, United States of America; Great Britain; France and the Soviet Union, the Allied Powers, established the International Military tribunal: in order to prosecute German officers, Nazi leaders, who had committed war crimes, crimes against peace and crimes against humanity during the war.[171] In terms of the Charter of the International Military Tribunal for the Trial of the Major War Criminals (herein after the "IMT charter")[172]that established the tribunal, the, jurisdiction of this tribunal was limited to Germans who were responsible for atrocities committed in Occupied Europe.[173] The tribunal was set up to try only major war criminals of the European Axis, while majority of other minor crimes were to be tried by national judiciaries.[174] This reflects a complementary scheme because both the international tribunal and national courts work together and prosecute war criminals but each forum deals with its category of crimes. Twenty four (24) German war criminals were charged with conspiracy to commit the crimes listed in the IMT Charter[175], there were other thirteen subsequent trials at the Nuremberg.

The text of the IMT Charter refers to the Moscow declaration of 1943[176] in which the parties agreed that German war criminals be tried in the countries in which the crimes in question were committed so that the international military tribunal focussed only on major crimes with no particular territory.[177] This also mirrored a complementary arrangement. This model of complementarity was born after in the International Law Association proposals for an international criminal court, where the international tribunal would only exercise its jurisdiction to complement lack of jurisdiction while national courts, in this case, of the

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[171] See H Jescheck "The General Principles of International Criminal Law Set out in Nuremberg, as Mirrored in the ICC Statute" (2004) 2 *Journal of International Criminal Justice* 38.

[172] See also Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, U.N.T.S. 279, *as amended*, Protocol to Agreement and Charter, Oct. 6, 1945.). The Charter is also sometimes referred to as the London charter because it was concluded in London on 8 august 1945. See Jescheck 2004 *Journal of International Criminal Justice* 38.

[173] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, U.N.T.S. 279.

[174] See BD Meltzer "War Crimes: The Nuremberg Trial and the Tribunal for the Former Yugoslavia"- the Seegers Lecture (1995-96) *Valparaiso University Law Review* 30. See also R Woetzel *The Nuremberg Trials in International Law* (1960) for a general discussion.

[175] See Ferencz 1998 *Pace International Law Review* 214.

[176] Article 4 of the IMT charter provides, "Nothing in this agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.…"

[177] This model of complementarity was born after World War I, where the international tribunal only exercises its jurisdiction to complement lack of jurisdiction while national courts, in this case, of the territorial state as opposed to the national state, were endowed with jurisdiction over international crimes committed during the war.

territorial state as opposed to the national State, were endowed with jurisdiction over international crimes committed during the war.

However, this differed from the complementary scheme envisaged by penal provisions in the peace treaties, as this tribunal would have exclusive jurisdiction over the core crimes. This left the less serious crimes to domestic courts, whereas the idea of complementarity envisaged by the peace treaties embraced the concept of deferral to national courts, an approach that is central to the notion of complementarity.[178] The Nuremberg model of complementarity however, contemplates a division of tasks between the national and international courts, with each court dealing with its own set of cases. This approach seems to reflect the doctrine of supremacy of the international court over municipal systems in that the Nuremberg Tribunals had exclusive jurisdiction over high profile cases while national courts only had jurisdiction to adjudicate low-level cases. This however, offset lack of jurisdiction of each of the forums because the other would have a particular set of cases to handle where the other does not have such powers, thereby playing a complementary role.

2.4.2 The Tokyo Tribunal

The International Military Tribunal for the Far East was also established after the Second World War by General Douglas MacArthur, a Supreme Commander for the Allied Powers in the Far East, through the Charter for the International Military Tribunal for the Far East, as amended.[179] Like the Nuremberg Tribunal, this tribunal was set up for trying Japanese war criminals for alleged crimes of aggression, war crimes and crimes against humanity. The jurisdiction of this particular tribunal also extended to the major war criminals with the Japanese courts seized with jurisdiction over minor offences hence, reflecting a complementary relationship between the tribunal and domestic courts.

2.4.3 The *Ad Hoc* Tribunals

The primacy of the *ad hoc* tribunals, the *International Criminal Tribunal for the former Yugoslavia* (hereinafter the *ICTY)* and *the International Criminal Tribunal for Rwanda*

[178] See El Zeidy "The Principle of Complementarity: A New Machinery to Implement International Criminal Law" (2001-2002) 23 *Michigan Journal of International Law* 869 at 875.
[179] The tribunal was established by a special proclamation found in Department of State Bulletin (USA) vol XIV No 349 361.

(hereinafter the *ICTR*) has been emphasised in most legal texts.[180] The *ad hoc* tribunals were established pursuant to the Security Council Resolutions.[181] The Statutes that established the two tribunals, that is, article 9 of the ICTY Statute[182] and article 8 of the ICTR Statute,[183] outline the relationship between the *ad hoc* tribunals and national courts respectively. They provide *verbatim* that these international tribunals and national courts shall have concurrent jurisdiction to prosecute serious human rights violations committed in each territory.[184] However, these Statutes vested the tribunals with primary jurisdiction:

> "The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."[185]

Inasmuch as the above provision emphasises primacy of the tribunals over national courts, it also reflects a complementary relationship between these forums. The provisions provide that at any stage of the proceedings (in national courts); the tribunal *may* request national courts to *defer* to the jurisdiction of the tribunals. This means that the tribunal may intervene in any given case and prosecute on an international level.[186] The report by the Secretary-General on the Former Yugoslavia also emphasised that the intention of the Security Council was not to bar national courts altogether from exercising their jurisdiction with respect to the crimes listed under the ICTY Statute.[187]

The Statutes of the *ad hoc* tribunals significantly envisaged the idea of division of labour between the respective States and the tribunals through concurrent jurisdiction. Although this

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[180] See A Cassese *International Criminal Law* (2003) 349; SJ Mallesons *et al* "ICTR – Jurisdiction, Completion Strategy and the Transfer of Cases to Domestic Courts" (2011) *Humanitarian Law Perspectives* 6; M El Zeidy 2001-2002 *Michigan Journal of International Law* 869; El Zeidy "From Primacy to Complementarity and Backwards: (Re)-visit1ng Rule 11 *bis* of the Ad hoc Tribunals" (2008) 57 *International and Comparative Law Quarterly* 403 at 405.

[181] United Nations Security Council Resolution 827 (1993) established the ICTY. See S.C. Res. 827, U.N. SCOR, 48th Sess., Annex, 3417th mtg., U.N. Doc. S/RES/827 (1993).

[182] Article 9 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., Annex, 3417th mtg., U.N. Doc. S/RES/827 (1993).

[183] Article 8 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 453d mtg., U.N. Doc. S/RES/955 (1994).

[184] See article 8(1) of the ICTR Statute and article 9(1) of the ICTY Statute.

[185] Article 8(2) of the ICTR Statute and article 9(2) of the ICTYS Statute respectively. See also *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808(1993)* UN SCOR 48th Sess UN Doc S/25704 (1993) [hereinafter Secretary-General's Report on the Former Yugoslavia] paras 64-65.

[186] The rationale behind the prosecutorial discretion here is the same as the rationale for primacy of the tribunal, namely, because it was highly likely that prosecutions by national courts would be unfair and biased, given the nature of the situations and circumstances under which the crimes were committed.

[187] See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* U.N. SCOR, 48th Sess., 9H 64-5, U.N. Doc. S/25704 (1993).

arrangement was subject to the discretion of the prosecutor of each tribunal, it mirrors a complementary regime because national courts had a hand in the criminal prosecution of their nationals, unless and until the international tribunal requested a deferral. Even in the case where the tribunal has requested a deferral, there is still complementarity because the tribunal steps in at any stage of the proceedings in the national courts, to supplement them in whatever respect they may be lacking, for instance, in cases where municipal proceedings may be impartiality.

Moreover, pursuant to the ICTR's Completion Strategy, Rule 11(*bis)* of the *Rules of Procedure and Evidence* was amended in May 2005.[188] The amendment gave the Tribunal the authority to transfer low or mid-level cases that were already before the Tribunal back to the national courts for investigation and/or prosecution.[189] These cases were to be referred to a State with jurisdiction provided they were 'willing and adequately prepared to accept such cases'.[190] The said State must have "a legal framework which criminalises the alleged conduct of the accused and provides an adequate penalty structure".[191] In addition, the prosecutor had to monitor those proceedings in the national courts to ensure that they conformed to the fair trial requirements.[192] The prosecutor also had the power to revoke any transfer should he find the proceedings unsatisfactory. This is a clear case of complementarity, when one of the forums, international or national is lacking in one way or another, it could be supplemented or complemented through the prosecutor's power of referral or deferral.

Additionally, the issue of jurisdiction was raised in *Prosecutor v. Tadic,*[193] and the proceedings before the ICTY mirrored a complementary approach to prosecution of international crimes. First, Dusko Tadic was arrested in Germany for crimes against humanity, grave breaches of the Geneva Conventions and genocide, but the Tribunal requested a deferral of jurisdiction from Germany because pursuant to article 9 (2) of the

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[188] See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Rules of Procedure and Evidence Extraordinary Plenary Session (30 may 2006) IT/32/REV. 38 8.

[189] In terms of Rule 11*bis* the prosecutor could apply for transfer of a case already before the tribunal either to the country where the crime was committed; where the accused was arrested or any other country with jurisdiction and 'willing and adequately prepared to accept such a case. See G Norris "Closer to Justice: Transferring Cases from the International Criminal Court" (2010) 10 *Minnesota Journal of International Law* 204 at 209.

[190] See President of the ICTR, Annex 1 (A), U.N. Doc. S/2009/247 (May 14 2009).

[191] See Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis* (*Prosecutor v. Hategekimana) (Appeals Chamber)* [2008] Case No. ICTR-00-55B-R11bis 40.

[192] Rule 11*bis* (D) (iv).

[193] Prosecutor v. Dusko Tadic Case No. IT-94-I-I, (Aug-10, 1995) International Criminal Tribunal for the Former Yugoslavia: (Decision on the Establishment of the International Tribunal).

ICTY Statute the Tribunal had primacy over national courts.[194] Tadic challenged the jurisdiction of the Tribunal arguing that the ICTY Statute's grant of primacy to the Tribunal over national courts violated international law. The Tribunal held that the crimes that Tadic was charged with were universal in nature and did not fall exclusively under the jurisdiction of the affected nations.[195] The approach of the Tribunal mirrored a complementary approach because by the nature of the crimes committed, an international tribunal had the power to try the case. Although the statute advocated a strict primacy approach, there is still division of tasks between national courts and the international tribunal.

It is also worth noting that there was a shift from the strict primacy of the tribunals to a more discretionary type of complementarity. This was because the complementary relationship between the two fora was dependent on the prosecutors' exercise of their discretionary powers to defer cases to national courts or request the national courts to refer to its jurisdiction during the proceedings. The amendment somehow reversed the primacy approach of the *ad hoc* tribunals to a complementary approach in the form of division of labour between the international tribunals and the domestic courts.[196] While the Tribunal only handled the high profile cases, there was a division of tasks between the low and medium level cases.

Since the amendment, the prosecutor has transmitted about eight transfer requests to the Appeals Chamber but so far, only two have been granted. Before a referral is granted, the legal and judicial system of the State to which the case is being referred is evaluated to determine its ability to prosecute, that is, if the crimes in question are punishable in its system. An inquiry into how well it can protect witnesses and offer fair trials is also made. The cases against *Munceslas Munyeshaka*[197] and *Laurent Bucyibanita*[198] were successfully referred to France as the French legal and judicial system fit the profile. The prosecutor's request to refer the *Bagaragaza's case*[199] to the Republic of Norway was one of those that were not granted. In this matter, the accused was charged with genocide and in the alternative, conspiracy to

[194] G Watson "The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic" (1996) 36 *Virginia Journal of International Law* 689 at 692.

[195] Tadic argued that he could either be tried in Germany or Bosnia. He further argued that when the case was referred to the tribunal he was already on trial, this was dismissed and the tribunal held that the proceedings against him were at an investigation stage and were not a trial. See G Watson 1996 *Virginia Journal of International Law* 693.

[196] See M El Zeidy 2008 *International and Comparative Law Quarterly* 410.

[197] *Prosecutor v Munyeshaka*, Case No. ICTR-2005-97-I, Decision on the Prosecutor's request for the Referral of Munceslas Munyeshaka's indictment to France (Nov. 20, 2007).

[198] *Prosecutor v Bucyibanita*, Case No. ICTR-2005-85-I, Decision on the Prosecutor's request for the Referral of Munceslas Munyeshaka's indictment to France (Nov. 20, 2007).

[199] Prosecutor v Bagaragaza, Case No. ICTR-2005-86-R11*bis*, Decision on the Prosecutor's Motion to Refer to the Kingdom of Norway (May 19, 2006).

commit genocide. Norway's body of criminal law did not adequately address the crimes in question; alternatively, the accused would be charged under the homicide act. Accordingly, the request was dismissed because Norway was 'unable' to treat genocide as a serious international crime.[200]

Similarly, under the Rome Statute complementarity regime, for a State to be able to investigate the crimes listed therein, its legal system must explicitly deal with the crime in question, that is, it must incorporate the ICC's body of law so that it meets the required standards for prosecution of the core crimes. Should the ICC find the State's legal system not in conformity with the requirements of the Rome Statute, the ICC will wrest the case in question from the jurisdiction of the State and prosecute, thereby, playing a complementary role. For instance, in his report to the Security Council about the situation in Darfur, the ICC Prosecutor stated that he had studied the Sudanese laws and procedure relating to the Sudanese justice system of administration of criminal justice and traditional dispute resolution systems. From his reading of these laws, he believed that they were not adequate to address the crimes arising out of the situation, and that no criminal proceedings had yet been initiated against the people his office sought to pursue.[201] This means that Sudan met the complementary criterion laid down by the Rome Statute and as such, the ICC would have jurisdiction to prosecute.

2.4.4 The Genocide Convention

The principle of complementarity was also further developed during the drafting of the Genocide Convention. On December 11, 1946, the United nations General Assembly passed Resolution 96(1) through which it transmitted a request to the Economic and Social Council (ECOSOC) to prepare for the drafting of a genocide convention.[202] The Council established an *Ad hoc* committee to prepare a draft convention and merge it with the one already prepared by the United Nations Secretariat.[203] During the negotiations for the Genocide Convention, a number of proposals were tabled, in the draft prepared by the *Ad hoc* Committee, article VII dealt with issues of jurisdiction. It provided:

> "The trial of persons accused of punishable acts shall be by a competent tribunal of the state in the territory of which the act was committed. Alternatively, punishable acts may be tried by such

[200] See G Norris 2010*Minesota Journal of International Law* 211.

[201] See *First Report of the Prosecutor of the international Criminal Court , Mr Luis Moreno Ocampo, To the Security Council Pursuant to UNSCR 1593 (2005*), 29 June 2005 3-4, see W Burke-White "Implementing a Policy of Positive Complementarity in the Rome System of Justice" (2008) 19 *Criminal Law Forum* 59.

[202] G.A. Res 47(IV) 4th session *Historical Survey* UN Doc A/CN.4/7Rev 1 30.

[203] G.A. Res 47(IV) 4th session *Historical Survey* UN Doc A/CN.4/7Rev 1 30.

> international penal tribunal as may have jurisdiction with respect to those Contracting States which shall have accepted its jurisdiction."[204]

This provision envisages a complementary scheme between national courts and an international tribunal with jurisdiction to prosecute and punish acts of genocide. It recognises the right of a territorial State to exercise its criminal jurisdiction, be it competent, with the international tribunal only intervening where it has jurisdiction or where the State with jurisdiction has accepted jurisdiction of the tribunal. However, some States argued that the establishment of an international court was premature as acts of genocide could be repressed internally, within the States' domestic legal systems. Advocates of national repression of genocide sought to preserve the sovereignty of States, arguing that relinquishing State sovereignty to such a judicial body might "wound national pride" of the State concerned.

Other delegates envisioned a complementary arrangement but proposed that the proposed criminal court should have jurisdiction to prosecute leaders of criminal acts. That is, the instrumentalities of the State where there is evidence that the territorial State had a hand in the commission of acts complained of, or it did nothing to stop them. National courts would therefore have jurisdiction over the less serious cases. Other States, for instance, France, proposed an international court with compulsory jurisdiction over the crime of genocide. Another proposal by the United States favoured a tribunal with limited and supplementary powers. The tribunal would exercise its jurisdiction only when a State with territorial State failed to prosecute. This proposal sought to preserve State sovereignty while at the same time ensured that acts of genocide went unpunished; the *ad hoc* Committee adopted this proposal. On December 9, 1948, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the Genocide Convention), through Resolution 260(III).[205]

The drafting history of this Convention highlights the importance of complementarity as the most viable procedural guideline for prosecution of international crimes. It also shows that it was a form of a compromise on the part of the States since they had to cede part of their sovereignty rights to a supranational tribunal. It also goes to show the commitment of States to repress international crimes and fight impunity. However, the proposed complementarity

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[204] Article VII of the Convention on the Prevention and Punishment of the Crime of Genocide Dec. 9, 1948, 102 Stat.3045, 78 UNITS 227.

[205] G.A.Res., 260 (III) 3rd session, 179th plenary meeting, 9 December 1948, 174-177. The Convention on the Prevention and Punishment of the Crime of Genocide Dec. 9, 1948, 102 Stat.3045, 78 UNITS 227 was adopted on 9 December 1948 and came into force on 12 January 1951.

provision did not make it to the final draft of the convention, as States feared that this would undermine the jurisdiction of the proposed court.[206]

2.5 The Rome Statute Complementarity Model

The Rome Statute complementarity as noted above is embodied in article 17 of the Rome Statute. Article 17 has incorporated this model into the admissibility criteria. This particular model, as will be argued later, is a refined version of the earlier models. A historical overview of complementarity in general has shown that it keeps evolving and these developments reflect a tentative consensus between all the models. Each subsequent model has been influenced in one way or another by the models that preceded it. The phases that this principle has gone through since its inception in international criminal law show a pattern of allocation of duties between international judicial bodies and national courts. The Rome Statute model prioritises national prosecution, unless it proves inadequate based on the criterion laid down in article 17.

2.5.1 Preparatory Works for the Rome Statute Model

Pursuant to the General Assembly Resolution 117(II) of 21 November 1947, the International Law Commission prepared a Draft Code of Offences Against Peace and Security of Mankind. The Commission was also asked to consider the desirability of creating an international criminal court. The Commission prepared a draft Convention for this purpose in 1994. During the meetings that were held to discuss and develop the draft statute, most of the delegates advocated for a complementary relationship between the proposed court and national judiciaries, because they were not ready to completely relinquish their sovereignty rights. An *Ad hoc* Committee on the Establishment of an International Criminal Court was appointed to develop the draft prepared by the International Law Commission in accordance with General Assembly Resolution 49/53 of December 9, 1994.

It was apparent in the proposals tabled by States that, although they appreciated the urgency of establishing the court, their biggest concern was loss of sovereignty. Most delegates favoured a criminal court that would promote national jurisdiction rather than replace it, and only invoke its jurisdictional powers if the state concerned lacks the necessary willingness or

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[206] See *Official Records of the Second Session of the General Assembly, Sixth Committee, 42nd meeting; UN DOC.A/C.6/SR.98, 379.*

ability to investigate and prosecute crimes listed under the draft convention.[207] This complementary scheme was favoured for a number of reasons: that national courts are for many reasons the *forum conveniens* because it was easier for them to access evidence, witnesses and machinery to ensure speedy trials;[208] also to avoid a backlog of cases at the international court.

However, to ensure the practicality of the court and quell fears of those States that argued that the court would be useless if States are given primary jurisdiction, the delegates adopted a compromise approach: endowing the court with limited (complementary) jurisdictional reach while preserving State's jurisdictional powers to be the first to prosecute. This way, States could still have their sovereignty while the international court played its role of being the guardian of international criminal justice, whenever a State shows inability or unwillingness to prosecute international crimes.[209]A conference was called by the General Assembly in Rome, Italy, to finalise the adoption of the Convection.[210] The Preparatory Committee revised the International Law Commission draft convention in line with hundreds of proposals and amendments suggested by States. Of the issues brought to the fore was the role of the United Nations Security Council, the guardian of international peace and security. Since it is a political body, most States argued that the fact that the Council has powers to defer to the jurisdiction of the Court, any situation it considers a threat to international peace and security, even when the International Criminal Court has no jurisdiction over a case, will undermine the independence of the Court.[211] Additionally, the fact that the complementarity safety valve does not apply in the case of Security Council referrals worried most delegates since complementarity was meant to limit the jurisdiction of the International Criminal Court.

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[207] RS Lee (ed.) *The International Criminal Court – The Making of the Rome Statute, Issues Negotiation .Results* (1999) 3.

[208] See El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 62.

[209] See *Report of the Ad hoc Committee on the Establishment of an International Criminal Court UN GAOR, 50th Sess.,* Supp. No.22, UN DOC. A/50/22 (1995) para 31.

[210] The United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court of 15 June to 17 July 1998.

[211] Under the Unite Nations Charter, Chapter VII thereof, the United Nations Security Council has the power to maintain peace and security and in terms of the Rome statute, the Council may transmit a case to the Prosecutor of the International Criminal Court, for prosecution. In this case the rules of complementarity do not apply and even non-member states' situations may be prosecuted whether the state in question has accepted the jurisdiction of the International Criminal Court or not. See article 16 of the Rome Statute in this regard.

It was also apparent in the proposals and amendments that States were reluctant to create a court that would impinge on their sovereignty and this meant the convention was at a risk of not receiving the requisite number of ratifications for it to be operational. The only safe option was to reach a compromise between the preservation of State sovereignty and an effective and independent criminal justice system through complementarity jurisdiction. At the end of the conference, the issue of the jurisdiction of the court was resolved. National courts were given priority to prosecute international crimes committed on their soil, and the International Criminal Court was to be the court of last resort. This would only apply where the State concerned shows "unwillingness" and "inability" to genuinely prosecute. At the end of the conference, the Rome Statute of the International Criminal Court (hereinafter the Rome Statute) was adopted despite the divisions between states.[212] The Rome Statute entered into force on July 1, 2002 upon the sixtieth ratification[213], thereby creating the International Criminal Court with complementary jurisdiction to prosecute and punish the most serious crimes of international concern: war crimes, crimes against humanity, aggression and genocide.

2.5.2 Analysis of the Rome Statute Model

The complementarity model in the Rome Statute is the result of a compromise approach adopted at the Rome conference. This compromise sought to limit jurisdictional reach of the international court and to preserve sovereignty of States. This was motivated by the concern that the court may supersede States and exercise its jurisdiction should they fail to honour their duty to investigate and prosecute international crimes. Article 35 of the 1994 International Law Commission Draft Convention for the International Criminal Court provided a blueprint for the Rome Statute complementarity model. Due to States' reluctance to give up their sovereignty to an international tribunal, the draft convention provided that the international court would prosecute where it is inconclusive whether the crime was duly investigated at the national level.[214] However, to safeguard State sovereignty, the draft predicated the Court's jurisdiction on the formal consent of the territorial or custodial state.[215] However, at the Rome Conference the consent prerequisite was hailed for undermining the

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[212] M Newton "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court (2001) 167 *Military Law Review* 20 at 22.

[213] The delegates adopted the statute for a vote of 120, with 7 votes against it and 21 abstentions. See Newton 2001*Military Law Review* 23.

[214] M Smith "The Principle of Complementarity in the Origins of Federal Civil Rights Enforcement, 1866-1871" (2011) 1 at 25. Available at http://bepress.com/matthew_smith/1 (accessed 27 August 2012).

[215] See M Smith "The Principle of Complementarity in the Origins of Federal Civil Rights Enforcement, 1866-1871" (2011) 1 at 27.

very existence of the court, as this left room for the possibility of the offender escaping punishment in 'politically sympathetic' States.[216]

The Rome Statute did away with the requirement of State consent, by ratifying the Rome Statute, the Member State was considered to have consented to the court's jurisdiction for any future cases where the State fails to investigate or prosecute crimes of concern to the international community, instead of the State having to give consent for every single case.[217] To safeguard States' sovereignty rights, the Rome Statute adopted a unique system of distribution of tasks between State parties to the statute and the Court, which embodies a carrot-and-stick mechanism.[218] The Rome Statute gives States primary jurisdiction over the crimes enumerated by article 5, thereby limiting the jurisdiction of the Court to cases where States fail to punish those responsible.[219]

The model of complementarity reflected in article 227 and 228 of the treaty of Versailles and common articles of the other peace treaties[220] differs from that set out by the Rome Statute. The Rome Statute model attempts to balance sovereignty of States and the jurisdiction of the court, by limiting the Court's jurisdiction to only those crimes listed under article 5, and to cases where the State fails to prosecute. The peace treaties on the other hand merely provided that the Allied Powers would review German and Turkey trials should they find them unsatisfactory, they would assume jurisdiction ad prosecute. Germany amended its laws in order to be in a good position to prosecute its nationals; this was Germany's manoeuvre to protect its sovereignty. However, under the Rome Statute, States are required to implement the Statute's body of law into their legal systems so that they are in a good position to try the crimes enumerated by article 5. Under the Rome Statute, the Court oversees that domestic

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[216] See Smith "The Principle of Complementarity in the Origins of Federal Civil Rights Enforcement, 1866-1871" (2011) 1 at 18.

[217] See M Melandri "The Relationship Between State Sovereignty and the Enforcement of International Criminal Law under the Rome Statute (1998): A Complex Interplay" (2009) 9(3) *Criminal Law Review* 531 at 536. He notes that the act of ratifying the Rome Statute is considered a sovereign act by a state, since it affirms its commitment to international criminal justice and gives a supranational judicial body powers to supplement any deficiencies in its judicial system.

[218] Kulundu *South Africa and the International Criminal Court: Investigation the Link Between Complementarity and Implementation* (LLM Thesis, Rhodes University, 2005) available at eprints.ru.ac.za/view/creators/kulundu=3Akenneth_wanyama=3A=3A.html (Accessed 13 September 2012).

[219] For the Court to seize jurisdiction over the core crimes, the state concerned must have shown an unwillingness and/or inability to 'genuinely' prosecute. See generally article 17 of the Rome Statute.

[220] See Article 173 of St Germaine; article 154 of Trianon' article 118 of Nueilly and article226 of Sevres.

courts administer international criminal justice, by intervening, should the State fail to adjudicate these crimes genuinely.

The Rome Statute complementarity model also differs from the optional complementarity model proposed by the International Law Association, the association proposed a court with universal jurisdiction over any individual; however, the State concerned had to have consented to an international trial. However, the proposal sought to give willing States an opportunity to hold trials nationally before the court could intervene. The Rome Statute model does not require State consent for the Court to be able to assert its jurisdiction, if a nation State fails to prosecute, the Court, upon finding the State unwilling or unable to genuinely prosecute, will assume adjudicative duties. On the other hand, the Association of Penal Law complementarity model sought to solve the conflict of jurisdiction cases, the international tribunal would supplement lack of jurisdiction in that it had universal jurisdiction, for instance, where no state has jurisdiction or a few States have jurisdiction.[221]

The Rome Statute model has solved the jurisdiction issue, it gives the Court temporal jurisdiction and the States have primary jurisdiction, with the Court being the court of last resort, where a State that has jurisdiction fails to prosecute. In terms of the 1937 complementarity model, the proposed international court would be seized with jurisdiction where the custodial or territorial State was unwilling to prosecute and refused to extradite the suspect. The State had the option of referring the case to the Court. Moreover, the Rome Statute model differs from the complementarity model of the *ad hoc* tribunal's in that the tribunals adopted a strict primacy approach while the Rome Statute adopts a reverse approach, which vests prosecutorial prerogatives in the State, unless they show an unwillingness to prosecute, in which case the Court would exercise its complementary jurisdiction.

The emergence of complementarity in the modern international law has a different meaning: the Rome Statute requires States' legislative efforts to incorporate the ICC body of law into their systems so that they are "able" to prosecute those responsible for serious international crimes.[222] This differs from the preceding models that compromised international justice for

[221] J Stigen *The Relationship Between The International Criminal Court And National Jurisdictions: The Principle Of Complementarity* (2008) 38.

[222] L Yang "On the Principle of Complementarity in the Rome Statute of the International Criminal Court" (2005) 4 *Chinese Journal of International Law* 121 at 123.

sovereignty of States. The Rome Statute sought to find a compromise between sovereignty and a credible international criminal justice system through a number of ways. It did this by doing away with the consent requirement; limiting the Court's jurisdictional reach by giving States primary jurisdiction; and by giving the Court the power to trump on State sovereignty whenever States failed to honour their duties. The Statute gives the ICC the inherent authority to oversee enforcement of International criminal law and at the same time limits, its powers to those cases where the State has failed to act according to the ICC's concept of acceptable conduct.

The Rome Statute also requires that before the Court can exercise its jurisdiction the case in question must be of sufficient gravity[223] making sure the Court does not supplant jurisdiction of States but acts in those cases where the State may be politically sympathetic to the offender.[224] The developments in the transformation of the complementarity principle reflect a paradigm shift in the formulation of the principle since its inception in the peace treaties up to the Rome Statute. The differing models of the principle each influenced by the political, historical, philosophical, practical and legal circumstances of its time have evidenced this. As opposed to the preceding models, which tilted the balance towards state sovereignty, the Rome Statute model relies on domestic courts to administer the ends of international criminal justice, with the ICC stepping in to supplement lack of justice.

Classical notions of sovereignty no longer have a place in international relations and international justice is greatly sought after by nations. In the words of the renowned author Michael Newton, complementarity reflects the "reality that justice must be rooted in the perceptions and perspectives of the domestic population that hosts the victims of the crimes to represent an authentic and inherent virtue."[225] The Rome Statute's principle of complementarity was successfully demonstrated in the case of R *v. Sec 'y of State for Def*[226]. This is a case where the prosecutor deferred to a national judiciary that was willing and able to prosecute genuinely.[227] The ICC Prosecutor had received communications of alleged

223 See article 17 of the Rome Statute.
224 These maybe cases where the offender is a high ranking official.
225 M Newton "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?" (2010) 8 *Santa Clara Journal of International Law* 141.
226 See generally *R v. Sec'y of State for Def.,* (2007) 3 W.L.R. 33 (H.L.).
227 The prosecutor did not assert jurisdiction over the cases upon finding the British judiciary system to be in line with the Rome Statute complementarity criteria. See Newton 2010 *Santa Clara Journal Of International Law* 138-139.

unlawfully killing and torture or Iraqi civilians by British Soldiers during their occupation in Iraq. When the British authorities assumed jurisdiction over the soldiers and continued to try them, the ICC did not intervene because the British government acted in accordance with the Rome Statute standards and further action by the Court was unwarranted.[228]

2.6 Positive Complementarity: Refining the Rome Statute Traditional Complementarity Model?

The principle of complementarity defines the contours of the ICC-State relationship. Since the ICC began its operations, the traditional Rome Statute complementarity model has been refined by practice into what is termed 'positive complementarity' by legal scholars.[229] This, it has been argued, was reflected from the Prosecutor's statement that the number of cases it handles need not measure the efficacy of the fledging court but by the absence of such cases, which would be indicative of functional domestic judiciaries.[230] This is different from the model envisioned by the Rome Statute, the traditional Rome Statute complementarity model that envisioned the ICC as an inherent authority that will enforce international criminal law, by supplementing national courts should they fail to prosecute the most serious crimes of international concern. Michael Newton opines that the practice of the Court may signal a paradigm shift from the traditional complementarity principle of the Statute that highlighted the ICC as the fallback forum that respects the primacy of domestic courts to prosecute and punish the crimes within the jurisdiction of the Rome Statute. This reflected 'a healthy synergy' between the domestic courts and international processes, to one built on 'a presumption of competition.[231] He further argues that if the textual premises of complementarity "become the vehicle for superimposing the prosecutorial preferences of the Court over the good faith reasoning of domestic officials applying the law of the sovereign, the intellectual foundations of the court will have been eviscerated and its long term viability severely undermined."[232]

[228] See Newton 2010 *Santa Clara Journal of International Law* 140.

[229] W Burke-White "Implementing a Policy of Positive Complementarity in the Rome System of Justice" (2008) 19 *Criminal Law Forum* 59. See also M Newton "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court" (2001) 167 *Military Law Review* 20.

[230] Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court (16 June 2003) available at http://www.acc-cpi.int/otp/otp_ceremony.html (accessed 13 September 2012).

[231] See Newton 2010 *Santa Clara Journal of International Law* 138-139.

[232] Newton 2010 *Santa Clara Journal of International Law* 138-139

This concern has been raised in some quarters with regard to the cases that the ICC is currently investigating. The concern has been that instead of the Court leaving prosecution of the core crimes to the jurisdiction of national courts; and only asserting its jurisdiction to complement national courts, it is at the front lines and wrests every case it can lay its hands on from the jurisdiction of domestic courts. This criticism has been levelled against the court in particular, concerning the case of *The Prosecutor v. Thomas Lubanga Dyilo*.[233] When the ICC issued an arrest warrant against Lubanga, he was already awaiting trial in the Democratic Republic of Congo (DRC) for war crimes and crimes against humanity. However, when the situation in the Ituri region of the DRC was referred to the ICC, the accused was only charged of minor crimes, enlisting and conscripting children soldiers and sentenced to 14 years' imprisonment. Some scholars argue that the tension that has taken hold in practice between African States and the Court is owing to the court's arbitrary application of the principle of complementarity.[234]

When the then prosecutor, Mr Luis Moreno-Ocampo, first assumed his duties in 2003, he reaffirmed his commitment to a complementarity regime that encouraged national prosecutions, with the Court only focussing on high profile cases, that is, cases involving people who bear the greatest responsibility for the core crimes.[235] He also promised to embark on a 'positive' approach to cooperation and the principle of complementarity by encouraging genuine domestic proceedings, liaison with international and national networks and adopting a system that reinforces State cooperation with the Court.[236] The prosecutor's commitment to a system that uphold the ideals that underpin complementarity in theory would make sure that the Court and national courts existed in a constructive and beneficial manner. However, complementarity in practice has not yielded the results envisioned by the drafter's of the Rome Statute. The philosophical, political, historical and practical factors that influenced the current model of complementarity seem to have been abandoned in the quest for accountability.

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[233] *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06-2941.

[234] See Newton 2010 *Santa Clara Journal of International Law* 138-139. See also L Keller "The Practice of the International Criminal Court: Comments on 'The Complementarity Conundrum" (2010) 8 *Santa Clara Journal of International Law* 199 at 214. They argue that the Court's recent importation of the third criterion to the two-tiered test in article 17 only makes it hard for States to appear willing or able to prosecute nationally.

[235] See Paper on Some Policy Issues Before the Office of the Prosecutor (September 2003), available at http://www.icc-cpi.int/otp/otp_policy.html (last accessed 27 November 2012).

[236] Address by the Prosecutor to the Third Session of the Assembly of States Parties (6 Sept. 2004), available at http://www.icc-cpi.int/library/asp/LMO_20040906_En.pdf (last accessed 27 November 2012).

As a fledging court, the ICC seems to have abandoned the traditional complementarity model that vested prosecutorial prerogatives in States, with the Court only intervening where States fail to honour their treaty obligations. This has in part, contributed to the tension that has taken hold within the ICC complementarity regime, particularly in the case of Africa. Michael Newton argues that this tension has been fermenting since the adopting of the Rome Statute, because some of the issues were glossed over during the negotiations in Rome.[237] He opines that this tension inherent in the Statute has manifested itself through "the politicized exploitation of a purported textual constraint designed to prioritize domestic jurisdiction" and the natural evolution of a treaty provision which is undertaken with due deference to the competing interests of sovereign States and the normative interests that gave rise to the very concept of complementarity".[238]

The tension inherent in the complementarity provision is finally playing out and practice indicates that it will cause a 'confidence crisis'[239] that would undermine the Court's future viability. Cooperation is central to the complementarity regime and without State's political support, the effective operation of the ICC is at stake. If complementarity is used to usurp prosecutorial powers of good willing States, by wresting every case from their jurisdiction, even when States make every effort to be in line with the Rome Statute's constitution of acceptable legal and judicial status, the principle of complementarity will lose significance and the long-term effectiveness of the ICC will be undermined.[240]

2.7 Conclusion

This chapter put the principle of complementarity in a theoretical perspective, traced its evolution in international criminal law and explored its development. This analysis discovered that the principle is premised on international principles with the same philosophical denominators, for instance, the subsidiarity of international law, the duty of States to prosecute international crimes nationally. Four major models of complementarity

[237] See Newton 2001 *Military Law Review* 23 (noting that "its hasty adoption in the last hours of the Rome Conference was warranted despite the fact that the complex substantive interface of treaty provisions was never wholly debated or analyzed in depth until after the adoption of the Rome Statute").

[238] See Newton 2010 *Santa Clara Journal of International Law* 142.

[239] M Newton 2010 *Santa Clara Journal of International Law* 122-123.

[240] Complementarity among others, is a guarantee that state's sovereignty will not be superseded arbitrarily, if Member States feel the principle no longer protects their interests, this may undermine the institutional foundations of the court and the quest for accountability. See Newton 2010 *Santa Clara Journal of International Law* 142.

were also identified, the first being *optional complementarity*. This model was based on States' consent to jurisdiction of the Court and voluntary surrender of the State's criminal jurisdiction.[241] The second model, *discretionary complementarity* was only exercised on the discretion of the International Military Tribunal judges. This facet of complementarity was based on the division of tasks between the national courts and the International Military Tribunal. Amendment of Rule 11*bis* also reversed the strict primacy approach of the *ad hoc* tribunals and introduced a kind of *'occasional' complementarity*.[242] Another model of complementarity principle, conditional upon consent by the State, was formulated in the 1994 International Law Commission's Draft Convention for the Creation of an International Criminal Court[243] A comparison of these models reveals overlapping features and shows a tentative consensus between the models. The upcoming chapter will critically analyse the articles that embody the principle of complementarity and examine the extent to which textual deficiencies in article 17 and other shortcomings of the complementarity regime have contributed to the tension that has taken hold between States and the ICC in Africa.

[241] El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 5.

[242] The amendment gave the prosecutor had powers to refer low and medium cases to national courts, for purposes of investigation or prosecution.

[243] See article 35 of the ICL Draft Convention for the International Criminal Court in section 3.1.1 for the admissibility criterion. See also footnotes 218, 221 and 224 on the complementarity reflected in the 1994 ILC Draft.

Chapter Three

THE ROME STATUTE'S COMPLEMENTARITY REGIME

3.0 Introduction

The previous chapter traced the evolution of the principle of complementarity and discussed the theoretical framework within which it evolved. The current chapter will discuss the admissibility criterion under article 17 of the Rome Statute and identify the flaws therein while referring to precedents from other international criminal tribunals. The aim is to put into perspective the deeply rooted source of the tension between the ICC and African States concerning the interpretation and application of the principle of complementarity in practice. A deeper analysis of the interplay between the ICC and national judiciaries, both theoretical and practical, remains necessary in the circumstances. To this end, the ICC's jurisprudence is repeatedly drawn on throughout the chapter to provide examples and precedents.

The chapter will also reflect and comment on the salient issues pertaining to the Court's decisions in admissibility challenges and their implications. The chapter will also discuss the widely held perceptions about the manner in which the Court has executed its mandate in Africa. Furthermore, the chapter will consider the role of regional bodies such as the African Union and investigate whether they also have a complementary role. The African Union Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights will be examined in this regard. This provides a basis for analysing the implications of the involvement of these bodies within the ICC regime. This discussion should enable the author to explain the tension that has been inherent in the complementarity regime.

3.1 The Principle of Complementarity: Rules of Admissibility

Article 17 of the Rome Statute sets out instances where the ICC may not entertain cases when they are being dealt with properly by municipal courts. This criterion requires that national judicial systems be competent to deal with the crimes listed in the Statute according to international standards. The aim is to ensure accountability and change the culture of impunity that has for decades, plagued the international criminal justice system. The criterion

has an in-build "carrot and stick" mechanism that encourages States to prosecute international crimes within their judicial systems, or else the ICC will be seized of the matter.[244]

3.1.1 The Drafting History of Article 17

The issue of jurisdictional reach of international tribunals has been a subject of intensive negotiations since the idea of an international criminal tribunal was born.[245] However, some of these issues were glossed over during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome (hereinafter "the Conference of Plenipotentiaries").[246] Jurisdictional reach and powers of the ICC were similarly some of the most contested substantive issues during the Conference of Plenipotentiaries.[247] The Preparatory Committee used the International Law Association Draft Statute for the International Criminal Court (hereinafter the ILC Draft)[248] as a basis for the Rome Conference, after incorporating numerous proposals and suggestions from States.[249]

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[244] See K Kulundu *South Africa and the International Criminal Court: Investigating the Link between Complementarity and Implementation* (LLM Thesis, RU, 2005) IV.

[245] Proposals for the creation of an international criminal tribunal date as far back as after World War I, however, the issue of jurisdiction of the proposed tribunal sparked so much controversy that it took decades to finally reach a compromise through the complementarity principle in the Rome Statute.

[246] The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome (hereinafter "the Conference of Plenipotentiaries") Rome, Italy- June 15 to July 17, 1998 was called pursuant to the United Nations General Assembly Resolutions adopted in 1996 and 1997, UN Doc. A/RES/51/203; UN Doc. A/RES/52/160. There were divergent views regarding the jurisdiction of the ICC, some States, such as Germany suggested that the Court be endowed with universal jurisdiction. On the other hand, some delegates' proposals sought to limit the jurisdiction of the ICC: they suggested that States be allowed to opt out of the Court's jurisdiction. However, to avoid a total collapse of the conference, the Bureau adopted a compromise approach by narrowing down the preconditions for the exercise of the Court's jurisdiction and by disallowing any more amendments to the final complementarity provision as it represented a "delicate" balance. The Statute was therefore presented on a "take-it-or-leave- it" basis, thereby glossing over some of the unresolved issues. See P Kirsch & J Holmes "The Birth of the International Criminal Court: The 1998 Rome Conference" in O Bekou and R Cryer *The International Criminal Court* (2004) 35 (pointing out that the chairman of the conference presented the final package with a caveat that last minute changes would upset the fine balance).

[247] The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, Italy, June 15 to July 17, 1998. See P Kirsch and J Holmes, "The Birth of the International Criminal Court: The 1998 Conference" (1998) 3*Canadian Yearbook of International Law* 7-8 and 25. They note that the provisions that embody the principle of complementary and issues of admissibility are some of the most controversial and largely contested and carefully crafted parts of the Rome Statute. See also SK Lee *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999) 22.

[248] See Report of the International Law Commission on the Work of its Forty-Fifth Session *Official Records of the General Assembly, U.N. GAOR 49th Sess., Supp.* No. 10, U.N Doc. A/49/10 (1993) 105; reprinted in 2 *Yearbook of International Law Commission Part 2* UN DOC A/CN./4/SER.A/1994 Add. 1 (1994) 2.

[249] For the consolidated version of the ILC Draft see Report of the Preparatory Committee on Establishment of the International Criminal Court Vol 1 (Proceedings of the Preparatory Committee March – April and August 1996) *United Nations Official Records, Fifty-First Session, Supplements No. 22 and 22A a/51/22 (1996).*

The proposals ranged from those that sought to give the Court universal jurisdiction to those that sought to limit the Court's jurisdiction. For instance, the German delegate suggested that the proposed Court be endowed with absolute powers to try the core crimes for which all States already had universal jurisdiction under customary international law.[250] However, most of the proposals sought to limit jurisdictional reach of the court. French and American delegates strongly suggested that the Court should only have jurisdiction in specific cases where the State with jurisdiction had given its consent, and also that States be allowed to opt out of the jurisdiction of the Court for specific crimes.[251] The United States advocated for mandatory consent of the State of the accused's nationality before the court could exercise its complementary jurisdiction.[252] These suggestions were criticized because they would undermine the purpose and existence of the Court, instead a case-to-case consent requirement was proposed and this was incorporated into Article 35 of the ILC Draft.[253] The spirit of Article 35 of the ILC Draft was that the proposed international criminal court would have

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[250] The German delegate, arguing that the act of ratifying the Rome Statute should have the legal effect of giving the ICC power to exercise universal jurisdiction over core crimes, stated that "[U]nder current international law, *all States may exercise universal criminal jurisdiction* concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every state can exercise its own national criminal jurisdiction, regardless of whether the custodial state, the territorial state or any other state has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice [T]here is no reason why the ICC - established on the basis of a Treaty concluded by the largest possible number of States - should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting Parties themselves. By ratifying the Statute of the ICC, the States Parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes." See Discussion Paper Submitted to the Preparatory Committee by Germany, A/AC. 249/1998/DP. 2, 23 March 1998.

[251] The US delegate objected to Germany's universal jurisdiction proposal, arguing that while the idea of universal jurisdiction theoretically sounded like a good step towards international justice, "… it is not a principle accepted in the practice of most governments of the world and, if adopted in this statute, would erode fundamental principles of treaty law that every government in this room support(s)." Instead, he advocated for formal consent of the territorial or nationality State as a precondition to the ICC's jurisdiction. See Statement of the United States on 9 July 1998 in the Committee of the Whole regarding *Discussion Paper, Bureau, Part 2 (Jurisdiction, Admissibility, and Applicable Law)* Committee of the Whole, United Nations Diplomatic Conference of Plenipotentiaries, Rome Italy, 15 June – 17 July 1998, A/CONF.183/C1/L.53 6 July 1998.

[252] See P Kirsch and J Holmes "The Birth of the ICC: The 1998 Rome Conference" (1998) 36 *Canadian Yearbook of International Law* 10.

[253] Article 35 of the ILC Draft was used as a blueprint for Article 17 of the Rome Statute. See Report of the International Law Commission on the Work of its Forty-Fifth Session *Official Records of the General Assembly, U.N. GAOR 49th Sess., Supp No.* 10, U.N Doc. A/49/10 (1993) 105. Article 35 provides:

> "[t]he Court may, on application **by** the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this statute set out in the Preamble, that a case before it is inadmissible on the ground that the crime in question;
>
> b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or
>
> c) is not of such gravity to justify further action **by** the Court."

jurisdiction to prosecute specific cases only where the proceedings by a State that had jurisdiction were either "unavailable" or "ineffective". The language of the provision was heavily criticized for vagueness and subjectivity.[254] It was suggested that a more objective approach be adopted.[255] Other provisions in the draft that dealt with issues of admissibility, for instance, article 42 (the *ne bis in idem* provision), were also to be merged with article 35 so that it represented a blanket provision for the complementarity doctrine.[256] The preamble was accordingly amended[257] and the words "unable" and "unwilling" replaced "unavailable" and "ineffective".[258]

Article 35 was also amended to accommodate a more objective test whose main premise was that the ICC's jurisdiction was intended for three situations. These included, cases where the State with jurisdiction was unable or unwilling to prosecute genuinely; or where the State had investigated the matter but had decided not to prosecute and that decision was influenced by an unwillingness or inability to prosecute genuinely.[259] This language mimics the London International Assembly's proposal for an international criminal court of 1941, established by

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[254] See Report of the Preparatory Committee on Establishment of the International Criminal Court, UN GAOR, 51st Sess., Vol. 1 Supp. No 22 U.N. Doc A/51/22 (1996). See also M El Zeidy "The Principle of Complementarity: A New Machinery to Implement International Criminal Law" (2002) 23 *Michigan Journal of International Law* 869 at 897. He notes that some of the delegated felt that the language of the preamble was too vague and intrusive, as it was confusing as to what would render proceeding ineffective or unavailable. See also J Holmes "The Principle of Complementarity" in SK Lee (ed.) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999) 45.

[255] Most of the delegates were not comfortable with the wording of article 35 and found the use of words such as "unavailable" and "ineffective" confusing, instead the words "unable" and "unwilling" were inserted. See Decisions Taken By The Preparatory Committee At Its Session Held 4 to 15August 1997, U.N. GAOR 52nd mtg. U.N. DOC A/AC.249/1997/L.8/Rev. 1 (1997) 11-12.

[256] See Report of the Preparatory Committee on Establishment of the International Criminal Court, *UN GAOR, 51st Sess Vol. 1 Supp. No 22 U.N. Doc A/51/22* (1996) 164.

[257] Before the amendment, the preamble read, "Emphasizing 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*"[emphasis added]. See Report of the International Law Commission on the Work of its Forty-Fifth Session *Official Records of the General Assembly, U.N. GAOR 49th Sess., Supp No. 10, U.N Doc. A/49/10 (*1996) 3.

[258] In essence, the preamble read: "[E]mphasizing further that the international criminal court shall complement national criminal justice systems when they are *unable* or *unwilling* to fulfill their obligations to bring to trial such persons. See Report of the International Law Commission on the Work of its Forty-Fifth Session *Official Records of the General Assembly, U.N. GAOR 49th Sess., Supp No. 10, U.N Doc. A/49/10* (1996) 2, [emphasis added].

[259] See Decisions Taken By The Preparatory Committee At Its Session Held 4 to 15August 1997, U.N. GAOR 52nd mtg. U.N. DOC A/AC.249/1997/L.8/Rev. 1 (1997) 10-11. Article 35 (2) provides:

> "Having regard to paragraph 3 of the Preamble, 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 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 League of Nations during World War II.[260] Article 3 (1) of the London International Assembly Draft Convention for the Creation of an International Criminal Court states that "…no case shall be brought before the Court when a domestic court of any of the United Nations has jurisdiction to try the accused and it is *in a position* and *willing* to exercise such jurisdiction."[261] The underlying premise of both provisions is that the international criminal court may only have jurisdiction in cases where the State that has jurisdiction is either not in a position, that is, unable, or is not willing to prosecute the crimes punishable under the respective draft Statutes.

The consolidated version of article 35 of the ILC Draft further laid down the criteria for determining unwillingness and inability and the same text features in the Rome Statute's Article 17.[262] A careful analysis of the negotiating history of Article 17 shows that the major concern of States was arbitrary loss of their sovereignty. Most of them were reluctant to relinquish their sovereign rights lest they create a Court with the power to wrest arbitrarily cases from their jurisdiction. Eventually, a compromise that both limited the jurisdictional reach of the ICC and protected sovereignty of States was ultimately reached to quell States' fears. Thus, a complementarity regimen where national courts of the territorial and national States were to be courts of first instance was established, with the International Criminal Court only having jurisdiction where the former fails to prosecute, due to unwillingness on their part or inability to prosecute genuinely.[263]

From the foregoing, it is clear that States were resolved to establish an international court that would work hand-in-hand with national courts. There were however perennial concerns that such a court might supplant domestic jurisdiction as opposed to supplementing it, hence the delegates insistence upon limited jurisdiction. It is contended that the making of the ICC largely depended on the complementarity compromise adopted at the Conference of

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[260] See *London International Assembly – Commission II on the Trial of War Criminals* TS 26/873 282-3.

[261] See article 3(1) of the Draft Convention for the Creation of the International Criminal Court, *London International Assembly – Commission II on the Trial of War Criminals* TS 26/873 324-325. [Emphasis added.]

[262] See article 35 (3), *Ibid. A*rticle 35 features word for word in the final draft of the Rome Statute but as article 17. See Report of the Preparatory Committee on the Establishment of an International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. DOC. A/CONF. 183/2 Add.1(1998).

[263] See generally, article 17 of the Rome Statute

Plenipotentiaries.[264] This approach, on the face of it, also reflects a tiered allocation of duties where municipal courts have to prosecute the Rome Statute crimes at first instance, failing which the ICC will intervene. Only after determining the basis of decision not to prosecute and/or incompetence of national courts to prosecute genuinely, can the ICC entertain the case. The ICC therefore has a twofold mandate: to review and assess the expediency of national prosecutions and to adjudicate in case they fail to meet the criterion in article 17. It is submitted that the ICC's mandate to be both supervisory and autonomous recalls the need for the Court to manage its independence while maintaining its legitimacy as a supervisory judicial body in practice. On the other hand, if the ICC were to defer to national courts at every instance, this would undermine its integrity, inasmuch as usurping jurisdictional discretion and supplanting national jurisdiction will put the future of the Court at stake.

3.1.2 The Admissibility Provision: Article 17

Article 17 of the Rome Statute is framed in a negative language; it lays down instances in which the International Criminal Court may **not** exercise its complementary jurisdiction.[265] By so doing, the admissibility criteria implements the principle of complementarity as the ICC may only assert its jurisdiction where the criteria in article 17 have been met. It provides:

> "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 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.
>
> 2. 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 which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

[264] See Newton 2001 *Military Law Review* 47 stating that complementarity played an important role in the negotiating history of the Rome Statute because "debate centered not on its merits or appropriateness, but on perfecting the most agreeable textual approach that would gain state consensus."

[265] See article 17 of the Rome Statute. It sets out guidelines for admitting cases before the ICC; the Court may only exercise its complementary jurisdiction where the criterion has been met. It provides: "Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is **inadmissible** where…". [Emphasis added.]

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

3. In order to determine inability in a particular case, the Court shall consider 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."[266]

In terms of article 17, a case is inadmissible before the International Criminal Court when it has been or is being investigated or prosecuted by a State that has jurisdiction over the matter, for instance, the State whose national is the accused in the case concerned.[267] The ICC may also not have jurisdiction in cases where a State has investigated the matter and has decided not to try the accused.[268] However, the ICC may exercise its jurisdiction if the State's decision to prosecute or not to prosecute was due to an "unwillingness" or "inability" to prosecute genuinely.[269] Essentially, the jurisdiction of the ICC is limited by a presumption of inadmissibility apparent in the language codified in Article 17. The Court has to satisfy itself that a case is not admissible in domestic courts before it asserts its complementary jurisdiction. For purposes of this determination of admissibility, the complementarity regime has at its core, a two-tiered inquiry; whether a particular State is "in a position," that is, "able" or "unwilling" to genuinely prosecute perpetrators of the crimes proscribed by the Rome Statute. This means that even if there has been an investigation or prosecution by a national court, it will not foreclose the jurisdiction of the ICC should the Prosecutor find that the State was not sincerely resolved to serve justice and try the accused in terms of the Rome Statute.

3.2 Unwillingness to Prosecute Genuinely

The question of unwillingness is one prong of the dual core admissibility test laid down under article 17 of the Rome Statute. In cases where the State has initiated an investigation but has decided not to pursue the matter to trial, the ICC Prosecutor has to determine whether the decision not to prosecute was made in bad faith. That is, was the decision influenced by unwillingness on the part of the authorities to punish the accused. Although the Court's jurisprudence is limited on substantive issues of complementarity, most cases have discussed issues of unwillingness in respect of arrest warrants. For instance, in an application for an

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[266] See Article 17 of the Rome Statute.

[267] A State may also have jurisdiction over a case because the alleged crimes were committed within its territory, thus the territorial jurisdiction model.

[268] See article17 (1) of the Statute.

[269] These notions of "unwillingness' and "inability" on the part of the state to genuinely prosecute the crimes proscribed by the Statute will trigger the ICC's complementary jurisdiction even if a case has been investigated and/or prosecuted if the Prosecutor is convinced that the state concerned was not sincerely resolved to administer the ends of justice in good faith. See Article 17 (1) (b) of the Rome Statute.

arrest warrant by the ICC Prosecutor in *Prosecutor v Katanga,*[270] the defence argued that the case was inadmissible before the ICC in terms of article 17 (1) (a) of the Rome Statute. Katanga argued that conduct that was the subject of the arrest warrant was the same as that which the Congolese government had charged him for prior to the referral of the situation to the ICC. In this case, the ICC Prosecutor had applied for warrants of arrest against Germain Katanga, an alleged commander of the *Force de resistance patriotique en Ituri* (FPRI). The ICC prosecutor made similar applications in the cases of Thomas *Lubanga*[271] and *Ngudjolo Chiu*[272]. These applications were based on allegations of crimes against humanity (murder, sexual slavery and rape) and war crimes (conscripting child soldiers and attacking a civilian population destruction of property; pillaging; sexual slavery and rape) having been committed by these Congolese nationals in the Ituri region of the country.

The defence submitted that the crimes Katanga was under investigation for in DR Congo also covered the Borogo incident relied on in the ICC warrant. It was argued therefore that the Trial Chamber should determine whether there were proceedings in the DRC and whether these extended to his conduct in Borogo. Moreover, the defence argued that for purposes of this inquiry, the Court had to determine whether the same person was being investigated for the same conduct as that for which he was investigated in DR Congo.[273] It was proposed that the Court must do a 'comprehensive conduct' inquiry for this determination. The prosecution challenged this on the basis that investigations by the DRC did not cover the crimes cited in the warrant, allegedly committed by Katanga during an attack in the Borogo village.[274] The prosecution further argued that the interpretation of the 'same conduct' test adopted by the defence was inconsistent with the spirit of the

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[270] See *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, ICC-01/04-01/07-4, Pre-Trial Chamber I, 6 July 2007.

[271] See *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, ICC-01/04-01/06-8-US-Corr, 10/02/2006, para. 18, unsealed pursuant to Decision ICC-01/04-01/06-37 dated 17/03/2006.

[272] See *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, ICC-01/04-01/07-262, Pre-Trial Chamber I, 6 July 2007.

[273] See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213, Trial Chamber II, 16 June 2009.at paras 11-12.

[274] *Prosecutor v. Katanga and Ngudjolo*, Public Redacted Version of the 19thMarch 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga pursuant to Article 19(2)(a), ICC-01/04-01/07-1007 (30 March 2009) para 109-110.

admissibility test as it was subjective.[275] The Trial Chamber held that the case was admissible because the DR Congo government was unwilling to investigate or prosecute Katanga in respect of his conduct in Borogo. His argument that the investigations against him were all embracing and inclusive of the attack in Borogo was dismissed. It is interesting that the DRC confirmed their unwillingness to prosecute Katanga in this regard through a concession that the suspect was never investigated in relation to Borogo.[276] Based on this the Trial Chamber stated that:

> "When, as in the present case, the existence of national proceedings is the sole reason for a possible finding of inadmissibility, it is a *conditio sine qua non* for such a finding that national proceedings encompass both the person and the conduct which is the subject of the case before the Court"[277]

It should be noted that in this case the Trial Chamber did not venture into the ability prong of the admissibility test. However, it is quite intriguing that the issue of inactivity was never brought into question when the government's reason for referring the cases to the ICC was an inability to apprehend the suspects. Instead, this issue was mentioned in the Appeal Chamber's decision, which seems to suggest that once there is evidence of domestic inactivity, inability is no longer in question.[278] Article 17 requires the ICC to weigh the admissibility of the case not only on unwillingness or inability to prosecute but also on other factors despite the existence of domestic proceedings. Assuming that a State is 'unable' to prosecute merely because there have been no investigatory or prosecutorial efforts at the time the ICC asserted its jurisdiction is, to say the least, arbitrary decision making regarding the State's inability to prosecute.[279] It follows from the Court's approach however, that a State referral may be interpreted as a gesture of unwillingness to prosecute on the part of the State,

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[275] The prosecution argued that States sought to make the 'same conduct' test as objective as possible and that adopting the 'comprehensive conduct' proposed by the defence would upset the objectivity of the test and would lead to inconsistencies. In fact, the unwillingness criterion was reworked at the Rome Conference during the negotiations in order to do away with the subjectivity because states feared that a subjective test would lead to inconsistencies. See J Holmes "The Principle of Complementarity" in SK Lee (ed.) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999) 45 (noting that most delegates feared that the wording of this provision was too subjective and broad in its scope and therefore confusing).

[276] See *Prosecutor v. Katanga and Ngudjolo*, Transcript of Hearing of 1 June 2009, ICC-01/04-01/07-T-65-ENG ET, at 78, lines 11–19; at 79, lines 18–21; at 81, lines 4–7; at 85, line 1–86, line 3; at 93, lines 14–16; at 94, line 12.

[277] See Decision on the Evidence and Information provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga ICC-01/04-01/07-4 para 19.

[278] See Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497 25-09-2009 2/44 IO T OA8, 25 September 2009, para 2 ("Inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute").

[279] The Rome Statute envisages a situation of inability as where due to total or substantial collapse of the judicial system, the State cannot apprehend the accused, collect evidence or carry out the proceedings..

more so where the proceedings have begun but have not been concluded.[280] What is also interesting from the Trial Chamber's decision is that it has exported another criterion of unwillingness not envisaged by article 17(1) (a), a State Party referral. The Chamber stated that a State may be deemed unwilling to prosecute where it "chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done" and has accordingly referred the case to the ICC.[281]

It is submitted that it is insufficient to make these decisions based on one prong of the admissibility test, because the unwillingness of a State to prosecute does not mean it is also unable to prosecute. Before the Court seizes itself of a matter, it should be satisfied on all accounts that the case is admissible before it, particularly where the accused and not the State, challenges admissibility. In essence, the proper construction of the admissibility criteria and the Rome Statute as a whole requires that the ICC ensure that all factors laid down in article 17 have been considered before the Court intervenes. These, it will be argued later, is the spirit of the complementarity regime, that the ICC be the court of last resort and only intervene where States have failed to act accordingly.[282]

Furthermore, a national justice system may be said to be unwilling to prosecute genuinely where it initiates investigation and/or prosecution yet the proceedings are inconsistent with the intention to punish the perpetrator. For instance, where the State holds a mock trial or where the proceedings are ongoing but there has been a substantially long and unexplained

[280] See *Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07OA 8, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (Sept. 25, 2009), available at http'/www.icc-cpi.int/iccdocs/doc/doc746819.pdf (accessed 12 August 2013). The Trial Chamber held at paragraph 77 that there are two forms of 'unwillingness'. The first instance is due to the State's intention to obstruct justice. In this case, the chamber envisioned a case where a State initiates proceedings which are inconsistent with the intention to bring the perpetrator to justice, for instance, holding sham trials or unjustified long delays in bringing the person in concluding the trial. The Trial Chamber also found that a self-referral is also another form of unwillingness. The Chamber noted that a State may be willing to bring the accused to justice but not willing to prosecute him within its national courts, and opt to refer the case to the ICC instead. Because of this, the Trial Chamber held that the DRC's referral of the Katanga case to the ICC, 'acquiescing his surrender to the Court' and the government's failure to challenge the admissibility of the case clearly demonstrated its unwillingness to try him nationally. See also A Senier "Introductory Note to the International Criminal Court: Prosecutor v Katanga and Chui" (2010) 49 *International Legal Materials* 45 at 46.

[281] See *Prosecutor v. Katanga and Ngudjolo*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213-tENG, 16 June 2009 para 77.

[282] See M El Zeidy "The Principle of Complementarity: A New Machinery to Implement International Criminal Law" (2001-2002) 23 *Michigan Journal of International Law* 869 at 898 (noting that the Prosecutor in his assessment whether a case is or would be admissible, should prove, on the one hand, that the State which is investigating the case is unwilling or unable to prosecute, and on the other hand that the case is of the requisite gravity to warrant action by the Court).

delay. In this case, the matter is pursued even up to the trial stage just so the State 'appears' to be administering justice while the idea is to protect the perpetrator from possible prosecution by another forum, particularly the ICC. These proceedings are some kind of a veil; since the accused appears to have been 'tried' by his State, it bars further prosecution by another forum, even if he was exonerated of all charges.[283] However, the regime established by article 17 attempts to offset impunity through complementary jurisdiction should evidence prove that national proceedings were phony.

3.2.1 Shielding the Perpetrator from Justice: Sham Trials

On the other hand, domestic authorities may be deemed unwilling to punish the perpetrator and feigning a trial where the proceedings against the person in question are inconsistent with an intention to administer justice, but rather seek to protect the accused from trial by an impartial judicial body such as the ICC. The shielding of a perpetrator from justice may manifest itself in "sham" trials. A sham trial occurs when a State decides to prosecute with the intention to exonerate the accused, but initiates proceedings just to bar the ICC or any other State with jurisdiction and political will to prosecute from exercising jurisdiction over the matter. In order for the Prosecutor to determine that the proceedings against a certain perpetrator were in bad faith, s/he has to inquire whether they conform to "internationally established principles of due process", and investigate whether they were impartial and independent.[284]

An independent and/or impartial judiciary is one whose judges are free from political influence and decisions not influenced by any other organ of the State. Internationally established principles of due process advocate a fair trial, judicial autonomy and unbiased application of the law. Therefore, if the Prosecutor finds that the proceedings were biased towards shielding the perpetrator, the case will be admissible before the ICC. Failure by

[283] The double jeopardy rule (the *ne bis in idem* rule under article 20(3) of the Rome Statute*)* protects an accused from being tried more than once for the same conduct. Therefore, if an accused has been tried for the crimes punishable under the Rome Statute municipally, a case against him for the same conduct is inadmissible before the ICC in terms of article 17(1) (c) and article 20(3), unless of course there is evidence to the effect that prior proceedings were a sham, in which case the case would be admissible.

[284] See W Schabas *An Introduction to the International Criminal Court* 4 ed. (2011) 86, he notes that article requires the Prosecutor to assess the quality of justice done by national courts, substantively and procedurally before he finds them unwilling to genuinely prosecute. See also Rule 51 ICC Rules of Procedure and Evidence, UN Doc. PCNICC/2000/Add.1 (2000) (it provides: "the Court may consider, inter alia, information that the state…may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct").

domestic authorities to follow recognised standards of a fair trial will render a State unwilling to prosecute the accused genuinely, as will an unreasonably long delay in the proceedings. The concept of a fair trial also requires that an accused be afforded a speedy trial. Therefore, it follows that an unjustified delay in the proceedings, which also goes against the due process thesis, renders a case admissible before the ICC.

It follows from the foregoing that failure to afford the accused a fair trial renders a case admissible before the Court. However, considering the hateful nature of conflicts in Africa, a factor that makes most African criminal justice systems appear uneven-handed, especially in those States that have experienced conflicts serious enough to attract the Court's attention, it is unlikely that the Court will find the proceedings therein "fair" or independent.[285] There is always a possibility of domestic authorities having to prosecute a fellow or rival ethnicity or political party war criminal. It is understood that chances of the proceedings being fair are bleak in such instances.

3.2.2. Unjustified Delay

A national judicial system may also be regarded as unwilling to prosecute genuinely where there has been an unexplained and long delay in bringing the perpetrator to justice.[286] Article 17 does not specify what exactly constitutes unjustified delay but this may be interpreted as when a State has taken an unreasonably long and unexplained delay to prosecute.[287] It is because of this lacuna that the author submits that in the absence of a standard prescription period for investigation or prosecution, the Court's decision as to unwillingness or otherwise of a State to prosecute based on an unjustified delay is rather flawed.[288] This leaves the issue of timely prosecutions open to broad and possibly diverse interpretations. Due to differing

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285 Primacy of the *ad hoc* tribunals' primary jurisdiction was in part based on fear of the domestic courts' possible partiality in the proceedings in the ICTY and ICTR due to antagonism among the Croats, Serbs and Muslims on the one and between the Tutsis and the Hutus on the other.

286 See Article 17 (2) (2).

287 An "unreasonably long and unexplained delay" in domestic proceedings was hailed as confusing at the Rome Conference during the negotiations and an "unjustified delay" was used instead. However, it is still not clear how much time is unjustifiably long in order for a state to be said to be unwilling to prosecute, given the differing legal system party to the complementarity regime.

288 The ICC is the sole *arbiter* in cases of admissibility and states genuineness to prosecute. Article 119 also gives the ICC power to rule out any dispute concerning its judicial functions. The fact that the Court exercises both a supervisory and restraint role expands the Court's reach. The dual capacity of the Court is gives the ICC arbitrary review powers over national judicial systems and threatens national sovereignty of states. See J Gurule "United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?" (2002) 35 *Cornell International Law Review* 2.

legal systems, some delays may be justified within other States legal systems. It is therefore important that the OTP liaises with States and come up with a period so that it is clear that a State that has not initiated any proceedings within that time is unwilling to prosecute.

However, in light of recent developments regarding the admissibility criterion, before inquiries are made into unwillingness or otherwise of a State to prosecute, the existence of national proceedings should be established. The ICC's jurisprudence has brought about interesting developments. Precedence has been set to the effect that before an inquiry can be made into the unwillingness or inability to prosecute genuinely, it should be determined first whether there were actually any proceedings, be it investigatory or prosecutorial efforts at the national level. This in essence, is in line with article 17 (1) (a) which provides that a case is inadmissible before the ICC when "it is being investigated or prosecuted by a State with jurisdiction over it." This was clearly articulated by the Appeals Chamber's decision in *Prosecutor v Katanga:*

> "In considering whether a case is inadmissible under article 17(1)(a) and (b) of the *Statute*, the initial questions to ask are (1) whether there are on-going investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1) (d) of the *Statute*."[289]

The Appeals Chamber's decision that a case is admissible before the ICC if and when there have not been any proceedings in national courts pertaining to a certain case is, arguably, based on the presumption that absence of adjudicative action indicates the State's unwillingness or inability to prosecute and as such, renders the case admissible before the ICC.[290] Similarly, as argued above, when the Ugandan and Congolese governments referred their respective situations to the ICC under article 14 of the Rome Statute, the Court did not

[289] *Prosecutor v Katanga (Judgment on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case)* (ICC, Appeals Chamber, Case No ICC-01/04-01/07-1497, 25 September 2009) at 78.

[290] See T Hansen "A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity" (2010) 13 *Melbourne Journal of International Law* 217 at 218 (stating that "inactivity…***automatically*** renders a case admissible before the Court"). [Emphasis added]. See also N Jurdi, 'Some Lessons on Complementarity for the International Criminal Court Review Conference' (2009) 34 *South African Yearbook of International Law* 28 at 29-30. He notes that it follows from the Court's jurisprudence that "once national courts fail to take any action or are unwilling or unable to conduct investigations and prosecutions … the ICC will find the situation admissible".

sua sponte venture into the unwillingness criterion.[291] The Court's interpretation of self-referrals: that they constitute inability on the part of each government to prosecute is inconsistent with article 17.[292] Pre-trial Chamber II applied the same two-phased test laid down in Katanga in *Prosecutor v Muthaura*[293] and *Prosecutor v Ruto*[294]. In these cases the Kenya government sought to challenge the admissibility of cases before the ICC against three Kenyan officials on 31 March 2011, pursuant to article 19(2)(b), arguing that proceedings against them were already under way in Kenyan Courts.[295] Pre-trial Chamber II reiterated that the question of whether the State is "unwilling or unable genuinely to carry out the investigation or prosecution" only becomes relevant after determining the existence or not of proceedings in the national courts.

The Pre-Trial chamber further dismissed the requirement of genuineness of the investigation as not being significant at this stage, stating that when assessing whether the State is indeed investigating, "the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps."[296] It is worth noting that although the Pre Trial Chamber relied on the *dictum* in *Katanga,* circumstances of these cases were largely different. In *Katanga*, the accused challenged the admissibility of his case even though his State, the DRC had referred it to the ICC claiming an inability to prosecute.[297]

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[291] Article19 (1) provides that before the ICC asserts its jurisdiction , even in the absence of admissibility challenges by any party, the Pre Trial Chamber may determine the admissibility of the case against the criteria set out by article 17 of the Statute.

[292] See Hansen 2010 *Melbourne Journal of International Law* 222. He opines that the ICC in an attempt to avoid dealing with the sensitive unwillingness test decided that both cases were admissible due to an inability to prosecute. The Democratic Republic of Congo referred their situation to the ICC pursuant to article 14 of the Rome Statute (State Party referral) through a letter addressed to the Prosecutor. See Press Release, ICC, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004), available at http://www.icc-cpl.int/press/pressreleases/19.html. (Accessed 15 June 2013). The Ugandan government also referred the situation in Uganda to the ICC Prosecutor. See Press Release, ICC, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), available at http://www.icccpl.int/pressrelease_details&id=16&l=en.html. (Accessed 15 June 2013).

[293] See *Prosecutor v Muthaura (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the* Statute*)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) [44].

[294] See *Prosecutor v Ruto (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the* Statute*)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) [48].

[295] *Prosecutor v Muthaura Appeal* 40 and *Prosecutor v Ruto Appeal* 41.

[296] See *Prosecutor v Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) 40; *Prosecutor v Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11 -307, 30 August 2011) 41.

[297] The DR Congo, in its letter of referral to the PTC claimed that it was unable to apprehend the suspect.

On the other hand, in *Ruto* and *Muthaura* the basis of the admissibility challenge was from a State that claimed that it was willing and able to prosecute its nationals. The main argument was that Kenya could not be held to be unwilling or unable to prosecute because investigations into the named suspects' criminal conduct were already under way in Kenya.[298] The government claimed that necessary preliminary steps towards investigation and prosecution of those who had a hand in the 2007 post-election violence that engulfed their country, including those identified as suspects by the ICC, were being undertaken and that these constituted "existing national proceedings".[299] In support of this "investigatory action" argument, evidence of constitutional and judicial reforms was presented.[300]

Over and above this, the Kenyan government undertook to complete all the cases against the named suspects by September 2011 and to keep the Court abreast with the developments.[301] Pre-Trial Chamber II found that although Kenya's express will to investigate was a good sign, there was a "situation of inaction" evident from the government's contradictory accounts regarding the existence of national proceedings. The Chamber also stated that there should actually be *on-going* national proceedings (concrete evidence of such steps) as opposed to intended future investigations.[302] Similarly, the DRC in *Katanga* led evidence proving their investigation did not extend to the attack he orchestrated against civilians in Bogoro, in the Ituri Province of the DRC, on which the ICC arrest warrant was based.[303] This, it is argued, is evidence of a State that was aware of, but failed due to unwillingness or otherwise, to genuinely investigate. This differs from a government that implies that it is "willing" and "able" to prosecute and that it was in the process of investigating. This according to article 17(1) (a) would render the cases inadmissible before the ICC since they were "being investigated by a State with jurisdiction".

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[298] See *Prosecutor v Muthaura* and *Prosecutor v Ruto* in n49 above.

[299] These steps were the enactment of the new constitution in 2010 in terms of which all ratified treaties automatically form part Kenyan legislation; and the setting up of the War Crimes Division of the High Court.

[300] The Government referred to the recent enactment of the new Kenyan Constitution as evidence of legal reform putting it in a position to satisfactorily try the crimes listed under the Rome Statute.

[301] *Ruto Admissibility Challenge* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-19, 31 March 2011) 13.

[302] See the Chambers comments on evidence of inactivity in *Muthaura Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) 59; *Ruto Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) 63-64. Pre-Trial Chamber II noted that the fact that the Kenyan government failed to submit reports to prove the existence of ongoing investigations into the cases already before the Court is not convincing that there may be on-going proceedings.

[303] *Prosecutor v. Katanga*, Case No. ICC-0 1/04-01/07-949 19.

The Defence in *Katanga* argued that the overzealous Prosecutor has eroded the principle of complementarity. Moreover, it contended that the current interpretation of the concept of complementarity by the ICC does not uphold the ideals and theories that underpin the principle, in that:

> "[It] negates the concerns raised by States at the Rome Conference, defeats the principle's object and purpose and turns it on its head; the current regime -as developed by the Court's early practice . . . is *de iure* one of complementarity, but *de facto* is nothing less than primacy of the ICC over national courts."[304]

This raises the important question: what is the threshold for evidence of investigatory action at the national level?

In an appeal against the Trial Chamber's decision to dismiss Kenya's application, the Appeals Chamber held that in order for a case to be inadmissible before the ICC, "the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court."[305] The Appeals Chamber dismissed Kenya's argument that the cases were not admissible before the ICC because they involved "suspects at the same hierarchical level" as those being investigated in Kenya. The Trial Chamber further noted that: "[a]t this stage of the proceedings, where summonses to appear have been issued, the question is no longer whether suspects at the same hierarchical level are being investigated by Kenya, but whether the same suspects are the subject of investigation by both jurisdictions for substantially the same conduct."[306]

The Appeals Chamber also held that although there was evidence that some instructions were issued for investigations into the same crimes being investigated by the ICC, the Kenyan Government failed to provide it with concrete information "about the asserted, *current*

[304] See *Prosecutor v. Katanga*, Case No. ICC-0 1/04-01/07-949, Motion Challenging Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2) (a) of the Statute, article 53 (Mar. 11, 2009) at 19. See also Linda Keller "The Practice of the International Criminal Court: Comments on 'The Complementarity Conundrum" (2010) 8 *Santa Clara Journal of International Law* 199 at 214 (noting that "The ICC practice to date can be interpreted to support … [the] contention that the ICC is undermining complementarity via a rigid interpretation of State action on the same case. In particular, it seems problematic that states conducting wide-ranging investigations into war crimes, crimes against humanity, and genocide might be required to include the specific enumerated act that would be chosen by the Prosecutor and/or confirmed by the PTC.").

[305] See *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) 39; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) 40.

[306] See (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) 41; (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) 42.

investigative steps undertaken."[307] The Appeals Chamber accordingly dismissed Kenya's claim that State Parties' statements must be respected and presumed to be "accurate and made in good faith unless there is compelling evidence to the contrary."[308] The Chamber held that instead of this rather subjective test suggested by Kenya, the State concerned should submit concrete and specific evidence to demonstrate that indeed they are investigating or prosecuting the case(s) before the ICC.[309] Hansel Thomas is of the view that the required "probative and significant actions" by national authorities comprise police statements indicating the time and place and when they visited the crime scene; witnesses if any have been identified; and proof that domestic authorities have already interviewed the suspects.[310] It follows therefore that the Kenyan government failed to meet the threshold for existing proceedings since no concrete and specific information was furnished to prove that, among others, the accused had been interviewed or a list of identified witnesses. It may also be implied from the Court's decision that failure to prove existence of ongoing investigations, in the form of police statements and perhaps forensic evidence a year or more after the crimes were committed, is indicative of the State's unwillingness to prosecute.

In *Prosecutor v Lubanga,*[311] the Court adopted a different approach to solve the issue of existence of national proceedings. This case involved an application by the ICC Prosecutor for a warrant of arrest against Congolese national Thomas Lubanga Dyilo for war crimes and several counts of conscripting child soldiers. The defence challenged the admissibility of this case before the ICC arguing that it under investigation in a State with jurisdiction. Lubanga was in custody in the DRC for war crimes, crimes against humanity and genocide when the DRC government referred his case to the ICC. The Prosecutor argued that the subject of

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[307] See *Muthaura Appeal* and *Ruto Appeal* paragraphs 60 and 64 respectively. The Appeals Chamber further stated that for a State to proof that a case is inadmissible before the ICC, it should furnish 'evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case' and that "it is not sufficient merely to assert that investigations are ongoing". See *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) 61; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11 -307, 30 August 2011) 62.

[308] *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) 62, quoting *Prosecutor v Muthaura (Document in Support of the 'Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the* Statute*')* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-130, 20 June 2011) 6, 8 (*'Kenya's Document in Support of Appeal Application*'); *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) 63.

[309] See Hansen 2010 *Melbourne Journal of International Law* 227 (he notes that this may comprise "police reports attesting to the time and location of visits to crime scenes and documentation demonstrating that witnesses and the (ICC) suspects have been interviewed by the authorities").

[310] See Hansen 2010 *Melbourne Journal of International Law* 227.

[311] See *Lubanga Arrest Warrant* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-US-Corr, 10 February 2006).

criminal investigation or prosecution must be the same – that, the proceedings must be against the same person and for the same criminal conduct for a case to be inadmissible before the ICC. Based on the foregoing, the prosecution argued that the case was admissible before the Court since the accused was not in custody in the DRC in respect of the crimes for which he was charged under the ICC warrant. Applying the "same person, same conduct" test, Pre-trial Chamber I stated that the threshold for assessing the existence of investigatory and prosecutorial activities at the national level, is whether the proceedings in the national courts involve the same person and the same conduct that is the subject of an ICC investigation.[312]

Although these developments will help clarify certain aspects of the admissibility criterion, the importation of the stringent "same person same conduct" test renders the criterion too technical. The requirement that the charges and conduct alleged in a domestic court be significantly similar to that alleged by the Court makes it even harder for States to prosecute nationally. This is geared towards the ICC finding States unwilling to prosecute, as it requires States to have thoroughly investigated and charged similar conduct of which the accused is charged before the ICC, even if the accused was charged of far more serious crimes before national courts, as was the case in *Prosecutor v Lubanga.*[313] On the other hand, a State may also be deemed unwilling to serve justice where the proceedings are not conducted "independently or impartially".[314] Additionally, if the ICC determines whether the proceedings before national courts are not independent or impartial, that is, if there are irregularities or unfairness in the proceedings to the detriment of the accused person; or if national courts cannot effectively administer justice due to an interest in the outcome of the proceedings,[315] the ICC will take over.[316]

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[312] See *Lubanga Arrest Warrant* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-US-Corr, 10 February 2006) 31.

[313] See *Lubanga Arrest Warrant* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-US-Corr, 10 February 2006) 31.

[314] This was one of the reasons for investing absolute jurisdictional powers in the predecessors of the ICC, the *(ad hoc) International Criminal Tribunal for Former Yugoslavia* (*ICTY) and* the *International Criminal Tribunal for Rwanda (ICTR)* respectively. They had primary jurisdiction over national judiciaries because it became apparent that national courts would be unwilling to bring criminals to book or that the courts would have been bias owing to the nature of the conflict. See also A Cassese *International Criminal Law* (2003) 349.

[315] In this case, it is argued, such an interest would be shielding the accused from criminal responsibility despite there being extenuating circumstances. Article 17(2) (c) seems to envision a situation where local proceedings are insincere because they are being carried out in a manner that in inconsistent with an intention to administer justice.

3.2.3 Independence and Impartiality of Proceedings

The admissibility criterion in article 17 (2) (c) properly requires a fair and impartial trial. Article 17 provides that a case is admissible before the ICC where a State that has jurisdiction over the case has or is prosecuting but the proceedings are not independent or impartial. Guarantees of an independent and/or an impartial tribunal are principles of due process recognised by both domestic and international law.[317] Due process requires that the accused be considered innocent until proven guilty and be afforded a fair trial. The notions of judicial independence and/or impartiality are codified by most national and international judicial systems, and constitute legal standards of every judicial body.[318] These notions derive from the doctrine of separation of powers advocated by the French philosopher Montesquieu in *L'Espirit des Lois*.[319] Montesquieu's doctrine of separation of powers advocated for an independent judiciary, separate and free from influence of other arms of government, the legislature and the executive. He cautioned that a judicial system that is not insulated from political influence exposes the life and liberty of its subjects to arbitrary control.[320]

An independent judiciary has the following characteristics: it is not subordinate to any organ of State and its judgements are predictable because they are based on legal precedent.[321] An impartial tribunal on the other hand is one that is not biased in favour of either side.[322] Legal scholarship in this area is divided as to whether impartiality and independence are similar notions.[323] Koslosky distinguishes between the two, arguing that judicial independence, as

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[316] The rationale for the strict primacy of the *ad hoc* tribunals, the *ICTR* and the *ICTY* was that due to the nature of the conflicts in the respective regions, it was believed that proceedings before national courts would be compromised as the conflicts emanated from tribal wars and ethnic cleansing.

[317] B Francois-Xavier "The Right to an Independent and Impartial Tribunal: A Comparative Study of the Namibian Judiciary and International Judges" (2008) *The Independence of the Namibian Judiciary* 243 at 247.

[318] See A Cassese *International Criminal Law* (2003) 393-394 (noting that the requirement of an independent and impartial trial constitutes a general principle of law and gives rise to the most fundamental human rights). International Human Rights Instruments also advocate for independence and impartiality of adjudicative bodies as basic human rights. See Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR); Article 6(1) of the European Convention on Human Rights (ECHR); Article 8(1) of the American Convention of Human Rights (ACHR).

[319] C S Montesquieu *L'Esprit des Lois* Book XI chapter 6 (1748).

[320] See Montesquieu *L'Esprit des Lois* Book XI chapter 6 (1748).

[321] See T Meron "Judicial Independence and Impartiality In International Criminal Tribunals" (2005) 99 *The American Journal of International Law* 359 (noting that "when judges are independent and act in accordance with the law, their decisions have a certain predictability, because they are based on existing law, judicial precedent, and the unbiased application of that law to the facts at issue").

[322] Francois-Xavier 2008 *The Independence of the Namibian Judiciary* 247.

[323] See DR Koslosky "Towards an Interpretative Model of Judicial Independence: A Case Study of Eastern Europe" *University of Pennsylvania Journal of International Law* (2009-2010) 31 203 at 226-227; Francois-

opposed to impartiality, which is more concerned with the transparency of the judicial process and reasoned judgements, is concerned with the *de facto* operation of the court.[324] Legal precedent also distinguishes between independence and impartiality of a judicial tribunal. The Canadian Supreme Court in *R v Valente*[325] noted that that judicial independence and impartiality are closely related, but that they are separate and distinct requirements:

> "Specifically, impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "independent", however, connotes not only the state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship with others, particularly to the Executive Branch of government, that rests on the objective conditions or guarantees."[326]

The International Criminal Tribunal for Rwanda (ICTR) also held in *Prosecutor v Kanyabashi* that "judicial independence connotes freedom from external pressures and interference" while impartiality on the other hand is characterised by "objectivity in balancing the legitimate interests at play."[327] In the same vein, the European Court of Human Rights held in *Findlay v United Kingdom*[328] that the two notions are closely linked and should be considered together as they are related.

Notions of independence and impartiality of the judiciary are deeply rooted in procedural guarantees embodied in constitutions and statutes of different jurisdictions and international conventions. These guarantees include the appointment and selection of judges and security of tenure; checks and balances that filter out bias[329], for instance, multi-judge panels[330]; and

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Xavier 2008 *The Independence of the Namibian Judiciary* 248. See also *R v Valente* [1985] SCR 673, 23 CCC 3d 193 (Can. 1985) and *Prosecutor v Kanyabashi* ICTR-96-15-A, Appeal Chamber, 3 June 1999, Decision on the Defence Motion for the interlocutory appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinions by Judge MacDonald and Judge Vohrah, para. 35.

[324] See Koslosky *University of Pennsylvania Journal of International Law* 2009-2010 226-227. See also Francois-Xavier 2008 *The Independence of the Namibian Judiciary* 248 noting that impartiality is wider than independence and that the court may be independent and yet be biased against one side. She also notes that in criminal cases however, it is difficult to have an independent and yet impartial tribunal.

[325] See *R v Valente* [1985] SCR 673, 23 CCC 3d 193 (Can. 1985).

[326] *R v Valente* 201-202.

[327] *Prosecutor v Kanyabashi* ICTR-96-15-A, Appeal Chamber, 3 June 1999, Decision on the Defence Motion for the interlocutory appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinions by Judge MacDonald and Judge Vohrah, para. 35.

[328] *Findlay v United Kingdom*, Reports 1997 – I, 263 (1997) 24 EHRR 211 para 73, "The concepts of independence and objective impartiality are closely linked and the court will consider them together as they relate to the present case."

[329] Multi-judge panels are believed to help filter out bias as a certain number of judges must agree on the decision and the rationale behind it as this prevents a single bias member from affecting the outcome of the case. The ICTY therefore serves as an instructive vehicle to filter bias as all trials are conducted by three judges and appeals by a bench of 5 judges.

[330] See T Meron " Judicial Independence and Impartiality In International Criminal Tribunals" (ed) (2005) *The American Journal of International Law* 359 at 361 noting that internal mechanisms that prevent and or correct bias like multi-judge panels ensure the integrity of the judiciary and an independent and impartial tribunal.

that law must have established the judicial organ. In *Prosecutor v Kanyabashi,*[331] the defence challenged the jurisdiction of the ICTR, among others, on the contention that it violated the principle of *jus de non evocando.* This principle gives persons accused of political crimes in times of social unrest the right to be prosecuted by regular domestic criminal courts rather than by politically established ad hoc judicial organs, which may not provide impartial justice.[332] In *casu*, the accused, Joseph Kanyabashi, was charged of genocide, complicity in genocide and violations of common articles of the 1949 Geneva Conventions for the Protection of Victims of War and Additional Protocol II, by the ICTR. The defence argued that the Tribunal was not impartial and independent since a political body, the Security Council, founded it. Moreover, that the Tribunal was impartial because it selectively prosecuted only persons from the Hutu ethnic group.[333]

The Appeals Chamber held that the independence of the Tribunal was demonstrated by the fact that it was not bound by national rules of evidence. Further that the judges of the Tribunal exercise their duties independently and freely, were under oath to act honourably, faithfully and impartially, and were not accountable to the Security Council for their judicial functions.[334] The Chamber also stated that article 12(1) of the ICTR Statute, which regulates the appointment of judges, requires that persons of high moral character, integrity and impartiality who possess adequate qualifications be appointed to the bench.[335]

In order for a court to be seen to pursue justice in accordance with established rules and standards of a fair trial, the due process thesis must be interwoven in the proceedings as a whole.[336] However, Cristian DeFrancia argues that instead of a strict application of due process standards, regard must be had to the predicates of due process that guide "the application of those rules in judicial interpretation".[337] Articles 14 and 6 of the International

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331 *Prosecutor v Kanyabashi* ICTR-96-15-A para. 35.

332 See *Prosecutor v Kanyabashi* ICTR-96-15-A, Appeal Chamber para 31, stating that this principle derives from constitutional law in civil jurisdictions and its aim was to avoid creation of special courts designed to try political offences without guarantees of a fair trial.

333 *Prosecutor v Kanyabashi* para 47.

334 *Prosecutor v Kanyabashi* ICTR-96-15-A, Appeal Chamber para 41(stating that "the judges of the Tribunal exercise their *judicial* duties independently and freely and are under oath to act honorably, faithfully, impartially and conscientiously as stipulated in rule 14 of the Rules. Judges do not account to the Security Council for their judicial functions").

335 *Prosecutor v Kanyabashi* ICTR-96-15-A, Appeal Chamber para 42.

336 See C DeFrancia "Due Process in International Criminal Courts: Why Procedure Matters" (2001) 87*Virginia Law Review* 1381 at 1383.

337 See DeFrancia 2001*Virginia Law Review* 1383-1384. She notes that a criminal system may not strictly adhere to the set norms of procedural fairness. She therefore recommends that before an inquiry is made in

Covenant for Civil and Political Rights (ICCPR) and the European Convention of Human Rights (ECHR), respectively enumerate the principles of due process. These are, inter alia, the right to a public hearing and subject to cross-examination; the right to counsel; presumption of innocence until proven guilty beyond reasonable doubt; privilege against self-incrimination and the right to adequate time to prepare one's defence.[338] These form the core of the due process standards recognised by international law. Therefore, where the accused was not afforded these procedural guarantees in a domestic trial, his case will be admissible before the ICC.

Not only does article 17 of the Rome Statute require that the Court adhere to principles of due process, article 64 (2) of the Rome Statute also provides that the Trial Chamber has to ensure that the accused is afforded a fair and speedy trial. Where the accused is not afforded a fair and expeditious trial, for instance, if the proceedings are biased, the ICC will assert its complementary jurisdiction and prosecute. Although traditionally the due process thesis was designed to protect the rights of the accused, it is contended that the Rome Statute in this case envisages a situation where the proceedings are biased towards acquitting the accused, even when there are aggravating circumstances. This is apparent in the wording of article 17(1) read with article 17(2) (c). They envisage a situation where a State exercises jurisdiction over a matter when it is clearly not resolved to administer justice in good faith. Such a State will be deemed unwilling to prosecute genuinely if the proceedings are found to be inconsistent with principles of due process.

It is noteworthy that the language of article 17(2) requires the Prosecutor to determine whether the proceedings are carried out in a manner that will make it hard to convict the accused[339] despite the presence of incriminating evidence. Thus, the case will be prosecuted by the ICC if the proceedings are so biased that the State appears to have derailed from the

to the extent to which the system has conformed to the due process guidelines, standards that guide those rules must be considered: rules of procedure and evidence and their interpretation. He opines that this will offset any bias, especially in situations where the interests of the accused and the prosecutor are in conflict.

[338] Rules 62, 63 and 78 of the Rules of Procedure and Evidence of the ICTR also require that the accused be afforded a fair trial and that principles of due process be adhered to. See also article 20 of the ICTR Statute which entrenches the right of the accused to a fair trial, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 453d mtg., U.N. Doc. S/RES/955 (1994).

[339] See KJ Heller "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process" (2006) 17 *Criminal Law Forum* 255 at 257 (arguing that article 17 permits the ICC to find a State unwilling to genuinely prosecute "only if its legal proceedings are designed to make a defendant more difficult to convict").

standard procedure in favour of the accused. This could be a case where domestic authorities fail to protect key witnesses from intimidation or downplay incriminating evidence. If this is a case, since there is procedural unfairness, the ICC will seize itself of the matter and prosecute. A recent similar situation took place in Sudan. The proceedings before the specialised courts of Sudan were in camera and the accused were routinely sentenced to death based on forced confessions.[340] It follows therefore that procedural failings of national courts of Sudan rendered Sudan Unwilling to prosecute diligently since those proceedings clearly defied international principles of due process.

3.2.4 The Double Jeopardy Rule

Article 17(1) (c) also renders a case admissible where the suspect has been tried for the conduct which is the subject of the complaint before the ICC (*ne bis in idem).*[341] This principle is reiterated by article 20 of the Rome Statute. It protects the accused against multiple prosecutions for the same offence. It is submitted that this rule also forms part of the due process guarantees as it protects the accused from being tried for the same conduct more than once. However, the double jeopardy rule only extends to genuine prosecutions. As such, if the accused was prosecuted by a domestic court but the proceedings are found to be insincere, for instance, a sham trial, the case will be admissible before the ICC. However, it is not clear what will happen where the domestic authorities have already tried the accused for the same conduct but have treated the crime in question as an ordinary crime. On the other hand, domestic authorities may charge an accused with a range of crimes listed in the statute, emanating from his general conduct and not the specific crime he has been charged with by the ICC.[342]

Michael Newton opines that the use of the term "conduct" in the provision poses a danger of the ICC automatically declaring a State unwilling to prosecute if it fails to charge an accused of the same offense as that alleged by the ICC.[343] For instance, in *Prosecutor* v *Katanga*[344]*,*

[340] See Heller 2006 *Criminal Law Forum* 256.

[341] Article 17 (1) (c). See also article 20(3). This rule is sometimes referred to as the double jeopardy rule, if a person has been tried for conduct that is the subject of a complaint, the courts of law cannot try him for the same conduct again if he was convicted or acquitted.

[342] In *Prosecutor v Lubanga*, the accused had been in custody in the DR Congo for genocide and war crimes including murder, before the case was referred to the ICC. Upon challenging the ICC's jurisdiction, the Prosecution argued that the conduct with which he was charged before the ICC as not the same as that of which he was under investigation in the DRC. Unfortunately, in the end the accused was charged with a less serious crime, conscripting child soldiers and escape the genocide and murder charges. In this case, the ICC prosecution was to the accused advantage and he was not held accountable for more serious crimes.

[343] See M Newton "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?" (2010) 8 *Santa Clara Journal of International Law* 115 at 149 ("…the hidden danger is that the ICC could

the DR Congo was declared unwilling to prosecute him because he was never charged with the specific crimes alleged by the ICC in respect of the attack he orchestrated against the civilian population in Borogo, in the Ituri province of the country.[345] Although the defence did not plead the *ne bis in idem* principle, this case would be a good example. However, the 'same person, same conduct' test applied by the Trial Chamber, which requires that the same person must have been charged with specifically the same crimes as those alleged by the ICC in order for a case of inadmissibility to hold water, was applied. This line of reasoning is based on the assumption that local authorities did not allege the crimes emanating from the specific conduct that is the subject of an ICC investigation because they were unwilling to administer justice.

Furthermore, as seen in the ICC's decision in *Prosecutor v Lubanga*[346], a case will still be admissible before the ICC even when the crimes alleged by the ICC are of a less magnitude than those alleged by domestic authorities[347], because of a technical difference between the conduct alleged to be criminal in each case.[348] The Appeals Chamber in *Prosecutor v Tadic*[349] warned against a situation where atrocious crimes are treated as ordinary crimes in domestic Courts:

> "Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as "ordinary crimes"…or proceedings being designed to "shield the accused," or cases not being diligently prosecuted…If not effectively countered…any of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute".[350]

automatically decide that domestic officials who fail to allege the same charge that the Court deemed appropriate are "unwilling genuinely" to prosecute the perpetrator.").

[344] *Prosecutor v. Katanga*, Case No. ICC-0 1/04-01/07-949 19.

[345] *Prosecutor v. Katanga*, Situation in the Democratic Republic of the Congo In The Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges, Case No. ICC-01/04-01/07 (30 September 2008) para 20.

[346] *Lubanga Arrest Warrant* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-US-Corr, 10 February 2006) 31.

[347] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, ICC-01/04-01/06-8-US-Corr, 10/02/2006, para. 18, unsealed pursuant to Decision ICC-01/04-01/06-37 dated 17/03/2006.

[348] See L Keller "The Practice of the International Criminal Court: Comments on 'The Complementarity Conundrum" (2010) 8 *Santa Clara Journal of International Law* 199 at 214. She argues that ICC's jurisprudence supports the contention that the Court has shifted from the textual approach of complementarity by adopting a rigid interpretation of the existence of national proceedings and the 'same person, same conduct test'.

[349] See Prosecutor v. Dusko Tadic Case No. IT-94-I-I, (Aug-10, 1995) International Criminal Tribunal for the Former Yugoslavia: (Decision on the Establishment of the International Tribunal).

[350] Prosecutor v. Dusko Tadic Case No. IT-94-I-I, (Aug-10, 1995) International Criminal Tribunal for the Former Yugoslavia: (Decision on the Establishment of the International Tribunal).

This notwithstanding, the ICC admitted the case against Lubanga who had already been charged in the DR Congo. The Court's decision to prosecute Lubanga seems to betray this line of reasoning. As noted above, the accused was charged with far serious crimes (genocide, crimes against humanity, war crimes) by his nation State but was nevertheless referred to the ICC and prosecuted for conscripting child soldiers. This makes one wonder whether this approach is due to an overzealous prosecutor who competes with domestic courts for jurisdiction, and foregoes the administration of justice for expediency. The approach also deviates from the spirit of the principle of complementarity that prioritizes domestic jurisdiction, unless the State fails to administer justice. These kind of situations are what seem to have betrayed the Court's commitment to preserving sovereignty and upholding the ideals upon which complementarity was founded.

3.3 Inability to Prosecute

The ICC may also wrest specific cases from the jurisdiction of municipal courts if there is an inability to prosecute genuinely. Inability, unlike willingness, is an objective test. A State may be deemed unable to prosecute where it is unable to obtain the accused or secure witness and or necessary evidence or is unable to conduct proceedings. This test requires a factual as opposed to a mental element, which is the case with the unwillingness test. In order to determine inability in a given case, the ICC has to determine whether there is a 'total or substantial collapse' of the judicial system and that as a result, the State is "unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".[351] Thus, given the nature of conflicts that African States experience, some States may be considered unable to prosecute because to political situations that make it 'impossible' to hold trials due to lack of judicial personnel.

The Appeals Chamber held in *Prosecutor v Katanga*[352] that it must first be determined whether there have been proceedings at all in national courts. Further, that a case will be admissible before the ICC where there have been no investigatory or prosecutorial attempts, the case is admissible before the ICC for reason of inability. The decision therefore presupposes that lack of action means the State concerned is either unable or unwilling

[351] See article 17(3) of the Rome Statute.

[352] *Prosecutor v. Katanga*, Situation in the Democratic Republic of the Congo In The Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges, Case No. ICC-01/04-01/07 (30 September 2008) para 20

because it has not attempted to prosecute. The question of whether domestic authorities are unable or unwilling only becomes relevant after determining whether there were any adjudicative efforts involving that particular case.[353]

Mohamed El Zeidy notes that the ICC may act to fill a gap in national judicial systems created by lack of proceedings.[354] However, the fact that the State may be deemed unable to prosecute just because it is unable to apprehend the accused may set the bar too high for States.[355] The fact that the State has not or cannot apprehend the accused does not necessary render the judicial system ineffective. In some cases, only a certain region of a State is crippled by the conflict and a substantial collapse in another region may not necessarily impede the functioning of other unaffected regions of a State's judicial organs. The ICC will be seized with the matter even where the State concerned, though experiencing a substantial collapse of its judicial system in some parts, may still be able to finally arrest and prosecute the accused. Setting a prescription period within which a State may initiate proceedings before a State is deemed to have failed to prosecute genuinely would solve this problem. Then, the ICC would only assert its jurisdiction where the State has failed to secure a prosecution within the set time frames, instead of taking over because the State has failed to arrest the suspect since it may even be more difficult for the ICC to apprehend the same person for lack of resources.

The use of 'or' in article 17 shows that the Rome Statute does not envision a situation where unwillingness and inability to prosecute coexist. A State may be found either unwilling or unable and not both. The Court's jurisprudence also distinguishes between unwillingness and inability to prosecute in such a manner that implies that they cannot co-exist.[356] On the other hand, where there is evidence of domestic process, the Court goes on to determine the genuineness of the proceedings to determine willingness or otherwise of the national courts involved to prosecute.[357] Even where the ICC has found a State unwilling or unable to

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[353] See M Benzing "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* 591 at 601 (He notes that the fact that the state has not done anything yet crimes were being committed renders the case admissible before the ICC).

[354] See M El Zeidy "The Principle of Complementarity: A New Machinery to Implement International Criminal Law" (2001-2002) 23 *Michigan Journal of International Law* 869 at 903.

[355] See *Lubanga Arrest Warrant* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-US-Corr, 10 February 2006).

[356] See *Prosecutor v Katanga*

[357] See article 17 (1) (a) and (b) of the Rome Statute.

genuinely prosecute, the Prosecutor has to make sure that the case is of sufficient seriousness to warrant further action by the ICC.[358]

3.4 The Gravity Threshold

The Rome Statute only gives the ICC jurisdiction over cases that meet a certain threshold of seriousness. As the preamble states, the Court has a mandate to try grave breaches of international law. The gravity threshold delineates complementary jurisdiction – it sets a baseline of conduct that elevates ordinary crimes from the jurisdiction of national judiciaries to the complementary jurisdiction of the ICC. For a crime to meet the threshold, it must be serious and large scale so that it constitutes a threat to international peace and security. A case is therefore inadmissible before the ICC if it is not of sufficient gravity to warrant further action by the Court.[359] In cases where a State has failed the "unwillingness" or inability" test, the Prosecutor must also determine the seriousness of the allegations before intervening and initiating prosecution.[360] This is also in line with the practicality issue: due to budgetary and infrastructural constraints of the Court, it cannot possibly try every international crime case from across the world; hence, its jurisdiction is limited only to core crimes of international concern as defined by articles 5 to 8 of the Rome Statute.[361]

The threshold requirement is one of the powerful constraints on the prosecutor's powers as it prevents the prosecutor from seizing itself of every case, lest the ICC supplants domestic jurisdiction.[362] Article 53 (1) (c) of the Rome Statute also limits the powers of the Prosecutor to protect States from an overzealous prosecutor. It requires the Prosecutor, before initiating an investigation, to consider the seriousness of the crime, interests of victims, and whether

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358 See article 17(1 (d) of the Rome Statute.

359 See article 5 of the Rome Statute provides:
"The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression: Article 6 uses the term "group" to define elements of the crime of genocide; this term connotes the idea of the acts listed therein as being committed against a large number of people. Article 7 also describes war crimes as "acts … committed as part of a widespread or systematic attack directed against any civilian population".

360 See Article 17 (1) (d) of the Rome Statute.

361 Articles 5 to 8 of the Rome Statute define the core crimes that fall under the Court's jurisdiction: genocide, war crimes, crimes against humanity and aggression.

362 See Newton 2010 *Santa Clara Journal of International Law* 134 (noting that the gravity threshold is a "subtle, yet potentially powerful, constraint on the Prosecutor's power *vis a vis* sovereign forums").

pursuing the case would serve the interests of justice.[363] The gravity threshold has been under a lot of scrutiny, as article 17 requires the ICC to defer to national courts where the case "is not of sufficient gravity to warrant further action by the court."[364] Some scholars have even argued that the case must not only be serious enough for the ICC to intervene but also that there must be a reasonable basis that crimes under the jurisdiction of the Court have been committed and that it is in the interests of justice for the ICC to seize itself of the matter.[365] However, it is hard to see how the Court's prosecution of the case against Lubanga was in the interests of justice when he stood trial before the ICC for crimes of a lesser magnitude than those he was charged with in the DR Congo.

On the issue of the seriousness of the case, the Pre-trial Chamber I in *Prosecutor v Lubanga* held that the threshold approach must be applied in two scenarios: Firstly at the initial stage of investigation of a situation and once a situation is determined to be of sufficient gravity. Once a case arises out of the situation, the case must also meet the gravity standard set by the provision that proscribes the conduct alleged to be a crime. It went further to say that for the conduct in question to meet the criterion; it must be systematic or large scale; and social alarm that such conduct has caused in the world must also be considered. [366] If these factors are not present, then the case is not of the desired gravity and is inadmissible before the ICC.

3.5 Flaws of the Complementarity Regime

3.5.1 The Admissibility Criteria under Article 17

The admissibility criterion under article 17 of Rome Statute is flawed because it does not clearly set out the clear guidelines for finding a State unwilling to prosecute. Although the Court's jurisprudence attempts to fill in some of these gaps, the lacunae in article 17 regarding the meaning of unjustified delay in bringing the perpetrator to justice still needs to be developed. The fact that a State may be found unwilling and acting in bad faith due to an unjustified delay in the proceedings, without clear and standard time frames leaves room for

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[363] See article 53 (1) (c) of the Rome Statute. It provides that "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice".

[364] See article 17 (1) (d). See also R Murphy "Gravity Issues and the International Criminal Court" (2006) 17 *Criminal Law Forum* 281 at 287. See also P Kirsch and JT Holmes "The Birth of the International Criminal Court: The 1998 Rome Conference" *(1998)* 3 *Canadian Yearbook of International Law* 18 for a general discussion of the negotiations at the Rome Conference that lead to the adoption of the gravity threshold.

[365] See Newton 2010 *Santa Clara Journal of International Law* 157-160.

[366] ICC-01/04/-01/06, Pre-trial Chamber I, *Situation in the Democratic Republic of Congo in the Case of the Prosecutor vs. Thomas Lubanga Dyilo,* Under Seal Decision of the prosecutor's Application for a Warrant of Arrest, art 58, Annexure 1, 10 February 2006, para. 42.

broad interpretations by different jurisdictions. In any legal system there is potential for delays despite the prosecutor's willingness to prosecute timeously,[367] especially if there is an on-going conflict. It is therefore imperative to arrive at a narrow definition of what constitutes unjustified delay in order to quell States fears that this provision may lead to arbitrary decision making regarding the willingness or otherwise of their judicial systems to prosecute genuinely international crimes. [368] The definitional inadequacy of article 17 in this regard renders the willingness test substantively deficient.

Moreover, the regime of complementarity may also be considered vague to the extent that it fails to define a standard criminal policy for prosecution of core international crimes. The practice of national judicial organs has shown that a prosecutorial authority without a basic substantive blueprint is deficient to the point of being dysfunctional. Neither the Rome Statute nor the ICC's Rules of Evidence define a criminal policy. However, the ICC may take lessons from domestic judiciaries and incorporate a standard prosecution template through judicial activism. The fact that there are no standardized guidelines for prosecution poses a real danger that of a state may genuinely prosecuting in accordance with its national laws being declared unwilling to prosecute genuinely even when the delay is not procedurally wrong within its legal system.

In another vein, the unwillingness test forms the subjective part of the admissibility test since it requires genuineness. It is the very nature of the inquiry that makes it difficult to know when a state is unwilling without prosecutorial guidelines. As it stands, article 17 fails to define the standard of proof that must be met in order for the Prosecutor to find a particular State genuinely unwilling or unable to carry out its investigative or prosecutorial functions.[369] Developing countries may also be at a disadvantage of seeming unwilling to punish perpetrators due to lack of resources for speedy trials. It also fails to establish standard criterion for assessing unwillingness on the part of the State.[370] The Appeals Chamber

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[367] See D Scheffer "The International Criminal Court: The Challenge to Jurisdiction, Address at the Annual Meeting of the American Society of International Law Washington DC" (March 26 1999) 237. Available at http://www.iccnow.org/documents/DavidSchefferAddressOnICC.pdf (accessed 27 August 2012).

[368] PA McKeon "An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands of International Justice" (2009) 12 *St John's Journal of Legal Commentary* 535.

[369] See A Cassese "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) 10 *EJIL* 537.

[370] See D Scheffer "The International Criminal Court: The Challenge to Jurisdiction" Address at the Annual Meeting of the American Society of International Law, Washington DC" (1999) 237. Available at http://www.iccnow.org/documents/DavidSchefferAddressOnICC.pdf (accessed 27 August 2012).

decision in *Prosecutor v Katanga* implies that the genuineness of the proceedings is not as important as the existence of local proceedings, which must meet a certain threshold.[371] This is confusing since article 17 requires that national proceedings be genuine and renders a case inadmissible where a state holds sham a trial. Li Jun Yang is also of the view that article 17 is ambiguous due to lack of a defined criminal policy.[372]

Without basic guidelines regarding satisfactory local investigatory and prosecutorial activities, there is a risk that certain genuine 'on-going domestic proceedings' may be excluded.[373] With the varied legal systems subject to the complementarity regime, it is necessary to have specific guidelines for investigations and prosecutions of the core crimes of international concern so that all State Parties follow the same baseline conduct required of them. It is submitted that incorporating basic investigatory and prosecutorial guidelines into the complementarity regime is congruent with the sovereignty-preserving aim of the drafters of article 17. The Rome Statute should therefore be amended to embrace the standard criminal policy thesis. Article 17 without clear guidelines as is, defeats its purpose - complementing and not supplanting domestic jurisdictions.

The *ne bis in idem* rule in article 17(1) (c) is also framed in such a manner that risks the accused being tried twice for the same conduct, first by a national court and by the ICC. The term 'conduct' has been used instead of 'crime' or 'offense' as the case may be. This argument finds support in the Court's use of the 'same person, same conduct test'. This test requires that the accused be charged of significantly similar charges for a case to be inadmissible before the ICC. That is, the charges in question must not only be against the

[371] See *Prosecutor v. Katanga & Chui,* Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute) Case No. ICC-01/04-01/07 (June 16, 2009) (noting that "for assessing whether the State is indeed investigating, the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps").

[372] See L Yang "Some Critical Remarks on the Rome Statute of the International Criminal Court" (2003) 2 *Chinese Journal of International Law* 599 at 605. He notes that many states hold that if the delay (unjustified delay) complies with their legal system, it shall not amount to an unjustified delay. See also X Philippe "The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?" (2006) 88 *International Review of the Red Cross* 375 at 384, (arguing that owing to the ambiguity of the unwillingness criteria, "it can logically be assumed that the inherent differences between legal systems will influence the way in which the principle of complementarity will be implemented. It will therefore not be uniformly applied").

[373] See JN Clark "Peace Justice and the International Criminal Court: Limitations and Possibilities" (2011) 9 *Journal of International Criminal Justice* 521 at 537. She notes that without a standard criminal policy in the Rome Statute, "the high content of local practices may be excluded regardless of the legitimacy with which the practices are received, thereby obstructing the sense of local ownership of the process [prosecution of international crime]". Emphasis added.

same person but also, conduct that is the subject of the complaint before the local court and ICC must have arisen out of the same conduct. For instance, as shown above, in *Prosecutor v Lubanga*, the accused was tried by the ICC despite having been arrested and charged by the DR Congo prior to referral of his case to the ICC. This was merely because the crimes alleged by the DRC did not extend to the crimes perpetrated by the accused during the Borogo attack, which formed the basis of the ICC charges.

The Rome Statute does little to guide State's interpretation of the Statute and lack of a standard criminal policy renders the complementarity regime incomprehensive[374], and the criterion for admissibility of cases is rather flawed.[375] Moreover, the Trial Chamber's decision in *Prosecutor v Lubanga*[376] exports a third criterion into the two-tiered test in article 17, namely the 'same person, same conduct' test. It was held that an inquiry must be made whether both national and ICC proceedings pertain to the same person and have arisen out of the same conduct. The Chamber also held that the charges must be 'significantly similar' to those alleged by the ICC for a case to be inadmissible.

3.5.2 African Perspectives on the Court's Application of Complementarity

The foregoing analysis necessitates a discussion of the fractious relationship between the African States, the AU and the ICC. This account will shed some light on how the African audience perceives complementarity and why. Some of these issues will require the Court to consider for purposes of strengthening its legitimacy. As noted in chapter one, African States showed formidable support for the Court during its early stages.[377] Things however, took a different turn when the Court became operational. The ICC's indictment of African heads of

[374] See Newton 2010 *Santa Clara Journal of International Law* 141. ("The Court does not follow any standardised procedures for deferring to domestic jurisdictions, so there is no authoritative precedent or template to indicate when a situation would better be handled domestically").

[375] See M Melandri "The Relationship Between State Sovereignty and The Enforcement of International Criminal Law under the Rome Statute (1998): A Complex Interplay" (2009) 9 *International Criminal Law Review* 531 at 540 (he argues that so far the complementary provisions act as "an implicit restriction on state sovereignty….but it did not establish specific standards for prosecution").

[376] See *Lubanga Arrest Warrant* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-US-Corr, 10 February 2006). See also the Appeals Chamber decision in *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) 39; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) 40, stating that 'the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court'.

[377] See the discussion in chapter one, pages 2-4. See also A du Plessis and A Louw 'The International Criminal Court that Africa Wants,' Symposium on International Crime in Africa Programme (2009) *International Security Studies* 11 (noting that "the ICC's creation was shaped and supported by African nations that played a pivotal role at the Rome conference at which the court's statute was drafted and adopted").

State and the Security Council's indifference to AU's pleas for deferral of some cases have severely strained the relationship between the Court and the AU and some African States.[378] This has culminated in some States, In particular, Kenya, threatening to withdraw its membership to the Rome Statute.[379] Subsequent to Kenya's passage of a motion in parliament to withdraw membership to the Rome Statute, the AU held the 15th Extraordinary Session of the Assembly of the African Union included among others, Decision on Africa's Relations with the ICC.[380] Most of the critics have called into question the manner in which the ICC has executed its complementarity mandate in the case under its investigation. Some African State actors and political elite have criticised the ICC for its exclusive focus on African heads of State when crimes within the Court's jurisdiction are being committed across the globe.[381] A widely held view is that most judicial systems in Africa are weak, which makes them an easy target for the ICC.

The perception that the Court administers selective justice by discriminately targeting African war criminals is based on allegations that similar crimes were committed in Colombia, Venezuela, Sri Lanka and Iraq.[382] At face value, the ICC docket is exclusive to Africa, but there is evidence that the ICC Prosecutor has investigated the situations in Iraq and Georgia, but decided not to prosecute because they did not meet the gravity threshold.[383] For instance,

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[378] The AU adopted the Sirte Declaration after failed attempts to get the Security Council to defer the case against President al Bashir to Sudan under article 16 of the Rome Statute. See Declaration on non-cooperation with the ICC Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII) Assembly/AU/Dec.245(XIII) Rev.1 Page 2 para 10 provides: "… 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 El Bashir of The Sudan".

[379] See "Kenya's Threat to Withdraw from the ICC: What Will SA Do?" *Daily Maverick* 29 November 2013. Available at http://www.dailymaverick.co.za/article/2013-10-08-kenyas-threat-to-withdraw-from-the-icc-what-will-sa-do/#.Uphni9IW1FU (accessed 29 November 2013). The AU adopted a decision to call for deferment or postponement of the cases against the Kenyan vice-president and President Uhuru Kenyatta. See "Africa to Request Deferment of Indictments against Kenyan President and Vice President" Press Release No 177/2013 Addis Ababa (12 October 2013). The ICC finally postponed the case against Kenyatta to February 2014. See "ICC Postpones Kenya President Kenyatta's Trial Date" *13th Forum Ecomonique International Sur L'Afrique* 29 November 2013. Available at http://www.panapress.com/iCC-postpones-Kenya-President-Kenyatta-s-trial-date--15-885721-32-lang2-index.html (accessed 29 July 2013).

[380] See Decision on Africa's Relations with the International Criminal Court Ext/Assembly/AU/Dec.1-2 (Oct.2013). See also See "Africa to Request Deferment of Indictments against Kenyan President and Vice President" Press Release No 177/2013 Addis Ababa (12 October 2013). The ICC finally postponed the case against Kenyatta to February 2014.

[381] See "Rwanda's Kagame Says ICC Targeting Poor, African Countries" *AFP* 31 July 2008. See also C Murungu and J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 155. See M du Plessis *The International Criminal Court that Africa Wants* (2010) 13-14 for a general discussion.

[382] See A du Plessis and A Louw 'The International Criminal Court that Africa Wants,' Symposium on International Crime in Africa Programme (2009) *International Security Studies* 19-20.

[383] See du Plessis and Louw (2009) *International Security Studies* 28.

in the case of Iraq, there were communications alleging that the several counts of aggression had been committed in the Iraqi war in 2003. However, the Prosecutor was unable to institute proceedings because some crimes fell outside the subject-matter jurisdiction of the Court and were not serious enough to warrant action by the Court.[384] Some of the complaints related to crimes committed before the coming into force of the Rome Statute.[385] Additionally, in the case of Iraq, the crime of aggression had not been properly defined when the OTP received these communications.[386] Although the evidentiary basis of this criticism is weak, the ICC must extent its influence universally and investigate all crimes. The court should not apply double standards in terms of who to investigate.

Closely linked to the issue of fairness is the concern that the ICC is a tool of neo-colonial policy by the West against weak African countries.[387] African Countries, under the aegis of the AU, have adopted the "African Solutions to African Problems" policy to protect themselves from the neo-colonial onslaught. The Court has also been criticized for its failure to heed and address concerns of the AU. This has culminated in the establishment of the complementary jurisdiction of the African Court of Justice and this will be discussed in detail below. Moreover, the AU and other state actors within the continent place a higher premium on peaceful settlement of conflicts. It has also been argued in some quarters that the ICC destabilises and is insensitive to traditional conflict resolution avenues pursued in Africa. This was the argument advanced by, among others, the Acholi Religious Leaders' Peace initiative, that the ICC should stop further investigations and prosecutions in northern Uganda as its involvement could deter protagonists from joining peace talks.[388] This argument is based on the continuance of armed conflicts despite international intervention (by the UN in the past

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[384] Some of the crimes complained of included, tax evasion, environmental damage, judicial corruption and these do not fall within the ambit of the ICC mandate. See du Plessis and Louw (2009) *International Security Studies* 29.

[385] Some of the cases complained of included the Israeli-Palestinian conflict. The problem with this case is that Israel is not a party to the Rome Statute and Palestine is defined as not a State yet. See du Plessis and Louw (2009) *International Security Studies* 29.

[386] See du Plessis and Louw (2009) *International Security Studies* 29.

[387] See C Murungu and J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 155.

[388] See the Statement by Father Carlos Rodrigues of the Acholi Leaders in *Dissent Magazine* (2004) available at <http://www.dissent-magazine.org/articles/?article=336> (accessed 12 March 2012), (arguing that "nobody can convince the leaders of a rebel movement to come to the negotiation table and at the same time tell them that they will appear in courts to be prosecuted"). See also A du Plessis and A Louw 'The ICC that Africa Wants,' Symposium on International Crime in Africa Programme (2009) *International Security Studies* 1 at 6.

and recently by the ICC). Opponents of the ICC have argued that this is because the international system foregoes the restitution of peace for judicial expediency.[389]

Some scholars have argued that the ICC may be used as a tool for political gain. Considering the hateful nature of most conflicts in Africa, where ethnicity takes centre stage and previous attempts by some African leaders to pursue their dictatorial neo-colonial regimes, this criticism is not without substance. It has been argued in some quarters that the referral procedure is prone to misuse by some dictators, since an ICC prosecution may be used as a viable weapon to get rid of the opposition. The Prosecutor's criteria for selection of suspects in the situation in Uganda have raised a few questions in some quarters.[390] Some scholars argue an ICC referral was used to settle political scores in Uganda as charges were only brought against the Lord Resistance Army and not President Museveni's militia when there was evidence that they also committed heinous crimes during the conflict.[391]

The absence of charges against the UPDF, the other party to the conflict, was seen as a sign of the Court's lack of impartiality in selecting its cases as they were also alleged to have had a hand in the conflict.[392] Furthermore, the timing of the referral seemed to be convenient for both the ICC and the Ugandan government.[393] For the Ugandan government, referral to the ICC was seen as a political manoeuvre to get rid of the opposition as the referral asymmetrically focussed on the LRA.[394] In addition, Ugandan government's subsequent attempts to withdraw the referral also go to show that some State actors just pay lip service to

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[389] M Newton "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?" (2010) 8 *Santa Clara Journal of International Law* 115 at 122 argues that emerging indicators in the practice of the Court have revealed hidden dangers of expediency.

[390] See ICC Office of the Prosecutor, Statement by the Chief Prosecutor on the Uganda Arrest Warrants (Oct. 14, 2005). See also N Waddell and P Clark (2008) *African Affairs* 1 at 22, noting that the prosecutor's decision to investigate only members of the LRA "…has often been presumed to be the result of bias rather than as the consequence of the ICC's application of its criteria for case selection".

[391] See Souare 2009 *Review of African Political Economy* 377 (noting, "The whole story of referring the LRA to the ICC was a political strategy by the Ugandan government to achieve international criminalization of the group and to gain foreign support for its military operations against the rebels").

[392] See J Sinclair "The International Criminal Court in Uganda" (2010) *Undergraduate Transitional Justice Review*: Vol. 1(5) 72 at 73. See also N Waddell and P Clark (2008) *African Affairs* 1 at 22, noting that the prosecutor's decision to investigate only members of the LRA "…has often been presumed to be the result of bias rather than as the consequence of the ICC's application of its criteria for case selection". See also ICC Office of the Prosecutor, Statement by the Chief Prosecutor on the Uganda Arrest Warrants (Oct. 14, 2005).

[393] See Souare 2009 *Review of African Political Economy* 377.

[394] See Souare 2009 *Review of African Political Economy* 377(noting, "the whole story of referring the LRA to the ICC was a political strategy by the Ugandan government to achieve international criminalization of the group and to gain foreign support for its military operations against the rebels").

accountability. On a policy and jurisprudential perspectives, the selective prosecution of the LRA top commanders or the ICC's failure to investigate the extent of the ruling party's responsibility in the conflict sets questionable precedents.

Another example of a situation where an ICC referral was used to stifle competition is the referral of the situation in the Central African Republic. State leaders that have risen to power through revolutions, which were characterized but grave breaches of international law, refer cases to the ICC to get rid of the opposition.[395] Because of these selective prosecutions, the ICC is perceived as a tool for regime change. In contrast, the Prosecutor has handles the situation in Mali in a principled and politically sensitive manner. Citing his article 53 duties as the basis for his selection of individuals to indict, the Prosecutor warned that he will investigate all parties to the conflict, not just the militia responsible for the crimes committed during the conflict. The prosecutor made it clear that the Malian Army will also be investigated for war crimes they committed during counter attacks.

Some of the concerns above form the core of issue that the ICC will have to address to ensure its future viability. For instance, the ICC must be conscious of ethnic, cultural and political sensitivities of those involved in the conflict. This way it will foster a healthy cooperative relationship with States and encourage the relevant authorities to show greater zeal and ending impunity. The Court should also become more nuanced in its communication with Africa, heed, and address concerns raised by African actors. The Court should also encourage national prosecutions, as these will provide a long-term solution to its problems. In addition, in cases where regional bodies like the AU are involved, both the body and the Court have to exist in a constructive manner. The role of regional bodies within the complementarity regime received limited attention until recently when the AU vested the African Court of Justice with complementary jurisdiction to try Rome Statute crimes.

3.6 The Role of Sub-regional Bodies: Are they also Complementary?

Amid the controversies surrounding ICC's actions within the African Continent, which intensified after the Court's indictment of the Sudanese President al Bashir, the fledgling Court faces yet another challenge. After numerous unsuccessful attempts to persuade the UN

[395] For instance, Francaois Bozize rose to power through a coup d'etat but referred the situation in the Central African Republic to the Court and only the late President Ange-Felix Patasse and his supporters was investigated for the violence perpetrated in the country.

Security Council to defer the case against al Bashir under article 16 of the Rome Statute, the African Union's (AU) support for the ICC has waned.[396] The AU passed the Sirte Resolution of non-cooperation with the ICC regarding the arrest and surrender of al Bashir in July 2009 in Libya in response to the Security Council's refusal to defer the case against Al Bashir.[397] The AU has since advocated for a regional response to Africa's problems. This culminated in the African Union Commission, the AU secretariat, appointing consultants to oversee the drafting of the Protocol on Amendments to the Protocol on the Statute of the African Court Justice and Human Rights[398] (hereinafter the AU Draft Protocol). The Protocol grants the African Court complementary criminal jurisdiction over serious international crimes: genocide; war crimes; crimes against humanity; human and drug trafficking; piracy; terrorism; corruption and unconstitutional changes of government.[399] Paragraph 16 of the preamble to the AU Protocol provides:

> "…convinced that the present protocol will *complement* national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples' rights, keeping with article 58 of the Charter and ensuring accountability wherever they occur…"[400]

This is however not unprecedented in international law. Regional bodies have been part of international law enforcement since the emergence of international jurisdiction. These bodies are formed by continental units that are, among others, geographically proximate and have economic and political ties and similar cultural identities.[401] These bodies include the African Union (AU); the European Union (EU); the Organization of American States (AOS); the Caribbean Community (CARICOM); NATO; Commonwealth of Independent States; Pacific Islands Forum; the Arab League; Association of South Asian Association for Regional

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[396] See para 9 of the Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII) Assembly/AU/Dec.245(XIII) Rev.1 (it states that the African Union "DEEPLY REGRETS that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of the ICC, has neither been heard nor acted upon, and in this regard, REITERATES ITS REQUEST to the UN Security Council").

[397] See Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII) Assembly/AU/Dec.245(XIII) Rev.1 Page 2 para 10 provides: "… 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 El Bashir of The Sudan".

[398] Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters (7 to 11 and 14 to 15 May 2012), Addis Ababa, Ethiopia Exp/Min/IV/Rev.7.

[399] See article 46H (1) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Exp/Min/IV/Rev.7. It provides: "The jurisdiction of the Court shall be *complementary* to that of National Courts and to the Courts of the Regional Economic Communities". [Emphasis added].

[400] See para 16 of the preamble to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

[401] See R Vayrynen "Regionalism: Old and New" (2003) 5 *International Studies Review* 25 at 26.

Cooperation; and Mecusur. The concept of regionalism has at its centre, an agentive relationship through which tribunals, special commissions, human rights bodies, non-governmental organizations and States relate in the national, regional and global context. These bodies technically create legal mechanisms and procedures that "complement" each other through judicial proceedings in the form of domestic criminal prosecutions, civil suits, truth commissions, *ad hoc* international tribunals, and other administrative proceedings such as UN Resolutions.

Philosophically, the State-centred regional system advocates for domestic and regional enforcement of international law, as policy and practical issues, have in the past, hindered transnational enforcement of law.[402] However, over the years, the State-centred regional system has proved problematic due to, among others, geopolitics. Regional politics have in the past, forestalled international criminal justice processes and led to large-scale impunity for atrocious international crimes.[403] With the advent of ICC's efforts to enforce accountability for human rights violations in Africa, the role of regional bodies is of particular interest. For purposes of this inquiry, this discussion will be centred on the AU relationship with the ICC. The African Union, which is seated in Addis Ababa, Ethiopia, comprises 54 African States.

3.7 The African Union

The African Union was established on 21 May 2001 through the Banjul Charter,[404] thereby replacing the Organization of African Unity (OAU).[405] In terms of article 3(f) of the Constitutive Act, the aim of the African Union is to "promote peace, security and stability on

[402] WW Burke-White "Regionalization of International Criminal Law Enforcement: A Preliminary Exploration" (2003) 38 *Texas International Law Journal* 729 at 730. He notes "Regional enforcement of international law, however, would be situated at a unique midpoint between the national state and the international system. Regionalization could, therefore, provide a hitherto unavailable means of balancing the benefits and dangers of both supranational and national enforcement. In terms of cost, legitimacy, political independence, and judicial reconstruction, regionalization may be a normatively preferable means of enforcing international criminal law".

[403] See R Vayrynen "Regionalism: Old and New" (2003) 5 *International Studies Review* 25, (noting that "early post-Cold War expectations that regions and regional concerts would form the foundation for a new international order have proven untenable").

[404] See the African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc.CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

[405] The OAU, the predecessor of the AU was established on 25 May 1963 through the Charter of the Organization of African Unity

the Continent." [406] Also, among the Union's principles is the peaceful resolution of conflicts among States as the Assembly of States of the African Union sees it fit.[407] The AU Peace and Security Council, which has the power to authorise support missions; impose sanctions; and take initiatives in response to potential and actual conflicts, implements these policies.[408] Since its creation, the AU has adopted a number of documents that establish internationally recognised norms at a regional level and put the continent at par with the rest of the international community. These include the AU Convention on Preventing and Combating Corruption; The African Charter on Democracy, Elections and Governance; AU Convention Governing Specific Aspects of Refugee problems in Africa; Convention for the Elimination of Mercenarism in Africa; and Protocol to the African Union Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[409]

Articles 4(h) of the Constitutive Act and 4 of the Protocol to the Peace and Security Council[410] respectively give the AU the right to intervene in Member States where crimes against humanity, war crimes and the crime of genocide have been committed, for peacekeeping and conflict management purposes. The AU has thus far been involved in conflict management in several parts of Africa including the Sudan, the DR Congo, Somalia and Burundi. The Union also represents individual Member States globally and is a permanent observer at the United Nations General Assembly. Over and above military interventions, embargos and peacekeeping missions in conflict-engulfed Member States, the AU has taken a big leap towards the enforcement of international criminal law. The Union has pushed for the adoption of the Draft Protocol that gives the African Court of Justice and Human Rights jurisdiction over international crimes, including those set out in article 5 of the Rome Statute.[411]

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[406] See article 3(f) of the Constitutive Act of the African Union: adopted in 2000 at the Lome Summit (Togo), entered into force in 2001. The Union's other objective is to "Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights" and "promote peace, security, and stability on the continent".

[407] See article 4(e) of the Constitutive Act of the AU.

[408] See Protocol Relating to the Peace and Security Council (PSC) of the African Union entered into force on 26 December 2003.

[409] See AU Treaties available at: http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm

[410] See article 4 of Protocol Relating to the Peace and Security Council (PSC) of the African Union entered into force on 26 December 2003

[411] See article 46H (1) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human

These developments bring up an important question: whether article 17 envisages a situation where regional bodies/tribunals are seized of the matter over which the ICC has jurisdiction. The Rome Statute makes no mention of regional bodies' involvement as far as prosecution of international crimes is concerned. Article 17 regulates the relationship between the ICC and national courts only and does not envisage a situation where other bodies, regional and sub-regional would partake in matters concerning parties to the complementarity regime. The ICC's attempts to enforce accountability for human rights violations in Africa have to some extent, ended up putting the fledging Court at the centre of regional politics.[412] The Court is yet to deal with a situation where a regional body, like the AU, whose membership comprises of Member States to the Rome Statute, seeks to assert regional sovereignty and challenges the jurisdiction of the Court.

As noted earlier, the African Union has become increasingly hostile towards the ICC since the Court began its work in Africa. This negativity intensified after the indictment of the Sudanese president and the Security Council's failure to act on the Union's requests for a deferral of the Al Bashir case and the Kenyan cases under article 16 of the Rome Statute.[413] The Union has since preached a policy of non-cooperation with the ICC and consequently embarked on an 'African Solutions to African Problems' mission. At the 15th Extraordinary Session of the Assembly of States of the African Union in October 2013, the Assembly adopted a decision calling upon the UN Security Council to defer the cases against the incumbent heads of States: President al Bashir, the Kenyan President and vice President. Alternatively, the Union requested that the cases against the Kenyan Elite be postponed until such time when their terms in office end.[414] The Assembly emphasised immunity of sitting heads of States from prosecution, and noted that the proceedings against heads of States will "distract and prevent them from fulfilling their constitutional responsibilities, including

412 For instance, the AU's Sirte Declaration of Non-cooperation with the ICC and the Union's exercises to have the cases against the Kenyan President and vice President deferred or postponed until their term in office expires, may could undermine the Court's efforts to end impunity in the continent.

413 The AU reiterated the need to find ways of persuading the UN Security Council to defer these cases at the 18th Ordinary Summit of the African Union, held in Addis Ababa, Ethiopia, from 23-30 January, the AU Assembly adopted a decision (Assembly/AU/Dec. 397(XVIII)). The Council also emphasised that the receipt of Al Bashir by African Rome Statute Member States (the Republic of Malawi, like Djibouti, Chad and Kenya) and failure to surrender him to the ICC was in accordance with the Union's decision on non-cooperation with the ICC regarding the arrest and surrender of Al Bashir to the ICC.

414 See Decision on Africa's Relations with the International Criminal Court Ext/Assembly/AU/Dec.1-2 (Oct.2013) para 10 (ii): "That the trials of President Uhuru Kenyatta and Deputy President William Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office".

national and regional security affairs".[415] These exercises represent negative regionalism and may undermine the long-term credibility of the ICC in Africa. An analysis of the Draft Protocol and the proposed creation of the criminal chamber of the African Court below will reveal some of the dangers of negative regionalism.

3.7.1 Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights: The Proposed International Criminal Chamber of the African Court

Following the referral of the situation in Sudan by the United Nations Security Council to the ICC in 2005 and the subsequent arrest warrants against incumbent President of Sudan, al Bashir, the AU the AU adopted an "African solution to African problems" policy.[416] This policy seeks to address the civil wars and other conflict situations emanating from the continent in ways that not only guarantee justice but also ensure long lasting peace within the continent. Since the Indictment and the failed attempts by the AU to reverse the Security Council's referral of Sudan's case to the ICC, the AU has since been "disengaged" from the ICC. The aftermath of the AU's failed attempts to have charges against Bashir dropped has led to the establishment of the Criminal Section of the African Court of Justice. The merger between the African Court of Human Rights and the African Court of Justice, though the Draft Protocol was first suggested by the Group of Experts at the 12th and 13th Ordinary Session in 2009.[417] The AU then commissioned the African Union Commission to work closely with the Commission of Human and People's Rights to draft a protocol that would endow the merged court with complementary jurisdiction to try serious international crimes including crimes against humanity, genocide and war crimes.[418]

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[415] See Decision on Africa's Relations with the International Criminal Court Ext/Assembly/AU/Dec.1-2 (Oct.2013) para 4: (noting that the Assembly "REITERATES AU's concern on the politicization and misuse of indictments against African leaders by ICC as well as at the unprecedented indictments of and proceedings against the sitting President and Deputy President of Kenya in light of the recent developments in that country." The Chairman of the African Union however, stated that the intention of the AU is not to undermine the ICC but to get it to take Africa's problems "seriously". He noted that "on a number of occasions, we have dealt with the issue of the ICC and expressed our serious concern over the manner in which the ICC has been responding to Africa's considerations".

[416] See M Martin and B Burgen "The Proposed International Criminal Chamber Section of the African Court of Justice and Human Rights: A Legal Analysis" (20 March 2013) 6 Available at http://ssrn.com/abstract=2236040 or http://dx.doi.org/10.2139/ssrn.2236040 (Accessed 10 April 2012) (noting that parallel to its anti-ICC attitude, the AU has also been "seeking an 'African solution to African problems'").

[417] See *AU Assembly's Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC),* Assembly/AU/13(XIII), 13th Ordinary Session, 1-3 July 2009, Sirte, Great Socialist People's Libyan Arab Jamahiriya.

[418] See *AU Assembly's Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC),* para 5.

The African Union's Draft Protocol on the Statute of the African Court of Justice and Human Rights was drafted and presented at the 12th African Union Annual Summit in Addis Ababa, Ethiopia.[419] It was later adopted at the Meeting of Government Experts and Ministers of Justice/Attorneys in Ethiopia in May 2012. The Draft Protocol has brought about a lot of controversy about the motivation behind the proposed criminal chamber of the African Court of Justice and Human Rights.[420] The Draft Protocol creates an International Criminal Law section of the African Court on Human and Peoples Rights and merges the African Court on Human and Peoples Rights and the Court of Justice of the African Union into one tribunal.[421] The international criminal law section of the African Court is divided into three chambers: the Pre-Trial Chamber, the Trial Chamber and the Appellate Chamber.[422]

The African Court on Human and Peoples Rights was established on 25 January 2004 upon the entering into force of the Protocol on the Statute of the African Court of Justice and Human Rights.[423] The mandate of the African Court is to complement the African Commission on Human and Peoples Rights and decide cases and disputes concerning the interpretation of the African Charter[424] and Protocol and other human rights instrument ratified by Member States.[425] The AU Draft Protocol, on the other hand, seeks to expand the jurisdiction of the African Court of Justice and Human and Peoples' Rights to serious

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[419] See Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters (7 to 11 and 14 to 15 May 2012), Addis Ababa, Ethiopia Exp/Min/IV/Rev.7.

[420] See M Du Plessis "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 16 June 2013).

[421] See the preamble to the Draft Protocol on Amendments to the Protocol on the Statute of the African Court Justice and Human Rights para 4 ("RECOGNIZING that the Protocol on the Statute of the African Court of Justice and Human Rights had merged the African Court on Human and Peoples Rights and the Court of Justice of the African Union into a single Court").

[422] See article 16(1) and (2) of the AU Draft Protocol.

[423] See M Du Plessis "Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes" 2012 (235) *Institute of Security Studies Paper* 2. Available at http://dspace.cigilibrary.org/jspui/bitstream/123456789/32975/1/Paper235-AfricaCourt.pdf?1 (accessed 9 September 2013).

[424] African (Banjul) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

[425] See Article 2 of the Protocol on the African Court of Human and peoples' Rights. See also M Du Plessis " Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes" (2012) 235 *Institute of Security Studies Paper* 2 for a general discussion of the mandate of the African Court.

international crimes.[426] It endows the Court with complementary jurisdiction over genocide; war crimes; crimes against humanity; human and drug trafficking; piracy; terrorism; corruption and unconstitutional changes of government. Jurisdiction of the African Court is to be complementary to the African Union Member States' national courts and of the courts of the Regional Economic Communities.[427]

What is also interesting about the Protocol is that the definitions of the crimes in the AU Draft Protocol incorporate all the elements of the crimes proscribed by the Rome Statute, verbatim.[428] This means that that both the African Court and the ICC will have jurisdiction over the same cases. One of the key issues in relation to the complementarity regime is the inevitable clash of commitments and the possibility of Member States' forum shopping. Vesting the African Court of Justice with complementary jurisdiction over the same crimes as the ICC, poses the risk of States that are members to both African Union and Rome Statute abdicating their Rome Statute duties by resorting to regional enforcement mechanism that corresponds with their national interests. In this arrangement, it is highly possible for a powerful member of State of another country to escape prosecution at the hands of fellow diplomats; this practice has roots that run back to impunity.

3.7.2 Implications of Regional Bodies' Involvement in ICC Matters

A close analysis of the practical effects of regional bodies' involvement in ICC matters is significant as they may disturb the synergy of cooperation and jurisdictional balance that is the fulcrum of the complementarity regime. It is contended that the involvement of regional bodies in ICC matters may be fraught with wide-ranging legal, political and practical issues. Involvement of regional bodies may make way for political, legal and economic implications, nationally, regionally and internationally. For instance, the possibility of Member States abrogating their duties under the Rome Statute, due to regional obligations.

On the other hand, regional international law enforcement also has its advantages. Regional legal regimes are often more specific to the problem, politically, geographically and

[426] Over and above the African Human Rights Court's protective mandate, the Court will have complementary, original and appellate jurisdiction over international crimes committed within the territory of AU Member States.

[427] See article 46 H (1) of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court Justice and Human Rights.

[428] See articles 6 to 8 of the Rome Statute and articles 28B, 28C, 28, D and 28M of the of the Draft Protocol on the Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights.

practically than international regimes and more general and independent than national regimes.[429] This way, the regimes complement one another through their sub-systems especially when each body is acquainted with the ramifications of judicial procedures of another body. In theory, granting the AU complementary criminal jurisdiction over Rome Statute crimes would ensure accountability for these crimes as the two fora would supplement each other's mutual lacks in bringing those responsible to justice. Nevertheless, disadvantages of sectionalism outweigh advantages. There may be a situation where each body, regional or global, applies only its standards, which may not be compatible with the other body's standards, more so where they are treaty bodies and follow their substantive law.[430] For instance, in the case of the AU and the ICC, in each of the founding documents, there is no mention of the other body's role or procedural guidelines for Member States to proceed where there is a conflict of interests.

Moreover, in the case of the AU and the ICC, the issue of jurisdictional hierarchy has not been resolved because neither regime makes a mention of another. It is surprising that the AU protocol makes no mention of the ICC but it is clear that article 17 does not envision complementarity of regional bodies. The question is whether the proposed criminal chamber will have primary jurisdiction over the crimes that committed within the continent. The AU recently adopted a decision to have African States that are members to the Rome Statute to first inform and seek the advice of the African Union before referring cases to the ICC.[431] Out of 54 AU Member States, 33 are ICC members and since the two fora will have jurisdiction on the same crimes. This will create a situation of overlapping jurisdiction and a possible clash of commitments. Furthermore, the establishment of the criminal section of the African Court has crippling fiscal implications.[432]

[429] See G Hafner "Pros and Cons Ensuing from Fragmentation of International Law" (2003-2004) 25 *Michigan Journal of International Law* 849 at 856. He however warns that although these regional regimes are complementary to national and international systems, the centralized system is prone to friction. This, he argues, is due to a "diversity of applicable regulations necessitates complex arguments about which regulation to apply, and may give rise to more conflicts than were solved by the creation of each individual legal regime".

[430] Hafner 2003-2004 *Michigan Journal of International Law* 857 notes that this fragmentation of a legal system may lead to states' forum shopping, and opting for a system that best corresponds with their national interests.

[431] See Decision on Africa's Relations with the International Criminal Court Ext/Assembly/AU/Dec.1-2 (Oct.2013) para 10 (viii): "That any AU Member State that wishes to refer a case to the ICC may inform and seek the advice of the African Union".

[432] See M du Plessis "A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes"3, Available at http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-

Another key issue is that enforcement mechanisms of one body may only settle the dispute within that system and not necessarily in the universal body. This fact could undermine the homogeneity of the system of law and lead to confusion as to which system takes precedence. This is also another challenge that faces Member States to the AU and the Rome Statute. Although the founding instruments, the AU Protocol and the Rome Statute, respectively, deal with more or less the same crimes, resolution of a conflict by the AU may not meet the standard of the Rome Statute.[433] For instance, article 98(2) of the Rome Statute does not recognise amnesties. While the immunity of certain persons is believed to assist in peace negotiation and the peaceful settlement of disputes negotiations within the AU system, this area of law is obsolete.[434] African States, under the aegis of the AU, have recently adopted a declaration reiterating the immunity of heads of States from prosecution at the 15th Extraordinary session of the Assembly of States of the African Union in Addis Ababa.[435] This will undermine the quest for accountability for core crimes of since perpetrators will resort to a forum that recognises their immunities. Amnesties are not suitable enforcement mechanisms since they forego justice for peace. This approach further contributes to impunity. Concisely, the creation of the criminal chamber of the African Court as well as the involvement of other regional criminal courts may be an unnecessary duplication of the ICC.[436]

3.8 Conclusion

This chapter has analysed the complementarity regime and critically analysed the interplay between the ICC and national courts, bearing in mind the status of criminal justice systems in most African States. This was achieved through a careful scrutiny of article 17. It is generally

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international-crimes/ (Accessed 16 June 2013). (noting that "Indeed, the fiscal implications of vesting the court with criminal jurisdiction raise serious questions about the effectiveness, independence and impartiality of such a court 3 "He opines that this project will not only be expensive for the AU but also for Member States as they will have to contribute to both tribunals.

433 See B Nowrojee "Africa on its Own: Regional Intervention and Human Rights" (2004) *Human Rights Watch World Report* 1 at 4 (noting that regional interventions may ignore important components of post-conflict restructuring such as justice at the expense and undermine to establish suitable accountability mechanisms).

434 B Nowrojee "Africa on its Own: Regional Intervention and Human Rights" (2004) 1 at 4 opines that although the African Union is actively involved in conflict resolution and peace-keeping missions, regional mechanisms it employs have proved marginal in human rights violations

435 See Decision on Africa's Relations with the International Criminal Court Ext/Assembly/AU/Dec para 9 where the AU "**REAFFIRMS** the principles deriving from national laws and international customary law by which sitting Heads of State and other senior state officials are granted immunities during their tenure of office".

436 Burke-White 2003 *Texas International Law Journal* 731.

accepted that the drafters of the Rome Statute did try to strike a balance between the two competing interests: the need to preserve State sovereignty and the need to establish an independent and effective criminal justice system.[437] However, a careful analysis of article 17 of the Rome Statute and the Court's jurisprudence has revealed the lacuna in article 17. The thesis therefore found that these textual deficiencies, coupled with the Court's deviation from the textual approach to a stringent and purely technical interpretation of the admissibility criteria form the core of the strain between the Court and the AU.

The regime was found to be deficient to the extent it fails to set out a standard criminal code for all States to follow for appropriate prosecution of Rome Statute crimes. Article 17 also fails to define time periods within which a State may be considered to be unwilling or unable to prosecute. It is important therefore that the Rome Statute sets a standardized approach on issues of jurisdiction because every State will rely on its usual criminal procedures, and this has roots that run back to the problem of impunity. In the same vein, the criteria's vagueness as to what constitutes unjustified delay to prosecute presents another problem. This thesis cautions that ambiguity leaves room for politically sympathetic States to stall an ICC prosecution by initiating but not prosecuting timeously. In another extreme, the ICC's interference in the judicial affairs of a State based on a decision that the State is unwilling may amount to an affront to that State's sovereignty, as the delay may conform to that State's criminal law and procedure. These findings call for inclusion of a standardized criminal policy with clearly defined periods for prosecution will help alleviate the interpretational hurdles of the admissibility criteria.

There also seems to be a paradigm shift from the sovereignty preserving aim of the principle of complementarity to a system that makes it hard for States to prosecute in their own courts because the unwillingness criteria has become more strict through the importation of the "same person, same conduct" test. The thesis illustrated that through the test, the principle has experienced a terminological shift. It is in light of this that the thesis argues for a participatory dialogue between States and the Court in addressing the lacunae in article 17. The Court's interpretation of a State Party referral as a form of unwillingness to prosecute nationally but as evidence of willingness to bring the perpetrator to justice is flawed. The fact that the ICC endorses referrals instead of encouraging States to prosecute nationally may lead to a situation where politically sympathetic States just refer cases to the ICC and stay on the sidelines while

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[437] RB Philips "The International Criminal Court *Statute*: Jurisdiction and Admissibility *Criminal Law Reform* (1999) 10 the Netherlands: Kluwer Academic Publishers 61-85 at 64.

the Court feels the political and financial strain of an international criminal prosecution. This interpretation is too rigid and shows a trend away from a regime that prioritises national jurisdiction to a system that merely pays lip service to complementarity.[438]

To that end, the chapter analysed perceptions of the principle of complementarity by the African audience and examined concerns raised in Africa regarding the Court's execution of its complementary mandate in practice. Some of the concerns discussed above form the core of issue that the ICC will have to address to ensure its future viability. For instance, the ICC must be conscious of ethnic, cultural and political sensitivities of those involved in the conflict. This way it will foster a healthy cooperative relationship with States and encourage the relevant authorities to show greater zeal to end impunity. The Court should also encourage national prosecutions, as these will provide a long-term solution to its problems of non-cooperation. It is suggested that the Court must follow a standardized procedure for deferring to domestic courts, and that the Statute provide clear guidelines detailing out when a situation could better be handled by States. In addition, to assuage State fears that the Court discriminately investigates certain classes of offenders and ignores the contribution of the ruling government; it must extent its influence universally and investigate all crimes. The ICC should also creatively interpret the existing rules to address the deficiencies in article 17. Moreover, to repair the strained relationship between the Court and the AU, the Court has to become more nuanced in its communication with Africa, heed, and address concerns raised by African actors to avoid resentment and non-cooperation. The next chapter will discuss the role of positive complementarity and its application to State Party referrals and investigations initiated by the Prosecutor. This analysis will to help reverse the trajectory of State practice regarding this type of investigations and restore States' confidence in the Rome Statute Justice System.

[438] See Keller 2010 *Santa Clara Journal of International Law* 214, (noting that "The ICC practice to date can be interpreted to support … [the] contention that the ICC is undermining complementarity via a rigid interpretation of State action on the same case. In particular, it seems problematic that states conducting wide-ranging investigations into war crimes, crimes against humanity, and genocide might be required to include the specific enumerated act that would be chosen by the Prosecutor and/or confirmed by the PTC.").

CHAPTER FOUR

APPLYING POSITIVE COMPLEMENTARITY TO STATE PARTY REFERRALS AND THE PROSECUTOR'S *PROPRIO MOTU* INVESTIGATIONS

> "Where… there is a dernier cri, such as suggestions for the development of an international criminal law, it is advisable not to follow uncritically in the train of the enthusiastic protagonists of such an idea, but to pause and reflect on the meaning and value of it all".[439]

4.0 Introduction

After critically analysing article 17's complementarity regime and the ICC's interpretation and application of complementarity in practice in the preceding chapter, the discussion in this chapter will be centred upon a collective approach to complementarity.[440] This discussion is important because complementarity is an indispensable principle in the determination of how States could relate to the International Criminal Court. The chapter begins by analysing how application of positive complementarity to State Party Referrals and the ICC Prosecutor's *proprio motu* investigations could be a useful development in resolving the tension between the ICC and African States. By so doing, it will investigate how complementarity could be applied to ensure regular functioning of the international criminal justice system at the municipal level. This is in conformity with the language, context, object and purpose of article 17.[441] An illustrative discussion of the referral of the situation in Uganda will be undertaken. This is against the backdrop of the perennial concerns that have been raised over the ICC's interpretation and application of the principle of complementarity in practice in State party referrals.[442]

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[439] See G Schwarzenberger "The Problem of an International Criminal Law" (1950) 3 *Current Legal Problems* 263.

[440] A collective approach in this context is a positivist view to the principle of complementarity as concept that carries the weight of the Rome Statute's Justice System. It advocates a partnership between the ICC and Member States and envisions a situation where both the ICC and national judicial systems work hand-in-hand, instead of against each other. This approach argues for a criminal justice system that is centralized within the municipal system, with the ICC playing a supervisory role and assisting national judiciaries in fighting impunity for the core crimes of international concern. The philosophy behind this is that national courts have a stronger nexus to the situation and can effectively deal and timeously prosecute. See Newton 2010 *Santa Clara Journal of International Law* 164 (noting that "… a framework of positive complementarity and cooperative synergy is the only feasible way to ensure long term vitality for the ICC as an autonomous international institution").

[441] The negotiating history of article 17 shows an inclination towards effective regular enforcement of international criminal law at the municipal level, with the ICC having political leverage to offset imcompetences therein. See W Burke-White "The International Criminal Court and National Courts in the Rome System of International Justice" (2008) 49 *Harvard International Law Journal* 49 at 54.

[442] Some scholars have argued that the ICC's strict interpretation of complementarity has shifted from the letter of article 17. See Newton 2010 *Santa Clara Journal of International Law* 163. He opines that the interpretation of complementarity in practice has shifted from "a tone of cooperation and consultation" to one of competition for jurisdiction. See also Keller 2010 *Santa Clara Journal of International Law* 214 (noting, "it seems problematic that states conducting wide-ranging investigations into war crimes, crimes

The Pre-Trial Chamber in *Prosecutor v. Katanga And Ngudjolo*[443] has interpreted a State Party Referral of a case to the ICC as indicia of a State's unwillingness to prosecute nationally, but of its willingness to bring perpetrators to justice before the ICC. There is a worrying trend in State referrals; the very States that voluntarily refer their situations to the ICC challenge their admissibility before the Court at some later stage.[444] Similarly, the jurisprudence of the Court proves that complementarity considerations have been more geared towards ICC prosecutions as opposed to national prosecutions. This chapter will therefore carry out a preliminary consideration and investigate how a collective approach to complementarity could help mediate the imperatives of international justice and sovereignty while alleviating the tension between the ICC and African States. To tie this up, the chapter will also draw lessons from the European law concept of subsidiarity as this principle is parallel to complementarity and unlike article 17, clearly sets out a standardized procedure for deferring to domestic courts. It will then scrutinize the Stocktaking Exercise adopted at the Review Conference on the International Criminal Court held in Kampala, Uganda. The Stocktaking Exercise advocated for positive complementarity and its analysis will positively enrich the discussion at hand.

4.1 The Concept of Positive Complementarity

At the ICC Chief Prosecutor's swearing in ceremony in 2003, the then incumbent, Mr. Luis Moreno-Ocampo stated that lack of cases before the ICC, because of positive complementarity and not presence thereof, would be a measure of the Court's success.[445] However, it has been argued in some quarters that ICC's deferral of every case to national judiciaries would undermine the very existence of the Court.[446] A stringent application of

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against humanity, and genocide might be required to include the specific enumerated act that would be chosen by the Prosecutor and/or confirmed by the PTC").

[443] See *Prosecutor v. Katanga And Ngudjolo*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213-tENG, 16 June 2009 para 77. The Trial Chamber found that a state may be declared unwilling where it "chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done".

[444] There have been four State party referrals of cases to the ICC, from Uganda, the DR Congo, Cote d'lvore and the Central African Republic. The government of Uganda referred their situation to the ICC but later challenged the admissibility of the cases before the ICC claiming they are in a position and willing to prosecute the perpetrators nationally.

[445] See *Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the ICC* Mr. Luis Moreno-*Ocampo* (16 June 2003), available at http://www.icc-cpi.int/otp/otp_ceremony.html. 2 (noting that "as a consequence of complementarity, the number of cases that reach the Court should not be a measure its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."

[446] See B Broomhall *International Justice and the International Criminal Court, Between Sovereignty and the Rule of Law* (2004) 68 (noting that to have required the Court to defer to national courts at every step would have crippled the Court and "tarnished its legitimacy".

complementarity, which views absence of cases before the ICC as evidence of the proper implementation of article 17 within national legal system, is against the letter of the principle of complementarity.[447] Where a State is willing to prosecute genuinely, the ICC should only get involved to ensure that that the State in question does its best to prosecute to the extent required by the Rome Statute. The very impetus for the ICC was to offset national judicial incompetence to prosecute the most serious international crimes.[448] Therefore, positive complementarity does not foreclose the jurisdiction of the Court where States fail to give provisions of the Rome Statute full weight and effect.

At the 8th Session of the Assembly of States Parties in New York in March 2010, "positive complementarity" was defined as "all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute…in capacity building, financial support and technical assistance…" without actively involving the Court.[449] The paper drafted by the Bureau of the Assembly of States Parties, and appended to the Resolution on the Review Conference, emphasised that the role the Court should play in all this should be minimal due to Court's irreducible budgetary constraints.[450] This view differs from one by the OTP in 2003; the paper shifts the burden of helping build capacity of national courts from the Court to State parties and civil society.[451] However, if the Court plays a supervisory role over national prosecutions, as opposed to being a "development agency" it could help national authorities show greater zeal in the prosecution of the Rome Statute's crimes.

From the foregoing, the term "positive complementarity" may be defined as a concept that seeks to give effect to the object and purpose of article 17, that the ICC exercise its jurisdiction only where states are either unwilling or incompetent to genuinely prosecute

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[447] See J Holmes "Complementarity: National Courts *versus* the ICC" in A Cassese *et al* (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 667 (arguing that if states effectively exercise their jurisdiction, and prosecute the crimes listed in article 5 of the Rome Statute, the Court "will not be seized of any cases".

[448] See J Holmes "Complementarity: National Courts *versus* the ICC" in A Cassese *et al* (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 667. He also quotes Ambassador Phillippe Kirsch stating that: "It is the essence of the principle of complementarity that if a national judicial system functions properly, there is no need for the ICC to assume jurisdiction".

[449] See Review Conference Resolution ICC-ASP/8/Res.9, adopted at the 10th Plenary Meeting, 25 March 2010, Appendix para 16.

[450] See Appendix of the Review Conference Resolution ICC-ASP/8/Res.9 adopted at 10th plenary meeting, (25 March 2010) *"Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap"*. Para 4 states that the ICC is not a development agency.

[451] See *Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the ICC* Mr. Luis Moreno-*Ocampo* (16 June 2003), available at http://www.icc-cpi.int/otp/otp_ceremony.html

those responsible.[452] This concept is based on a "presumption in favour of municipal judicial action"[453] unless there is a clear case of incompetence. It fundamentally requires that the ICC defer to national judiciaries while encouraging and facilitating national prosecutions of the core crimes. It is however, submitted that the Court must be diligent in executing its mandate and only assert its jurisdiction where there is a clear case of incompetence. Similarly, where states voluntarily defer cases to the ICC, the ICC has to satisfy itself that the case in question meets the criteria in article 17, that the State is indeed unwilling or unable to prosecute the core crimes nationally.

4.1.1 The Establishment of a Healthy Cooperative Synergy between the ICC and States

Moreover, as a pivotal guiding principle of the ICC justice system, a positive approach to the principle of complementarity would require the Court, in its quest to help states prosecute international crimes according to the letter of article 17. This is predicated on the Court's mandate to enforce the rule of law where states fail to do so. The Court could use its supranational power, encourage and monitor national prosecutions to ensure accountability for grave breaches of international human rights law, rather than compete with national courts for jurisdiction.[454] The Court may also need to be actively involved in certain special cases that require the expertise lacking within the prosecuting State through a division of labour where it becomes necessary. This approach will foster a dialogue between the ICC and states and while preserving State sovereignty, and ensure the effectiveness of the international criminal justice system.

Once the State authorities feel in control of the judicial process, this will foster a healthy synergy between the Court and domestic judiciaries. This will help both forums implement

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[452] See P Akhavan "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court" (2005)99 *American Journal of International Law* 403 at 413. He notes that on one hand, a negative interpretation of article 17 would assume that the role of the ICC is to replace national trials where states are found to be either unwilling or unable to prosecute. On the other hand, a positive interpretation would assume that article 17 limits the Court's jurisdiction to those cases where there is a conflict of jurisdiction between the ICC and national courts. See also Burke-White 2008 *Harvard International Law Journal* 56, (noting that the positive approach to complementarity "utilizes the full range of legal and political levers of influence available to the Court to encourage and at times even assist national governments in prosecuting international crimes themselves").

[453] See M Newton "The Quest for Constructive Complementarity" University of Vanderbilt Law School Public and Legal Theory Working Paper Number 10-16 (April 6, 2010). See also C Stahn and M El Zeidy (eds) *International Criminal Court and Complementarity: From Theory to Practice* (2011) 14.

[454] See Luis Moreno-Ocampo, Prosecutor of the ICC, Statement of the Prosecutor to the Diplomatic Corps (Feb. 12, 2004), available at http://www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf, (accessed 10 July 2013). He advocated for a positive approach to complementarity "rather than competing with national systems for jurisdiction, we will encourage national proceedings wherever possible".

and execute strategies that offset mutual inadequacies in either institution, the ICC will make sure perpetrators are punished and the States will cooperate. Considering the current state of affairs between the ICC and the African States, the AU 2009 declaration of non-cooperation, and the Union's general hostility[455] and African State Parties' failure to apprehend the President of the Sudan, Al Bashir, it is necessary for the ICC to reconsider its approach to complementarity.[456] Similarly, while other African countries like Botswana, South Africa, Chad and Benin pledged their commitment to the ICC's request to apprehend Bashir, Kenya however, publicly invited him to the Darfur Crisis Conference held in March 2010. This policy does not suggest a complete deferral to all States, a notion that would undermine the very existence of a clearly indispensable institution. It encourages a participatory dialogue between the Court and States that will result in a harmonious relationship. It is however, regrettable that not all States will be politically willing or able to prosecute the crimes in articles 6 to 8. However, States that honour their international duty to prosecute and have a stronger nexus to the cases should be given a chance to prosecute.

Essentially, this notion requires that national courts be given primacy over the crimes defined by the Rome Statute with an aim to ensure regular enforcement of international criminal law through a more resourceful system. Accordingly, complementarity is not to be merely applied as a procedural requirement before the ICC admits cases but as a concept, that encourages domestic prosecution and helps harness a constructive relationship between the ICC and States. In this fashion, complementarity will operate in such a way that ICC intervention will only be exceptional – only in cases where no proceedings have been conducted or a State has initiated an investigation but there is evidence of malice. This way, the ICC will not only be influential in the face of actual prosecutions before it. It could steer the national criminal justice system towards genuine investigatory and prosecutorial processes through its political leverage and power to pronounce on the incompetence thereof.[457]

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[455] See Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII) Assembly/AU/Dec.245(XIII) Rev.1 Page 2 para 10 provides: "… 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 El Bashir of The Sudan".

[456] M Du Plessis *The International Criminal Court that Africa Wants* (2010) 17.

[457] See Burke-White 2008 *Harvard International Law Journal* 54 (noting that under a proactive complementarity policy "the ICC would cooperate with national governments and use political leverage to encourage states to undertake their own prosecutions of international crimes").

Michael Newton supports this approach and suggests that in order to preserve the constructive "cooperative synergy" that complementarity seeks to establish, the principle should be viewed not as empowering the ICC to wrest specific cases from the jurisdiction of national courts but as restrictive one.[458] He argues that the restrictive nature of the principle is borne by the operational language of article 17 that limits the Court's jurisdiction to cases that do not meet the criteria therein.[459] That is, complementarity should be used to encourage national prosecution of international crimes in willing and able states, or states that can, with little technical assistance, meet the prosecutorial requirements of the Rome Statute. This way, the Court will pronounce upon the judicial inadequacies of national courts and prosecute only after though factual inquiries and judicial findings have been made into the admissibility of a case. William Burke-White also advocates a similar policy termed "proactive complementarity".[460] He argues that in order to bridge the gap between the Court's mandate and its limited resources, complementarity should engender a partnership between the Court and States, maintain a positive relationship of joint forces geared towards effective prosecution of the crimes that plague the international community.[461]

In the same vein, this notion requires that the ICC stand on the sidelines and motivate States that have a closer connection to the case and are resourceful. The ICC is to use its political leverage as a last resort, where there is evidence of incompetency. This approach however will be viable in situations where the State in question is willing to administer the ends of justice. For instance, it would be difficult for the ICC Prosecutor to assist a state that does not recognise the Court's authority. Considering the trajectory of State practice regarding State Party Referrals, where states have in the past self-referred cases to the ICC only to challenge their admissibility, adoption of the positive complementarity policy will help prevent a backlog of cases at the Hague through encouraging national prosecution of the core crimes and best serve the ends of justice.

It is against this backdrop that it is argued that application of a policy of positive complementarity to state party referrals and the Prosecutor's *proprio motu* investigations will help strengthen and promote the effectiveness of international criminal justice processes at

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458 See Newton 2010 *University of Vanderbilt Law School Public and Legal Theory Working Paper* 8.
459 See Newton 2010 *University of Vanderbilt Law School Public and Legal Theory Working Paper* 8.
460 Burke-White 2008 *Harvard International Law Journal* 54.
461 See Burke-White 2008 *Harvard International Law Journal* 56. He advocates an IC C that uses its influence and power to encourage and empower states to carry out national prosecutions in their own courts.

the national level. This could help lessen the tension between the Court and African states. Furthermore, the sad reality is that the ICC as a supranational judicial body has practical and fiscal limitations and can only handle a few cases. In the end, this approach seeks to enhance the Court's limited resources and ensure accountability for genocide, war crimes, aggression and crimes against humanity, by encouraging a state that has a stronger link to the case in question to prosecute.

4.2 Applying Positive Complementarity to State Party Referrals (Self-Referrals)

The ICC's complementary jurisdiction may be triggered by one of the three ways laid down in article 13 of the Statute. It provides that the Court has jurisdiction over a situation that has been referred to it by a State party (self-referrals);[462] or where the United Nations Security Council has transmitted a request to the Court to investigate a situation, pursuant to Chapter VII of the UN Charter.[463] Article 13 also gives the Prosecutor power to initiate an investigation *proprio motu* in a situation when he/she has reasonable belief that the core crimes proscribed by the Statute have been committed therein.[464] In terms of article 14 of the Statute, a State Party may refer its situation to the Court for investigation and/or prosecution where there is evidence that a national of that State has committed crimes within the Court's jurisdiction or the alleged crimes have been committed within that state's territory.[465] The wording of article 13(1) and 14(1) clearly indicate that the State may refer a situation as opposed to specific cases to the Court.

Since the Court became operational, there have been three State Party referrals in terms of article 14 of the Statute. First, in December 2003, the Ugandan government referred the situation in Northern Uganda regarding atrocious crimes committed during an internal conflict between the Ugandan government and the Lord's Resistance Army (LRA) to the

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[462] See article 15(1). It provides that a State Party may refer a situation in which the crimes under the Court's jurisdiction have been committed, with all the necessary documentation proving that crimes within the ICC's jurisdiction have been committed.

[463] Pursuant to its Chapter VII powers under the UN Charter, the United Nations Security Council may refer a situation to the Court where crimes set out by article 5 of the Statute have been committed. See article 13 (b) in this regard. The Security Council is the guardian of international peace and security and as such, has the power to refer any cases where crimes that threaten international security and order to the ICC for prosecution.

[464] See article 13, it gives the ICC Prosecutor the discretion to initiate investigations into situations where she has reasonable belief that crimes within the jurisdiction of the Court have been committed.

[465] See Article 14 of the Rome Statute.

ICC.[466] The Prosecutor formally opened an investigation into the matter in July 2004. Second, the Democratic Republic of Congo also referred the situation in the Ituri region of the country to the ICC in April 2004, because, among others, the authorities were unable to apprehend the named suspects.[467] The Office of the Prosecutor initiated a formal investigation on 23 June 2004.[468] Third, the government of the Central African Republic also referred the post-election violence situation in CAR to the ICC on 22 December 2004. The Prosecutor opened an investigation on May 22 2007, investigating, among others, the Congolese, Jean-Pierre Bemba Gombo for crimes against humanity. It is interesting that these States cited failure to apprehend suspects as indicia of their inability to prosecute, yet in all sense it is practically more difficult for the ICC to apprehend such suspects. Even more disturbing is Uganda's subsequent attempt to have the ICC defer its cases merely because they have located one of the Suspects.

Even in cases of a self-referral, the Rome Statute requires the ICC Prosecutor to determine the admissibility of the 'case' before the Court prior to embarking on an investigation. This is in line with the complementarity principle that requires that before the ICC can exercise its complementary jurisdiction, the State concerned be shown to be unwilling or unable to prosecute locally. To further safeguard a State's primary right to prosecute international crimes against an overweening prosecutor; article 18(2) requires the State concerned to respond with its investigation within a month where a State Party has referred a case to the Court. [469] Meanwhile, the State concerned is supposed to continue with its investigation unless the Prosecutor presents evidence that renders the State investigation significantly lacking.[470] In a carefully balanced fashion, the Rome Statute emphasises the primacy of domestic jurisdiction over the core crimes and domestic judiciaries are regarded the default forum. This is evident in the language of article 18. It requires that the ICC Prosecutor's investigation be on hold while the domestic authorities continue with their investigation. This rule applies even in cases where the case has been referred to the ICC and the case meets the admissibility criterion.

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[466] See generally P Akhavan "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court" (2005) 99 *The American Journal of International Law* 405-406.
[467] See B Olympia and S Sengeeta "Realising the Potential of the ICC: An African Experience" (2006) 6 *Human Rights Law Review* 499 at 521.
[468] See Olympia and Sengeeta 2006 *Human Rights Law Review* 521.
[469] See article 18(2) of the Rome Statute.
[470] See Article 18(2).

4.2.1 The State Party Referral Provision: Article 14 of the Rome Statute

The question of when and how the ICC would exercise its jurisdiction was among the carefully negotiated provisions by States during the Rome Conference of Plenipotentiaries. As one of the three ways in which the Court's jurisdiction may be triggered, a State Party referral has been a controversial subject of legal scholarship.[471] Kress argues that the drafters of the Rome Statute did not envisage a State Party referral in the fashion it has unfolded in the cases of Uganda, the DR Congo and the Central African Republic, all of which were self-referred to the ICC by the respective States.[472] This argument emanates from the negotiating history of the provision and the much debated question whether a self-referral equates a waiver of complementarity.[473]

An analysis of the drafting history of article 14 shows that it was based on the assumption that the territorial or nationality State, having a stronger nexus to the situation, would normally exercise jurisdiction over crimes committed within its territory. In line with State's insistence upon giving the ICC jurisdiction only over exceptional cases, it was envisaged that a State Party's voluntary surrender of its jurisdiction by way of a referral of the situation to the Court would be rare, if not improbable. However, State practice regarding referrals has taken on a different direction: so far the bulk of the ICC docket is made up of self-referred cases from the DR Congo, Uganda, the Central African Republic and Cote D' Ivoire. While paragraph six of the preamble to the Rome Statute recognises and emphasises the duty of States to exercise their jurisdiction, it would seem that a state party referral was offered in the alternative. This way, a territorial State passively exercises its duty by ensuring that perpetrators of the core crimes are punished, be it by the Court or the State itself.

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[471] C Kress "'Self-Referrals' and 'Waivers of Complementarity' Some Considerations in Law and Policy" (2004) 2 *Journal of International Criminal Justice* 944 at 945. He notes that the evolving practice of referrals of cases to the ICC by States that would otherwise be expected to exercise territorial jurisdiction over them differs from what was envisaged by drafters of the Rome Statute as it was reasonably expected that States would rather prosecute nationally than have the Court do so on their behalf. He says the Drafters thought the idea of a State Party referral would be "as rare as are state complaints under international human rights instruments". See also W Burke-White and S Kaplan "Shaping the Contours of Domestic Justice, the International Criminal Court and an Admissibility Challenge in the Ugandan Situation" (2009) 7 *Journal of International Criminal Justice* 257 at 259 (noting that "Such self-referrals were not generally contemplated during the drafting of the Statute").

[472] See Kress 2004 *Journal of International Criminal Justice* 944. He notes that negotiators of the Rome Statute assumed that state party referrals would be rare exceptions: "as rare as are state complaints under international human rights instruments".

[473] See Kress *Journal of International Criminal Justice* (2004) 945, (noting that "the evolving practice in question which…be referred to as one of *self-referrals* and, possibly, one of subsequent *waivers of complementarity*"). See also TA Muller and I Stegmiller "Self-Referrals on Trial - From Panacea to Patient" (2010) 8 *Journal of International Criminal Justice* 1267-1294.

Another equally important question is whether, given the Court's limited resources, it is tenable for a state that is "able" to conduct a prosecution to surrender voluntarily its case to the authority of the ICC pursuant to article 14.[474] Article 14(1) of the Rome Statute provides:

> "A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes."[475]

The referral of a situation to the ICC has often been called a "self-referral" because the territorial state on whose soil the crimes within the Court's jurisdiction have been committed voluntarily referred the situation. The negotiators at the Rome Conference assumed State Party referrals would be a rare occurrence in the jurisprudence of the Court, and delegates did not envision a situation where the territorial state would hand its citizens to the authority of the ICC.[476] However, the first three situations before the Court were self-referrals. These were pursuant to article 14 of the Rome Statute.

Article 14(2) on the face of it, authorises a State Party to the Rome Statute to refer a situation to the ICC where the crimes listed in article 5 of the Statute have been committed. Although article 14 does not expressly provide for a territorial State referral of its situation to the ICC, the Court's practice has mirrored a situation where the territorial state refers its cases to the Court. The general understating is also that a State Party referral is exercisable by a State with a direct link to the case in question, for instance, the territorial State. An interesting question is whether it is tenable, as a matter of law and policy, for a State to have the unrestrained freedom to refer a case to the ICC and later purport to withdraw its referral based on the primacy of domestic jurisdiction. Against the background of customary international law duty of States to prosecute, which is reiterated in paragraph six of the Preamble to the Statute, it is hard to reconcile this interpretation of article 14 with standard treaty practice.[477] In terms of international legal policy, a State has to abide by its treaty obligations.[478] It is for this reason that the author finds the referral provision poses a risk of

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[474] This question is motivated by Uganda's referral of its situation to the ICC and its subsequent attempted withdrawal of the referral. Closely linked to this is whether a state's referral of a situation amounts to a waiver of complementarity.

[475] See article 14(1) of the Rome Statute. Article 13(a) also provides that the ICC will have jurisdiction where a situation has been referred to it by a state and crimes within the Court's jurisdiction have been committed.

[476] See Kress 2004 *Journal of International Criminal Justice* 944.

[477] Treaty practice requires that a state satisfy its treaty obligations and not cite political reasons as excuses to abdicate its duties.

[478] See article 26 of the Vienna Convention on the Law of Treaties (entered into force on 27 January 1980) UN Doc. A/CONF. 39/27. *International Legal Materials*, (1969) 679-735 (hereafter cited as Vienna Convention

States abdicating their duty to prosecute international crimes to the ICC for political convenience.

4.2.2 Implications of a State Party Referral

Considering State sensitivities when it comes to their internal affairs and the fact that the territorial state has the closest link to crimes committed within its territory, referral of a situation to the ICC raises complex legal issues. For instance, whether an unrestrained right of a state to refer cases to the ICC does not defeat the purpose of complementarity: that the ICC should only intervene in exceptional circumstances. In another vein, State party referrals of every case to the ICC will potentially undermine the expeditious trial of those accused of international crimes. Regarding the legality of a referral of a case by a State that has jurisdiction and a duty to prosecute, the then ICC Prosecutor stated that there are cases where referral of a situation to the Court is the appropriate course of action.[479] For instance, where the State is engulfed and incapacitated by the conflict that a national prosecution would not serve the ends of justice. In this case, the Prosecutor noted that the State in question and the ICC would work together to share the burden. Furthermore, both the Court and the State work together to prosecute, however, the proceedings will be international.[480] It follows therefore, that where the State's judicial system is inoperative due to insurgencies, it may be desirable for a case to be handled by the ICC and not a local court, for reason of the unavailability or inadequacy of the judicial process in the State in question. However, even in such cases, the ICC has to be certain local proceedings will not yield the desired results and that only an ICC prosecution could supplement the incompetence of the State in question.

While a self-referral may seem, on the face of it, to be a legal concern, it raises the question of its proper application. An unrestrained right of a state to refer a case to the Court could in the long run only catch up with the Court's limited resources and practicality problems. A state party referral may as well be influenced by the need on the part of the referring state to escape the political pressure or handling international cases and/or to escape fiscal

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on the Law of Treaties). It provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". The third preambular paragraph of the Vienna Convention on the Law of Treaties also emphasizes the principles of free consent and of good faith and the *pacta sunt servanda* rule.

479 See *Paper on Some Policy Issues before the Office of the Prosecutor* ICC-OTP September 2003 para 5 (noting: "There may be cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach").

480 See *Paper on Some Policy Issues before the Office of the Prosecutor* ICC-OTP September 2003 para 5.

implications of prosecuting such cases. In the same vein, a state party referral is also prone to abuse by the government that seeks to "selectively" hold its opponents accountable while it is in itself responsible for certain crimes.[481] For instance, in the Ugandan referral, there were concerns over the symmetry of the referral as it only covered mass atrocities committed by LRA leaders when there was supposedly evidence implicating the ruling government.[482] Although the Prosecutor has adopted an approach that ensures symmetry, by investigating not only the named suspects but also the whole situation,[483] there is a real danger of the authorities downplaying evidence that could implicate them.

Owing to State practice regarding self-referrals, it would be constructive for the ICC to apply the principle of complementarity to encourage national prosecution even where a state has referred a case citing inability. The least the Court can do in such cases is to assess the nature of the inability and work with States to help build judicial capacity of the state in question. If national prosecution is considered a viable option as opposed to an ICC prosecution, the State in question should be encouraged to prosecute. Also, since a national prosecution is regarded as the default prosecution hence the Statute's emphasis that the jurisdiction of the ICC is only complementary; a State Party Referral should not be regarded as an estoppel to admissibility challenges.[484] Instead, where a State voluntarily refers cases but later challenges its admissibility before the Court, claiming to be "able" and "willing" to prosecute, such a State should be given a chance to prosecute with the ICC exerting pressure to make sure the state prosecutes effectively as contemplated by the Statute. In this scenario, the Court will also have to determine the motivation behind the admissibility challenge and the legitimacy of the subsequent intention by the State to prosecute nationally. This will help the Court determine

[481] See Kress 2004 *Journal of International Criminal Justice* 946. Arguing that "there may be a temptation of the territorial state to proceed to what may be called a 'selective or asymmetrical self-referral' where the *de jure* government is itself party to an internal armed conflict".

[482] See K Souare "The International Criminal Court and African Conflicts: The Case of Uganda" (2009) 36 *Review of African Political Economy* 369 at 373, (noting that "The Ugandan government's counterinsurgency has also been brutal toward Acholi, as the NRA and its successor, the Uganda People's Defence Force (UPDF), have focused their use of force on destroying suspected rebel support among civilians").

[483] See Letter by the Chief Prosecutor of 17 June 2004 addressed to the President of the ICC as attached to the decisions of the Presidency of ICC the Decision of the Presidency assigning the situation in the Democratic Republic of Congo to Pre-Trial Chamber I, 5 July 2004, ICC-01/04, and the Decision of the Presidency assigning the situation in Uganda to Pre-Trial Chamber II, 5 July 2004, ICC-02/04.

[484] See Newton 2010 *Santa Clara Journal of International Law* 161. He argues that there is no provision in the Rome Statute that strips a State that has referred a case to the ICC of its right to reclaim its pre-existing jurisdiction to prosecute the case nationally subsequent to the referral. He notes "complementarity creates a regime of primary domestic jurisdiction with supranational jurisdiction exercised on an exceptional basis".

if the State in question can indeed investigate and prosecute the crimes to the extent required by the Rome Statute.

The Ugandan government, as noted above, referred the situation in their country to the ICC for reason of inability to apprehend suspects.[485] However, the government later challenged the admissibility of these cases before the ICC claiming they were not only "willing" to prosecute those responsible, but they were also in a position to hold genuine trials.[486] This case will be used as a litmus test for positive complementarity in self-referrals, to investigate how the principle may be used to help empower states to commit to prosecution of international crimes without necessarily overriding their sovereignty or compromising international criminal justice system processes. The Ugandan case represents a first state party referral, interpretation and application of the principle of complementarity by the Court.

4.2.3 The Situation in Uganda

For purposes of putting the Ugandan referral into perspective, a short synopsis of the referral and events leading up to the government's attempt to challenge the admissibility of the cases is necessary. A cursory view of the background of the conflict will also throw some light on the nature of the conflict and help determine whether Uganda was unable or unwilling to prosecute nationally. This will also help understand the motive behind the Ugandan government's decision to refer the LRA case to the ICC.

4.2.3.1 Background of the Conflict

Before delving into how application of positive complementarity to the situation in Uganda would have spun things around, a brief historical overview of the conflict that has haunted the northern region country for more than two decades, is necessary. The history of Uganda has been characterised by a series of insurgencies since the 1980s.[487] Some scholars suggest that the root cause of these conflicts is the division between the northern and southern part of the country.[488] For instance, that the northern region which was mainly a recruitment base for the

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[485] See section 4.2 in page 7 above. See also Akhavan (2005) 99*The American Journal of International Law* 405-406 for a general discussion.

[486] See also Akhavan (2005) 99 *The American Journal of International Law* 406.

[487] See Souare 2009 *Review of African Political Economy* 372. He notes that there have been many rebellions in Uganda since the 1980s.

[488] See Souare 2009 *Review of African Political Economy* 373 (noting that the insurgencies were due in part to the perceived economic marginalization of the North who unfortunately had "a history of being only

military, and which ruled the country after independence, was economically marginalised.[489] Yoweri Museveni, the then leader of the National Resistance Army (NRA) and the incumbent president of Uganda, became a President after the government of Milton Obote, a northern Ugandan, was overthrown in a 1986 coup.[490] It has been argued that Northern Ugandans perpetrated the rebellions that followed thereafter in an attempt to win back power from the South.[491]

The LRA insurgency is the most recent and protracted, and of interest to this thesis because it is the subject of an ICC referral. The LRA was born when Joseph Kony, its commander-in-chief, succeeded his cousin, Alice Auma Lakwena, the leader of the Holy Spirit Movement (HSM) and self-proclaimed prophet, in 1988.[492] Kony also claimed to have inherited Alice's spiritual powers and asserted that insurgency was an attempt to spiritually cleanse the northern region of the country and rule it by the Lord's 10 commandments.[493] This conflict was characterised by gross violations of human rights, which included acts of wilful killing, torture, abductions and conscripting of children into the rebel army, and other inhumane acts such as amputation committed against the civilian population.[494] Moreover, the crimes committed during the conflict were within the Court's jurisdiction and they included large-scale wilful killing of the civilian population; and the brutal severing of tongues, ears, lips and other limbs of the civilian population.[495] It is noteworthy that these crimes fall under the rubric of the Rome Statute's crimes against humanity and war crimes. This means that the Court had subject-matter jurisdiction over the situation in Uganda if the Ugandan government failed to investigate or prosecute genuinely. However, the Court only has jurisdiction over

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peripherally included in the economic structures and processes of the country". See also Akhavan (2005) 99*The American Journal of International Law* 405-406.

489 See A Omara-Otunnu "The Dynamics of Conflict in Uganda" in OW Furley (ed) *Conflict in Africa* (1995) 223 at 226.

490 See S Finnstrom "War of the Past and War in the Present: The Lord's Resistance Movement/ Army in Uganda, Africa" (2006) 76 *Journal of the International African Institute* 200-220 for a general discussion of the revolutions that have for decades waged in Uganda.

491 See KP Apuuli "Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda" (2005) 5 *African Journal of Conflict Resolution* 37. See also S Finnstrom 2006 *Journal of the International African Institute* 200-220.

492 See Akhavan 2005 99 *American Journal of International Law* 407.

493 See K Souare 2009 *Review of African Political Economy* 373. He notes "Kony proclaims himself a messianic prophet, declaring that he aims to overthrow the government in Kampala and rule Uganda according to the Ten Commandment". See also Waddell N and Clark P (eds) "War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention. Courting Conflict? Justice, Peace and the ICC in Africa" (March 2008) *African Affairs* 1 at 21.

494 N Waddell and P Clark 2008 *African Affairs* 21.

495 See T Nkonge "Prosecution of International Crimes in Uganda: Prospects and Challenges: A case Study of *Thomas Kwoyelo alias Latoni v Uganda"* LLB Dissertation, (June 2012) Makerere University, Kampala, 3.

crimes committed after Uganda became a party to the Rome Statute.[496] Additionally, since the crimes were systematic and large-scale,[497] the case was of the required seriousness to warrant action by the Court.[498] Uganda was both the territorial and nationality state and had primary jurisdiction to investigate and prosecute those responsible for this atrocities.

4.2.3.2 Efforts by the Ugandan Government to Investigate and Prosecute Nationally

The LRA rebellion waged for more than two decades, evidence of the government's failure to stop the rebellion and protect the civilian population. Although people from the Northern region of the Country perpetrated the LRA attacks, they were not only directed at the governmental authority of Museveni but also at the civilian population in a plan to spiritually cleanse the country. The UPDF's counter-attacks against the LRA did not yield any results as the LRA supposedly had support from Sudan.[499] In an attempt to stop the suffering, the government passed an Amnesty Bill in 1999 that was adopted on January 21, 2000.[500] This Act called upon those who partook in the hostilities since 1986 to surrender arms and stop the conflict and promised that no consequence will come of their actions in the war.[501] Although this Act sought to provide the LRA with an incentive to stop the attacks, they continued to wage war. The United Nations High Commissioner for Human Rights also criticised Uganda's decision as an encouragement of the impunity culture and as inconsistent with international norms to hold criminals accountable.[502]

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[496] In terms of article 11(1) of the Rome Statute, the ICC lacks jurisdiction *ratione temporis* over the crimes committed before the Rome Statute's entry into force.

[497] See M El Zeidy, "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* 83 at 88 (noting that between 1995 and 1998 approximately "600 people were killed in Gulu district and Lamwo County close to the Sudanese border. An estimated number of more than 10,000 children from the northern region (Gulu-Kitgum-Apac-Lira-Adjumani-Arua and Moyo) between ages 6-15 have been abducted by the LRA since 1986."

[498] See article 17(1) (d) of the Rome Statute. See also El Zeidy 2005 *International Criminal Law Review* 91 (arguing that the crimes committed by the LRA constituted serious human rights violations and were committed on a massive scale and thus amounted to the war crimes and crimes against humanity).

[499] See Akhavan 2005 *American Journal of International Law* 409. He argues that the government could not thwart the LRA because they had support from Sudan as this undermined efforts to stop the conflict.

[500] See Akhavan 2005 *American Journal of International Law* 409. See also the Amnesty Act, 2000, at <http://www.c-r.org/accord/uganda/accord 1/downloads/2000Jan_The_Amnesty_ Act.doc> (accessed 27 August 2013).

[501] Amnesty Act 2000 (Uganda). Available at http://www.c-r.org/accord/uganda/accord 1/downloads/2000Jan_The_Amnesty_ Act.doc> (accessed 11 September 2013).

[502] See UN High Commissioner for Human Rights, Report on the Mission Undertaken by Her Office, Pursuant to Commission Resolution 2000/60, to Assess the Situation on the Ground with Regard to the Abduction of Chil- dren from Northern Uganda UN Doc. E/CN.4/2002/86 (2001) paras. 12-13. Available at < http://www.ohchr.org/english/ (accessed 12 August 2013) (noting that "a blanket amnesty, particularly where war crimes and crimes against humanity have been committed, promotes a culture of impunity and is not in conformity with international standards and practice.").

Essentially, Uganda's attempt to grant immunity to those responsible for the crimes committed during the war did not only fall short end the conflict, but was also inconsistent with its duty to prosecute international crimes. In this context, it is worth noting that at this point Uganda had not ratified the Rome Statute and its attempt was not necessarily to secure international prosecution of the perpetrators but to stop the conflict as the Amnesty Act offered the perpetrators a clean slate should they cease-fire. As the atrocities continued unabated, despite counter-insurgency attempts and amnesty offers, the government ratified the Rome Statute on June 14, 2002.[503] However, despite several diplomatic attempts to stop the bloodshed, the conflict resumed in 2005.[504] Seeming to have exhausted all the viable options, excluding national prosecution that was feared would be potentially biased; ideas of referral of the ICC emerged.[505] Akhavan argues that referral to the ICC was the only viable option at the time since the ICC had political leverage by way of international cooperation in order to gain access to the suspects in Sudan.[506]

4.2.3.3 Referral to the Situation to the ICC and its Aftermath

Having failed to put an end to the conflict, the Ugandan government referred the situation to the ICC in confidence, and the Prosecutor kept it secret for seven months.[507] The referral called upon the ICC Prosecutor to investigate mass atrocities committed by the LRA in Northern Uganda, noting that the Ugandan government had failed to apprehend those responsible.[508] After the government referred the on-going conflict to the ICC, an investigation was initiated and in October 2005, five unsealed arrest warrants were issued against LRA leaders:[509] Joseph Kony; Vincent Otti; Okot Odhiambo; Dominic Ongwen and

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503 See ICC Press Release, 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC', ICC20040129-44-En, 29 February 2004 (accessed 27 August 2012).

504 See "Uprooted and Forgotten – Impunity and Human Rights Abuses in Northern Uganda" (2005) 17 (12A) *Human Rights Watch* 1 at 2 Available at http://www.hrw.org/reports/2005/uganda0905/uganda0905.pdf. (Accessed 9 October 2013) (Noting "…the failure of the Ugandan government to address the concerns of the people of northern Uganda has been especially troubling"). See also Akhavan 2005 *American Journal of International Law* 410. He notes that the 1999 Sudan-Uganda Non Intervention Agreement between Uganda and Sudan meant that Sudan was no longer justified in Law to continue aiding the LRA. However, Sudan continued to harbour them.

505 See Akhavan 2005 *American Journal of International Law* 405 (noting that "the imprimatur of international criminal justice, sought through the referral to the ICC, was a means of thrusting this long-forgotten African war back onto the international stage").

506 See Akhavan 2005 *American Journal of International Law* 411.

507 See ICC Press Release, 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC', ICC20040129-44-En, 29 February 2004 2004 (accessed 27 August 2012).

508 K Souare 2009 *Review of African Political Economy* 374.

509 See K Souare 2009 *Review of African Political Economy* 374.

Raska Lukwiya.[510] The charges against the named suspects were among others, crimes against humanity and war crimes, namely, sexual enslavement; mutilation, murder, rape, forced abduction.[511] Kony himself was charged with 33 counts of crimes against humanity. The LRA continued to wage war even after the warrants of arrest had been issued.

The Ugandan government continued its attempts to stop the conflict through a series of peace negotiations in Juba, Sudan in 2006.[512] The Juba Peace Agreement's agenda was cessation of the hostilities and presented a comprehensive solution to the conflict, which comprised a formal and informal accountability and reconciliation plan. The final 2007 Peace and Reconciliation Agreement between the Ugandan government and the LRA leadership specified the reconciliation and accountability framework: this included the establishment of the War Crimes Division of the High Court that would prosecute those who were most responsible for the crimes committed during the conflict.[513] The agreement also provided for other non-penal justice mechanisms such as truth-telling commissions and other ceremonial transitional justice mechanisms for crimes of a lesser magnitude.[514] However, a few days before the signing of the agreement the ICC Prosecutor delivered a public statement stating that the warrants against the LRA suspect would not be withdrawn.[515] The prosecutor

[510] See "*President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC*", The Hague, 29 January 2004, available at, <http://www.icc-cpi.int/php/index.php> [hereinafter Ugandan Referral]. See also A Arief *et al* "International Criminal Court Cases in Africa: Status and Policy Issues" (7 March 2011) *Congressional Research Service* 21. Available at http://www.fas.org/sgp/crs/row/RL34665.pdf (accessed 9 September 2013).

[511] See Arief A *et al* "International Criminal Court Cases in Africa: Status and Policy Issues" (7 March 2011) *Congressional Research Service* 21. Available at http://www.fas.org/sgp/crs/row/RL34665.pdf (accessed 9 September 2013).

[512] See Annexure to the Agreement on Accountability and Reconciliation Between the Lord's Resistance Army/Movement and the Government of Uganda, 19 February 2008 [hereinafter February 2008 Agreement], available at http://www.iccnow.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf. See also KS Kasande "Centring Women's Rights in Transitional Justice Processes in Northern Uganda: FIDA-Uganda's Experience" African Transitional Justice Research Network Workshop 1 at 4. Available at http://www.transitionaljustice.org.za/docs/2010workshop/3_Kasande.pdf (accessed 02 October 2013).

[513] See Clause 7 of the Annexure to the Agreement on Accountability and Reconciliation of 2007.

[514] See W Burke-White and S Kaplan "Shaping the Contours of Domestic Justice, the International Criminal Court and an Admissibility Challenge in the Ugandan Situation" (2009) 7 *Journal of International Criminal Justice* 257 at 258 (noting that the latest round of peace talks in June 2007 contemplated trying the LRA offenders in Uganda "with alternative sentences including the possible use of ceremonial traditional justice mechanisms").

[515] See L. Moreno-Ocampo, Prosecutor of the International Criminal Court, Address at Building a Future on Peace and Justice International Conference Nuremberg 25 June 2007 available at http://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf. 3-4 (Accessed 10 October 2013). (Stating that "As the Prosecutor of the ICC…my duty is to apply the law without political considerations…for each situation in which the ICC is exercising jurisdiction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust to the situations on

emphatically stated that arrest warrants are decisions taken by the judges in accordance with the law, and they must be implemented without being swayed by state politics**.** The Prosecutor called upon states not to replace the ICC justice system with their peace initiatives but to commit to their Rome Statute obligations. If anything, the conflict resolution mechanisms should be complementary to the international criminal justice system already underway. Consequently, the LRA commander-in-chief refused to sign the agreement at the last minute, claiming that his decision was based on the government's failure to persuade the ICC to withdraw the charges against him and his commanders.[516]

Given that the Ugandan situation was the first case to be prosecuted by the fledgling court, and was also the first state party referral, it has been argued that it served as a test case for the young Court.[517] This referral presented a good opportunity for the ICC to hear its first case and for States to demonstrate their commitment to the fight against human rights abuses within the continent. After the Prosecutor decided to investigate the Ugandan situation, he flatly stated that the Ugandan situation was admitted on the because of the gravity of the crimes committed by the LRA therein. The prosecutor also noted that all sections of the conflict were investigated and that the crimes committed by the UPDF were not of sufficient gravity to warrant further action by the Court.[518]

4.2.3.4 Was Uganda "Unable" or "Unwilling" to Prosecute Genuinely?

The referral and the Prosecutor's selection of suspects have raised a few questions in some quarters. For instance, the absence of charges against the UPDF, the other party to the conflict, was seen as a sign of the Court's lack of impartiality in selecting its cases as they

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the ground, to indict or withdraw indictments according to short term political goals. We also hear officials of States Parties calling for amnesties, the granting of immunities and other ways to avoid prosecutions, supposedly in the name of peace; we can hear voices portraying the ICC as an impediment to progressing further with Peace processes…Arrest warrants are decisions taken by the judges in accordance with the law, they must be implemented."

[516] See K Kasande "Centring Women's Rights in Transitional Justice Processes in Northern Uganda: FIDA-Uganda's Experience" African Transitional Justice Research Network Workshop 1 at 4. Available at http://www.transitionaljustice.org.za/docs/2010workshop/3_Kasande.pdf (accessed 02/10/2013).

[517] See Souare 2009 *Review of African Political Economy* 377.

[518] See also Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties (Nov. 28,2005), at 2 ("In Uganda, 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 Army (LRA) was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we must start with the LRA."). "The criteria *[sic]* for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA"

were also alleged to have had a hand in the conflict.[519] Furthermore, the timing of the referral seemed to be convenient for both the ICC and the Ugandan government.[520] For the Ugandan government, referral to the ICC was seen as a political manoeuvre to get rid of the opposition as the referral asymmetrically focussed on the LRA.[521] These criticisms and the Ugandan government's subsequent attempts to withdraw the referral raise several questions**.** The first question that merits examination is whether Uganda was "unable" or "unwilling" to prosecute at the time of the referral. Secondly, does a State referral of a case to the ICC waive the right to challenge admissibility of the case before the ICC? Equally important is whether it is tenable for a State to refer to the ICC only to try to withdraw its referral at a subsequent stage.

It must be noted at this point that Uganda is not only a State Party but also a territorial and nationality State. Additionally, that Uganda was found unable to prosecute genuinely at the preliminary review of the situation based on its failure to apprehend the suspects.[522] For instance, although a party to the Rome Statute that clearly does not recognise amnesties,[523] the Ugandan government promised blanket immunity to those who were responsible in order to lure them to the negotiation of the peace agreement.[524] Furthermore, no real domestic proceedings investigatory or otherwise were in motion against the named suspects before the referral. In any event, the traditional justice mechanisms that were in use in the country in tribal courts and truth commissions do not meet international standards.[525] Over and above this, no admissibility challenge was brought at the situation phase, that is, prior to the

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[519] See J Sinclair "The International Criminal Court in Uganda" (2010) *Undergraduate Transitional Justice Review*: Vol. 1(5) 72 at 73. See also Waddell N and Clark P (March 2008) *African Affairs* 1 at 22, noting that the prosecutor's decision to investigate only members of the LRA "…has often been presumed to be the result of bias rather than as the consequence of the ICC's application of its criteria for case selection". See also ICC Office of the Prosecutor, Statement by the Chief Prosecutor on the Uganda Arrest Warrants (Oct. 14, 2005).

[520] See Souare 2009 *Review of African Political Economy* 377.

[521] See Souare 2009 *Review of African Political Economy* 377(noting that "the whole story of referring the LRA to the ICC was a political strategy by the Ugandan government to achieve international criminalization of the group and to gain foreign support for its military operations against the rebels").

[522] *Decision on the Prosecutor's Application for Warrants of Arrest Under Art. 58 Kony, Otti, Lukwiya, Odhiambo and Ongwen* (ICC-02/04-01/05) Pre-Trial Chamber II 8 July 2005 at para. 37.

[523] See article 98 of the Rome Statute.

[524] See N Waddell and P Clark (March 2008) *African Affairs* 23, noting that the Ugandan government proposed ways in which members of the LRA responsible for atrocities could be reintegrated into society, including thorough the *mato oput* ceremony and amnesty." However, the ICC emphasized that Uganda, as a party to the Rome Statute, had duties, and that whatever peace agreement it entered into should in no way undermine those duties.

[525] N Waddell and P Clark (March 2008) *African Affairs* 23.

identification of suspects.[526] In essence, the Ugandan situation was admissible before the ICC in terms of article 17.

Although Uganda exercised its right under article 14 of the Rome Statute, the referral and reasons thereof, and the government's subsequent interest to prosecute nationally, beg the question of why a referral to the ICC was regarded as an option then. Uganda had a better chance of locating and apprehending the suspects as compared to the ICC that has to depend on States' cooperation to apprehend suspects. However, the fact that the referral was motivated by Uganda's failure to secure physically custody of the named suspects who were suspected to be hiding in Congo seems by far the most plausible. This is interesting given States' reluctance to endorse the proposal of voluntary relinquishment of jurisdiction to the ICC during the evolving stages of the principle of complementarity.[527]

An analysis of the evolution of the principle of complementarity in the preceding chapters shows States' concerns over establishing a Court with too much power hence the insistence upon the Court's jurisdiction being merely complementary to domestic jurisdictions. Specifically, the question of states voluntarily referring cases to the ICC was raised during the 1995 *Ad hoc Committee*.[528] The question of a State Party referral being tantamount to a waiver of complementarity was discussed in passing, but a footnote with a proviso to the effect that voluntary relinquishment of jurisdiction by a State should not prejudice the admissibility criterion, was inserted.[529] The question of waiver was criticised for being inconsistent with the spirit of complementarity as the aim was to establish a complementary Court that would "in no way undermine the effectiveness of national justice systems" and

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[526] See T Allen "Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda: Courting Conflict? Justice, Peace and the ICC in Africa (March 2008) *African Affairs*. Among others, the ceremony of 'stepping on the egg', the *Nyono Tong Gweno,* and the *Mato Oput* were often used, where people confessed and some drank a bitter root, some of which were not necessarily legal.

[527] See section 2 in chapter 2 above.

[528] See Report of the Ad hoc Committee on the Establishment of an International Criminal Court, **G.A.** 50th Sess. Supp. No. 22 A/50/22 1995 para. 47.

[529] See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act (A/Conf.183/2/Add.1 1998) art. 15. The issue of voluntary referral of cases to the ICC was inserted as a footnote and left for further discussion and most of the drafts had the proviso: "The present text of article **...** is without prejudice to the question whether complementarity-related admissibility requirements of this article may be waived by the State or States concerned." However, it was never resolved in subsequent meetings.

only intervene in special cases.[530] Article 14 on the other hand, allows a state party to refer a situation over which it has jurisdiction to the ICC without any restriction.

Furthermore, the Pre-Trial Chamber in *Prosecutor v Lubanga* stated that the self-referral of a situation to the Court is consistent with the spirit of article 17 of the Statute in that the Court does not replace but complement national courts where they are found unwilling or unable to genuinely prosecute the most serious crimes of international concern.[531] However, the Court did not address the issue of whether the referring state may later challenge the admissibility of such a case when it is willing and able to prosecute. It appears from the Court's jurisprudence that once a State adopts the referral procedure, it is interpreted as the unwillingness or inability to prosecute. Therefore, a subsequent challenge of admissibility by the same State will not be entertained. This approach finds support in article 18 of the Statute that limits the State's right to challenge admissibility of "cases" at the situation phase.[532] For instance, the Ugandan government did not challenge the admissibility of its cases at this stage, and therefore lost this right. Nevertheless, Uganda could have found a reprieve in Article 18 (3), which requires the Prosecutor to defer to national judiciaries where there has been a substantial change of events, regarding the state's unwillingness or inability to prosecute.[533] In this regard, the Ugandan government will need to present evidence of its judicial and legal reforms and the location of the suspects to prove their willingness and ability to prosecute them nationally.

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[530] See Report of the Ad hoc Committee on the Establishment of an International Criminal Court, **G.A.** 50th Sess. Supp. No. 22 A/50/22 1995 para. 47-48.

[531] See *Situation in the Democratic Republic of Congo,* Decision on the Prosecutor's Application for Warrants of Arrest, Article 58 (ICC-01/04-01/07), Pre-Trial Chamber I, 10 February 2006, p. 16, par. 36.

[532] Article 18 (1) read with article 18(7), makes a distinction between a "situation" and a "case". The article gives a State a right to challenge admissibility of a "situation" in the initial stages of an investigation, that is, before the suspects have been identified. States are expected to furnish evidence that they are investigating the "situation" within one month of the Prosecutor's notice. Once suspects have been identified, the "situation' is regarded as a "case" and any admissibility challenges may be brought under article 19. See article 18(7) of the Statute. See also the Pre-Trial Chamber II's decision in the *Situation in the Republic of Kenya (Decision pursuant to Article 15 of the* ICC Statute *on the Authorization of an Investigation into the Situation in the Republic of Kenya)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-19 31 March 2010) [50]. It stated that "[a]dmissibility at the situation phase should be assessed against certain criteria defining a 'potential case' such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s)."

[533] See article 18(3) of the Rome Statute: "The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation."

Although no admissibility challenges were brought before the Court after the referral, the Ugandan government agreed to prosecute the indictees within its national courts in a Peace Agreement in 2006. The Peace agreement although never finalised, contemplated establishment of the War Crimes Division of the High Court for domestic prosecution of those who bore the most responsibility for the crimes committed during the conflict. These included the top LRA leaders that had been indicted by the ICC. Despite this, the government at the time initiated no investigatory or prosecutorial steps. However, when Uganda's intention to prosecute international crimes nationally became apparent, through the establishment of an international crimes division of the High Court of Uganda, the ICC initiated proceedings to examine the admissibility of the Ugandan cases.[534] In these circumstances, the most important question is, how can the principle of complementarity be applied in cases like this one to help assist states prosecute nationally, considering the caseload the Court is currently handling is already too much?

4.2.3.5 Positive Complementarity in the Ugandan Referral: Is a Deferral to Uganda in the Interests of Justice?

Since the intention to prosecute the LRA suspects nationally was made public in 2007, the Ugandan government has thus far made a few institutional and legal changes. Applying the policy of positive complementarity, the ICC would need to defer the cases to Uganda. However, this should only be done after the Court has made inquiries as to the ability and willingness of Uganda to hold genuine trials and if these will conform to the Rome Statute. It is essential for the ICC to rule out any political motivations behind a withdrawal of a State Party referral. When a State expresses an interest in asserting its jurisdiction even after referring the case to the ICC, the Court has to consider whether deferring to the State in question would be in the interests of justice.[535] It is imperative that the ICC ensures that the

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[534] See W Burke-White and S Kaplan "Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation" (2009) 7 *Journal of International Criminal Justice*) 257 at 258. See in particular, *Decision-initiating proceedings under Art. 19, requesting observations and appointing counsel for the Defence, Kony, Otti, Lukwiya, Odhiambo and Ongwen* (ICC-02/04-01/05), Pre-Trial Chamber II, 21 October 2008 8-9. The President of Uganda also stated that "because he (Kony) was not under our jurisdiction, we sought the assistance of the ICC. If he (Kony) signs the peace agreement and returns to our jurisdiction, it becomes our responsibility not any other party's, including the ICC" in *The NewVision:* "We can save Kony - President Museveni" 12 March 2008.

[535] It has often been argued that that the Ugandan referral was asymmetrical as it only identified suspects from the LRA when there was evidence implicating the ruling government. See Souare 2009 *Review of African Political Economy* 373 (noting that "The Ugandan government's counterinsurgency has also been brutal toward Acholi, as the NRA and its successor, the Uganda People's Defence Force (UPDF), have focused their use of force on destroying suspected rebel support among civilians").

national accountability mechanisms put in place constitute a viable and credible option to an ICC prosecution as intervention by the Court is to ensure accountability. At this stage, the Court will not be a bystander but will actively participate in the proceedings as a supervisory judicial body.

The Court must also make sure that the State's decision to prosecute is genuine and not motivated by the desire to shield the perpetrators. The Court once again has to put the State's legal system under scrutiny to establish whether the state is "able" or in a position to prosecute genuinely.[536] The State in question must not only have incorporated the Rome Statute into its legal system, its legal system must explicitly deal with the crime in question, that is, it must incorporate the ICC's body of law so that it meets the required standards for prosecution of the core crimes.[537] This argument flows from the ICC Prosecutors report to the Security Council concerning the situation in Darfur.[538] He stated that he had studied the Sudanese laws and procedure relating to the Sudanese justice system of administration of criminal justice and traditional dispute resolution systems and believed that these were not adequate to address the crimes arising out of the situation.[539]

This argument also finds support in the Appeals Chamber's decision to reject the Prosecutor's request to defer the *Bagaragaza case*[540] to the Republic of Norway, pursuant to the *ICTR*'s Completion Strategy.[541] The ICC may take lessons from the ICTR's Completion Strategy

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[536] See AY Sheng "Analysing the ICC Complementarity Principle Through a Federal Courts' Lens" (2006) 1249 *Bepress Legal Series* 1 at 7-8. Available at http://law.bepress.com/expresso/eps/1249/ (accessed 12 September 2012) (noting that the Court and States must "engage in a system of trial and error until States eventually mould their national laws" and their criminal justice system until they conform to the ICC body of law).

[537] See Statement by Ms. Patricia O'Brien Under-Secretary-General for Legal Affairs, *The Legal Counsel Seminar on International Criminal Justice: The Role of the International Criminal Court* Trusteeship Council Chamber, New York (19 May 2009) 7 available at http://untreaty.un.org/ola/media/info_from_lc/seminar_int_criminal_justice.pdf (Accessed 10 October 2013)

[538] See *First Report of the Prosecutor of the international Criminal Court, Mr Luis Moreno Ocampo To the Security Council Pursuant to UNSCR 1593 (2005*), 29 June 2005 3-4.

[539] See *First Report of the Prosecutor of the international Criminal Court, Mr Luis Moreno Ocampo To the Security Council Pursuant to UNSCR 1593 (2005*), 29 June 2005 3-4, see W Burke-White "Implementing a policy of positive complementarity in the Rome System of Justice" *Criminal Law Forum* (2008) 19 59-85 at 59.

[540] *Prosecutor v Bagaragaza*, Case No. ICTR-2005-86-R11*bis*, Decision on the Prosecutor's Motion to Refer to refer to the Kingdom of Norway (May 19, 2006).

[541] This was in accordance with the amendment of Rule 11 (*bis)* of the *Rules of Procedure and Evidence,* which gave the Tribunal the authority to transfer low or mid-level cases that are already before the Tribunal back to the national courts for investigation and/or prosecution. See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Rules of Procedure and Evidence Extraordinary Plenary Session (30 may 2006) IT/32/REV. 38 8.

procedure to ensure effective and expeditious trial of perpetrators of the most serious crimes of international concern. As noted earlier in chapter 2 section 2.3.3, *the Bagaragaza's case* concerned an accused that was charged with genocide and in the alternative, conspiracy to commit genocide. Norway's body of criminal law did not adequately address the crimes in question; alternatively, the accused would be charged under the homicide act. Accordingly, the request was dismissed because Norway was regarded in the circumstances, as "unable" to treat genocide as a serious international crime.[542] Similarly, the Court has to ensure that the core crimes are not treated as ordinary crimes within the state's legal system. It has been argued that for a State to be able to regain its jurisdiction to prosecute a case, a comprehensive and credible accountability mechanism must be in place for such a State to be able to prosecute the crimes the alleged offenders have been charged with by the ICC.[543] The State should demonstrate more than mere political intent to seize itself of prosecution.

4.2.3.6 Uganda's International Criminal Court Act No 11 of 2010

To enable its courts to adjudicate the Rome Statute crimes, Uganda incorporated the provisions of the Rome Statute into its legal system through the enactment of the International Criminal Court Act No 11 of 2010.[544] The preamble of the Act provides that the purpose of the Act is to give effect to the Rome Statute and implement the obligations assumed thereunder. The Preamble goes on to point that the Act seeks to cater for offences under Ugandan law that are also listed by the Statute. Most importantly, the preamble provides that the Act aims "to enable Ugandan courts to try, convict and sentence persons who have committed the crimes referred to in the Statute." Article 3(1) of the International criminal court Act defines a "crime" or an "international crime" as including genocide, crimes against humanity, aggression and war crimes and as crimes over which the ICC would have jurisdiction under article 5 of the Rome Statute.

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[542] See G Norris "Closer to Justice: Transferring Cases from the International Criminal Court (2010) 10 *Minnesota Journal of International Law* 204 at 211.

[543] See Statement by Ms. Patricia O'Brien Under-Secretary-General for Legal Affairs, *The Legal Counsel Seminar on International Criminal Justice: The Role of the International Criminal Court* Trusteeship Council Chamber, New York (19 May 2009) 7 available at http://untreaty.un.org/ola/media/info_from_lc/seminar_int_criminal_justice.pdf (Accessed 10/10/2013) (noting that "a mere political intent or even enacting a requisite piece of legislation that establishes a "special accountability mechanism" to investigate and prosecute those international crimes at the national level is unlikely to suffice").

[544] See the International Criminal Court Act No 11 of 2010, entered into force on 25 June 2010.

Moreover, section 25 of the Act addresses the issue of immunities. It provides that "[t]he existence of any immunity or procedural rule attaching to the official capacity of a person is not a ground for refusing a request or postponing execution of a request for surrender or assistance made by the ICC." This provision does not only do away with immunity against prosecution, it also binds Uganda to cooperate with the ICC for arrest and surrender of any person, despite immunities attaching to their capacity. Thus, by virtue of this Act, the promise of immunities to the LRA indictees would not apply if they were to be prosecuted in Uganda. Similarly, Uganda would be required to apprehend them and surrender them to the ICC for prosecution. This provision strengthens Uganda's position as far as the "ability to prosecute genuinely" is concerned. The fact that Uganda authorities have located some of the LRA leaders removes the element of inability as was shown in their letter of referral.[545]

The Act constitutes an important development in the Ugandan case as Uganda has a dualist legal system where treaties do not have force unless they are incorporated domestically by an Act of parliament.[546] It shows the government's willingness to punish those responsible for the most serious crimes of international concern. This however raises the issue of impartiality as there are allegations of selective referral,[547] the ICC would have to watch the proceedings closely to ensure that the judiciary is not only independent but also impartial to guarantee fair trials. Another interesting development in the situation of Uganda is the establishment of the International Crimes division of the High court, which is tasked with trying those accused of the crimes listed under article 5 of the Rome Statute.[548] As far as the implementation of the Rome Statute in the Ugandan legal system is concerned, and the establishment of a special Chamber to deal with the crimes in article 5 of the Statute, Uganda may be regarded as not only willing but as able to prosecute its indicted nationals in its courts.

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[545] See "We can save Kony - President Museveni" *The NewVision* 12 March 2008 that they referred the situation to the ICC because the whereabouts of the suspects were unknown. He added that if the perpetrators signed the peace agreement and returned to Uganda, their prosecution would be Uganda's responsibility not any other State's, including the ICC.

[546] See section 2 of the Ratification of treaties Act. It requires that a treaty be incorporated into the State's body of law through a ratification of the same by the Cabinet and that the parliament pass a resolution to that effect.

[547] See Waddell and Clark 2008 *African Affairs* 1 at 22, noting that the prosecutor's decision to investigate only members of the LRA "…has often been presumed to be the result of bias rather than as the consequence of the ICC's application of its criteria for case selection". See also du Plessis and Louw (2009) *International Security Studies* 20.

[548] See section 3 of the *Legal Notice High Court (International Crimes Division) Practice Direction* No. 10 of 2011, entered into force 0n May, 31, 2011. This changes the War Crimes Division of the High court of Uganda, established in 2008, to the International Crimes Division. The purpose of this is to give the High Court jurisdiction not only over war crimes but over all international crimes listed by the Statute.

To this end, the ICC needs to defer the cases to Uganda, encourage genuine national proceedings yet remain vigilant to ensure the effective prosecution of these cases. If the Court offers technical advice, assistance when and where it is required; and implements anti-impunity structures, the Ugandan nationals can be prosecuted in Uganda, a fact which will not only be practical but also in conformity with the purpose of the article 17 that national courts be the primary prosecutorial agents. The Court's decision to defer to Uganda, will not only ensure the expedient trial of those responsible, it will also preserve the sovereignty of Uganda. It will also ensure the effective prosecution, as Uganda, feeling in control of prosecution of its nationals, will cooperate fully with the Court.

Furthermore, under the ICC's watchful eye, the prosecutors will show greater zeal in the proceedings, which in turn will ensure that they conform to international standards, than if the Court, distanced itself from the prosecution. This approach to complementarity in self-referrals, where the ICC helps in national capacity building, and does not compete with State jurisdiction, where their judicial incompetence is curable will foster a healthy partnership between the ICC and States. A positive approach to complementarity will therefore ensure that the Court does not oust a functional judicial system. In addition, giving states latitude to prosecute these crimes nationally will not compromise international criminal justice procedures that would otherwise be employed by the Court but prove unsuccessful because the States concerned do not cooperate with the Court.

4.3 Positive Complementarity in the Prosecutor's *Proprio Motu* Investigations

Proprio motu investigations are investigations that have been initiated by the Prosecutor of his initiative, following receipt of information concerning the commission of crimes within the jurisdiction of the Court. These investigations differ from State Party referrals or the Security Council referrals as an additional criterion is applied before the Prosecutor is allowed to proceed with an investigation. Articles 53 and 54 of the Rome Statute govern the Prosecutor's investigations. The Prosecutor is required to investigate the credibility of the information he received informing him about crimes committed within the Courts jurisdiction before formally opening investigations.[549] Furthermore, the Prosecutor has to apply for

[549] See article 54 (1) (a) : "In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally".

authorisation to initiate an investigation from the Pre-Trial Chamber.[550] For a *proprio motu* investigation to be authorised, the case has to be admissible under article 17 of the Rome Statute. Most importantly, the case has to be of sufficient gravity for the Prosecutor to intervene, and it must be in the interests of justice that the case be investigated by the prosecutor and not by State authorities.[551]

Owing to the Court's limited resources, it is equally important to investigate ways in which the complementarity principle may be implemented in cases where the ICC Prosecutor initiates *proprio motu* investigations.[552] Where the Prosecutor is satisfied that crimes within the Court's jurisdiction have been committed, it is important for him/her to bring this to the attention of domestic authorities so that they could both work in harmony. It is suggested that implementing complementarity with an aim to ensure prosecution of those responsible, by helping strengthen judicial efforts domestically seems a more viable option than exhausting the Court's already depleted resources. As has been noted, no State has thus far prosecuted the Rome Statute crimes within its domestic courts, all 20 cases are before the ICC. All the cases before the Court have been referred either by the territorial states themselves, or by the UN Security Council or the ICC Prosecutor, of his own volition, has initiated investigations.

The drafters of article 17 did not envision this practice of the Court and the number of cases it is handling since it became operational. The ICC was not in law and principle, meant to be the dominant adjudicator of the most serious crimes of international concern, but to supplement inability or unwillingness to prosecute in national judiciaries.[553] Considering the load the Court already has, it is imperative to investigate situations in which it is necessary to prosecute nationally. After all, as noted in the preceding chapters, domestic courts are the *forum conveniens* for prosecuting these core crimes. With proper supervisory measures in place, the ICC can ensure that these crimes are punished through regular national enforcement, or where such are not operational, a threat of prosecution by the Court itself can help steer national authorities in the right direction. However, it is understood that there are

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[550] See Article 54 (2) (b).

[551] See article 53(1) © of the Rome Statute.

[552] Pursuant to article 15 and article 13(c) of the Rome Statute, the ICC prosecutor may of his own initiative decide to investigate a situation if there is reasonable believe that crimes within the jurisdiction of the Court have been committed.

[553] This is apparent in the letter of article 17 – it prioritizes domestic jurisdiction, with the ICC being the Court of last resort.

cases where the Court itself will have to assert its jurisdiction and prosecute, as it plays the role of complementary adjudicator where states fail to prosecute genuinely.

The Rome Statute has in place a system of checks and balances to limit the powers of the Prosecutor. This does not only protect States against an overweening prosecutor but also safeguards the independence of the Court. By virtue of articles 13(c) and 15 of the Rome Statute, the ICC Prosecutor has the power to initiate an investigation *proprio motu*, where s/he has received information from credible sources that crimes within the Court‘s jurisdiction have been committed.[554] However, article 15 requires that the Prosecutor analyse the seriousness of and submit, evidence that proves that crimes within the jurisdiction of the Court have been committed.[555] Additionally, since national judiciaries are the default forum for prosecuting these crimes in terms of the complementarity principle, it follows that the Pre-Trial Chamber will require the Prosecutor to submit proof that he has initiated investigation into the situation because the State in question is either unwilling or unable to prosecute.[556] Article 15(4) accordingly provides:

> "If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case."[557]

In line with the principle of complementarity, it is clear from the afore-going that the Pre-trial Chamber will consider, among others, the admissibility of the case before the Court before the Prosecutor is given the green light to prosecute. This means the prosecutor has to submit, together with proof that the case is of the requisite gravity to warrant action by the Court, evidence that renders the concerned State either unwilling or unable to prosecute the crimes in question genuinely.

4.3.1 The Role of the Office of the Prosecutor and the Principle of Objectivity

Articles 53 and 54 of the Rome Statute both require the Prosecutor be objective in his assessment of information in his possession, indicating that crimes within the Court's jurisdiction have been committed. The information has to be from credible sources and there

[554] Article 13(c) establishes the Court's jurisdiction over situations where the prosecutor has initiated investigations into situations on his own in accordance with article 15.

[555] See article 15(3) provides: "The Prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court."

[556] See article 15(4) of the Rome Statute.

[557] See article 15(4).

should be a reasonable basis for the Prosecutor to initiate an investigation.[558] This means that the prosecutor has to be objective at the initial stages of an investigation and during the investigation respectively. In all these stages, the Rome Statute emphasises the need for the Prosecutor to be objective and only continue with an investigation where there is a reasonable basis for such. Both articles also require the Prosecutor to investigate only where the investigation is in the interests of justice, and the crimes committed are serious enough to require the Court's intervention. It can be deduced from articles 53 and 54 that the Rome Statute emphasises the complementary role of the Court, that it should only intervene in exceptional cases and if need be, such intervention must be in the interests of justice. This would be in cases where the State in question has failed to discharge its duties and the Court's intervention would be to ensure accountability of those responsible. Both article 53 and 54 seek to ensure that selection of cases by the Prosecutor is based on both an objective and an impartial analysis of all the facts. [559]

4.3.2 Article 53 of the Rome Statute: Initiation of an Investigation

Over and above the requirements in article 18 of the Statute, article 53(1) read with article 54 (1) (b) require the prosecutor to ensure that the case is not only admissible under article 17 of the Statute but that it is serious enough to require the Court's attention.[560] The prosecutor is also required to make sure that the evidence available to him provides "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed".[561] Article 53 (1) (b) read with article 18, reflects the spirit of complementarity in that both articles favour the primacy of national judiciaries. They require the Prosecutor to inquire whether the case is admissible under article 17 before he starts an investigation with the intention to prosecute. The article essentially requires the Prosecutor to objectively look at the whole situation, consider the victims[562] and then decide whether it will be in the interests of justice to prosecute before the ICC and not nationally.

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[558] See article 53(1) (a).

[559] See Statement by Luis Moreno-Ocampo, Prosecutor of the ICC, Informal meeting of Legal Advisors to Ministries of Foreign Affairs, New York, (24 October 2005) 6.

[560] See Article 53(1) (c) requires the prosecutor to consider the gravity of the crime and the interests of victims and that ensure that "there are nonetheless substantial reasons to believe that an investigation [by the State that has jurisdiction in the matter] would not serve the interests of justice. " [Emphasis added].

[561] See article 53(1) (c) of the Rome Statute.

[562] See article 54(1) (b) provides that the prosecutor must "take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children".

In order for the prosecutor to be objective, he/she has to apply reason in his/her investigation and only decide to continue with an investigation where there is reasonable belief that prosecuting the case before the ICC is the only viable option. Article 53(1) (c) also requires the prosecutor to assess the gravity of the case and investigate whether an investigation would be in the interests of justice. However, where the Prosecutor has decided that there is no reasonable basis for continuing with an investigation, because either the case is not of the required magnitude, and/or investigation is not in the interests of justice; he is required to inform the Pre-Trial Chamber of his findings.

Additionally, Rule 92 of the Rules of Procedure and Evidence requires the Court to "notify victims of the Prosecutor's decision not to initiate an investigation pursuant to Article 53".[563] Article 53(2) lists instances that may influence the Prosecutor's decision not to investigate a situation, for instance, where the case is inadmissible under article 17, either because it is being investigated by a state that has jurisdiction or because it has been investigated and there was no reasonable basis to go to trial.[564]

Moreover, the Prosecutor may also decide not to investigate where the information in his possession is not sufficient for the issuance of an arrest warrant or summons.[565] In terms of article 58, summons or arrest warrants may only be issued where there is a reasonable basis to believe that the crimes within the Court's jurisdiction have been committed. If the evidence before the Prosecutor cannot secure either of the two, then it means the information before the prosecutor is not sufficient to require investigation by the Court. The decision not to investigate could also be due to the fact that an investigation will not be in the interests of justice, taking into account the interests of the victims, the age of the perpetrator and the role she/he played in the commission of the crime.[566]

Although article 53 does not significantly clarify what "interests of justice" entails, taking into account the object and purpose of the Rome Statute, it may be interpreted to mean

[563] See Rule 92 0f the Rules of Procedure and Evidence. See also R Murphy "Gravity Issues and the International Criminal Court" (2006) 17 *International Criminal Forum* 281 at 283.
[564] See article 53(2) (b) of the Rome Statute.
[565] See article 53(2)(a), where evidence before the Prosecutor is not sufficient for an issuance of summons or a warrant of arrest in terms of article 58, there is no reasonable basis for the Prosecutor to investigate the situation.
[566] See article 53(2) (c) of the Rome Statute

putting an end to impunity.[567] Taking this into account, interests of justice in the context of article 53 entail punishing those who bear the greatest responsibility for war crimes, genocide, aggression and crime against humanity where States have failed to do so. It follows therefore that it is in the interests of justice that the prosecutor investigate the Rome Statute crimes where States fail to do so. This will also assuage victims' feelings by holding accountable those responsible for the crimes.

Thus, where investigations by the prosecutor are already underway because no domestic proceedings were initiated at the time of the investigation, it may not be in the interests of justice to continue with such an investigation since the State that has jurisdiction is subsequently keen to prosecute nationally. Moreover, all people who have been affected by the conflict, particularly victims, will more likely participate actively in the proceedings if they are local. Article 54(1) (a) requires the Prosecutor to make judicial inquiries and factual findings into the admissibility of cases before the Court and criminal culpability of the alleged offenders. This also ensures that the Prosecutor only intervene in exceptional cases, thereby protecting State's from an overzealous Prosecutor.

4.3.3 The Situation in Kenya

Since the Court began its operations in 2003, the ICC Prosecutor has only initiated one investigation. The prosecutor, of his own initiative, submitted his application to investigate the 2007 post- election violence, into the crimes committed in the Kenyan. After the post-election conflict, the government of Kenya established the Commission of Inquiry on Post-Election Violence (The Waki Commission)[568], to investigate key players in the violence and make recommendations on how to deal with those responsible. The Waki Commission submitted its report to the government in which it identified 20 suspects and witnesses and recommended the establishment of a hybrid tribunal to deal with those responsible.[569] The same reports were also sent to the ICC Prosecutor. The Kenyan government was given one

[567] See Policy Paper on the Interests of Justice (September 2007) 4. Available at http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf (accessed 10 October 2013) (noting that "the interpretation of the concept of "interests of justice" should be guided by the ordinary meaning of the words in the light of their context and the objects and purpose of the Statute,"an approach which is consistent with Article 31 of the Vienna Convention on the Law of Treaties).

[568] See S Brown and C Sriram "The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya" (2012) 111*African Affairs* 244 at 245.

[569] See the Waki Commission, Report of the Commission of Inquiry into Post-Election Violence 474, it recommended the setting up of the Special Tribunal for Kenya and gave the Kenyan authorities 105 days to consider the matter, after which time the report would be submitted to the ICC.

year to implement the recommendations in the Waki Commission report but nothing happened. It is because of the Kenyan governments' inaction that Pre-Trial Chamber, at a preliminary hearing, authorised the Prosecutor to investigate the crimes committed during the 2007 conflict.[570]

Upon finding evidence of large scale crimes against humanity and war crimes, in which over a thousand civilians were killed and thousands displaced, summons to appear before the ICC were issued against six high ranking Kenyan officials.[571] The summons detailed the alleged crimes with which the suspects were charged. The three suspects, William Ruto, then a Member of Parliament and currently Kenya's Deputy President; Henry Kosgey, then Minister of Industrialisation and Joshua Arap Sang, a radio journalist, were called to answer charges of crimes against humanity, murder; persecution; and forcible transfer they allegedly perpetrated against the Orange Democratic Movement's opposition at the Prime Minister Raila Odinga's camp.[572] Additionally, charges of crimes against humanity, viz., murder, rape, forcible transfer, persecution and other inhumane acts committed against ODM supporters were brought against Francis Muthaura, former chairperson of the National Security Advisory Committee; Deputy Prime Minister and now President Uhuru Kenyatta; and former commissioner of Police, Mohamed Hussein Ali.[573]

4.3.4 Issuance of Summons against Suspects

After the issuance of summons, Kenyan political elite threatened withdrawal from ICC. Upon realising that withdrawal of their membership would not bar prosecution for the crimes committed while Kenya was a State Party, they changed tact. In 2011, the government of Kenya sought to challenge the admissibility of the cases against the six officials.[574] The

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[570] See *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) Case No. ICC-01/09-19 (31 March 2010). See also the Waki Commission, Report of the Commission of Inquiry into Post-Election Violence 473.

[571] See Arief A *et al* "International Criminal Court Cases in Africa: Status and Policy Issues" (7 March 2011) *Congressional Research Service* 21. Available at http://www.fas.org/sgp/crs/row/RL34665.pdf (accessed 9 September 2013).

[572] See K Brown "Recent developments in international Criminal Law with regional Perspectives: the International Criminal Court" African Center for Legal Excellence, available at http://ssrn.com/abstract=2084997 6 (Accessed 24 August 2013).

[573] See K Brown "Recent developments in international Criminal Law with regional Perspectives: the International Criminal Court" African Center for Legal Excellence, available at http://ssrn.com/abstract=2084997 1 at 6 (accessed 24 August 2013).

[574] See *Prosecutor v Muthaura (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the* Statute*)* (ICC, Pre-Trial Chamber II, Case No

government strongly argued that after certain legal and judicial developments in the country, which included a new constitution, they were in a position and willing to prosecute the indicted suspects nationally and that proceedings to that effect were already underway in Kenya.[575] They also added that preliminary investigatory steps in Kenya were in motion to prepare for the prosecution of those responsible.[576] On top of this, the government referred to recent legal and judicial developments, the promulgation of the Constitution in 2010 and the establishment of the International Crimes Division of the High Court to prove its willingness and ability to prosecute genuinely. The Promulgation of the Constitution was indeed an interesting development as it automatically incorporates all treaties that Kenya has ratified into its body of law. As noted in section 3.2.2 in the previous chapter, the government of Kenya undertook to complete the cases by September 2011 and keep the ICC abreast with the developments.[577]

On the face of it, the admissibility challenges seem to be in good faith and given the legal and judicial developments in Kenya, this would, constitute a watertight case for a deferral to Kenya. However, the Pre-trial Chamber II dismissed the application, stating that there were no actual ongoing proceedings in Kenya in respect of the six suspects before the ICC. Technically, since no actual proceedings were initiated in Kenya against the suspects when the ICC Prosecutor commenced his own investigation, the Pre-trial Chamber was right in dismissing the admissibility challenge based on article 19(2)(b) of the Rome Statute.[578] Although Kenya had *locus standi in judicio,* as both a territorial and nationality state, there was no concrete evidence of ongoing proceedings against the indictees.[579] Although the Trial

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ICC-01/09-02/11-96, 30 May 2011) and *Prosecutor v Ruto (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the* Statute*)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) respectively.

575 See chapter 3 section 3.2.2. Kenyan authorities challenged the admissibility of cases before the ICC against Kenyan officials on 31 March 2011, pursuant to article 19(2) (b), arguing that proceedings against them were already under way in Kenyan Courts.

576 See *Prosecutor v Muthaura* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) 40 and *Prosecutor v Ruto* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) 41 respectively.

577 See Chapter 3, section 3.2.2. See also *Ruto Admissibility Challenge* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-19, 31 March 2011) 13.

578 See article 19(2) (b), it provides that the Court may make an inquiry into the admissibility of a case in accordance with article 17 of the Statute where a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted wishes to challenge the admissibility of the case before the Court.

579 See the Chambers comments on evidence of inactivity in *Muthaura Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) 59; *Ruto Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) 63-64. Pre-Trial Chamber II noted that the fact that the Kenyan government

Chamber II commended Kenya on its willingness to prosecute nationally, it held that the state's intention to prosecute in the future was not good enough to challenge the admissibility of cases.[580] This was also in line with article 17(1) (a) which renders a case inadmissible before the Court if it has been or is being investigated by a State that has jurisdiction over it.

However, if the Pre-Trial Chamber, given the legal reforms and judicial restructuring Kenya had gone through, considered the admissibility challenge in a positive light, it would have been more prudent for the cases to be deferred to Kenya to free up the ICC to focus on other cases. During the admissibility challenge, the Kenyan authorities had set a completion date of September 2011. Based on this, the Court could have, if it decided to defer to Kenya, overseen and supervised the trials in Kenyan Courts up to a prescribed completion date. This would not only ensure speedy trials but would also provide the prosecutorial body with a rich source of evidence as the trial would take place in the courts of a State that has a stronger nexus to the conflict. Moreover, with access to the witnesses and resources, the victim would get to see justice served and feel part of the whole process. This could also engender a healthy relationship between the Court and States, as the Court would not be seen as a threat to sovereignty, but as a partner in crime prosecution, working together with states, to ensure accountability for the most serious human rights violation.

As noted above, once States feel they are in control of their legal process, with the threat of an ICC prosecution hanging over their heads should they prove incompetent; they are likely to show greater zeal to prosecute genuinely those responsible. In both self-referrals and the prosecutor's own investigation, the Court could learn a thing or two from the well-established principle of subsidiarity. Since the ICC already endorses the idea of States referring cases to the Court, if and when they do not wish to prosecute, which is basically a corollary to the subsidiarity principle,[581] the Court could, in assessing the desirability of its prosecution, consider additional factors, constitutive of the subsidiarity principle, as will be shown below.

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failed to submit reports to prove the existence of on-going investigations into the cases already before the Court is not convincing that there may be on going proceedings.

[580] See the Chambers comments on evidence of inactivity in *Muthaura Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) 59; *Ruto Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) 63-64.

[581] See El Zeidy 2005 *International Criminal Law Review* 221. He notes that in the case of the ICC the State will choose to either prosecute nationally or 'extradite' or defer to the Court.

4.4 The Subsidiarity Principle: Lessons from Bystander States

The principle of subsidiarity applies in cases where more than one State has jurisdiction over the same case. This principle features in the controversial customary international law concept of universal jurisdiction. In line with the principle of complementarity, the ICC Prosecutor, before initiating proceedings *proprio motu,* could encourage national proceedings, as is required by the subsidiarity rule that the State that has a closer link to the cases be offered an opportunity to prosecute.[582] This approach was supported by the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant Case.*[583] The Princeton Principles on Universal Jurisdiction 2001[584] lay down the criteria for a State, other than the territorial or national State, that wishes to prosecute to avoid conflict of jurisdiction. For instance, on an "aggregate balance", it has to consider the likelihood of good faith and the effectiveness of prosecution in the nationality or territorial State where it wishes to prosecute.[585] Closely linked to this, is the requirement of fairness and impartiality of the proceedings in the interested State.

Similarly, the principle of complementarity requires that the prosecutor defer to national courts unless there is potential for bias within the domestic Courts. However, complementarity, in its strict sense, does not expressly oblige the prosecutor encourage national proceedings upon identifying crimes within the jurisdiction of the Court. Complementarity favours primacy of national judiciaries but once the prosecutor identifies a situation in which the Court has a jurisdiction; article 17 does not place a duty on him/her to encourage states to prosecute. Poels warns that a State that has taken upon itself to prosecute may be prone to political pressure and bias in its determination of the desirability of prosecuting the perpetrators in question in the territorial State courts.[586] Often it has been argued that, the ICC has been blinded by competition in admissibility considerations to the

[582] See Principle 8 of the Princeton Principles on Universal Jurisdiction (2001) reprinted in Macedo S (ed.) *Universal Jurisdiction*, (2004) 23.

[583] See ICJ, Arrest Warrant, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal para.54, noting that (''A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned'').

[584] Principle 8 of the Princeton Principles on Universal Jurisdiction (2001) reprinted in Macedo S (ed.) *Universal Jurisdiction*, (2004) 23.

[585] See Principle 8 of the Princeton (2001) reprinted in Macedo (2004) 23 para. F.

[586] A Poels ''Universal Jurisdiction in Absentia'' (2005) 23*Netherlands Quarterly on Human Rights* 65 at 83. (arguing that priority should be given to the interested state, ''as the subsequent commencement of investigations and prosecutions by the other State on the basis of the territoriality or personality principle will probably be concurrent with political pressure and judicial bias'').

point where it runs the risk of ousting functional judicial regimes.[587] Legal scholars like Newton and Keller have cautioned that if the Court deviates from the textual predicates of complementarity, from prioritising national prosecution, to competing with States, this will compromise the Court's future viability.[588]

4.5 Conclusion

In light of the foregoing, the thesis argues that adopting a policy of positive complementarity will help solve the crisis that has befallen the ICC in Africa. Owing to the limited resources of the Court, national courts are best placed to effectively deal with international crimes within their local systems. Therefore, it is imperative that the ICC invokes the complementarity principle, not as a vehicle to supersede jurisdiction of good willing states on technicalities, but to help encourage States and point out their judicial inadequacies. This participatory dialogue between States and the ICC will help establish a healthy environment for combating international crimes. Likewise, the effectiveness of the international legal system depends largely on cooperation of States. Therefore, the Court and States must work together and not against each other to secure regular enforcement of international criminal law. It is submitted that this will be made possible largely, by a positive approach to the principle that prioritises national jurisdiction; and leaves the Court the power to step in where the former proves inadequate.

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[587] M Newton 2010 *Santa Clara Journal of International Law* 214.

[588] See Keller 2010 *Santa Clara Journal of International Law* 214 (arguing that "The ICC practice to date can be interpreted to support … [the] contention that the ICC is undermining complementarity via a rigid interpretation of State action on the same case. In particular, it seems problematic that states conducting wide-ranging investigations into war crimes, crimes against humanity, and genocide might be required to include the specific enumerated act that would be chosen by the Prosecutor and/or confirmed by the PTC").

CHAPTER 5
CONCLUSION AND RECOMMENDATIONS

5.1 Summary

This thesis set out to define the principle of complementarity and investigate how it regulates the relationship between the ICC and Member States as provided for under article 17 of the Rome Statute. It noted that the principle gives national courts prosecutorial prerogatives over the most serious crimes of international concern: genocide, war crimes, aggression and crime against humanity. The nature of the relationship is such that the Court only intervenes where States fail adjudicate these grave breaches of international law within their domestic legal systems. Theoretically, complementarity seems to have delicately balanced two competing interests that have crippled international criminal justice processes since World War I. Untested, the principle strikes a "delicate" balance between sovereignty of States and a credible international criminal system, however, the jurisprudence of the Court has proven otherwise. Textual deficiencies in article 17, the Court's interpretation and application of the principle in practice have raised an array of issues that have injured the relationship between the ICC and States.[589] from concerns that the Court is arbitrarily applying complementarity to target weak States and that it is used by the West to "colonize" Africa. As a result, confidence in this revolutionary institution seems to have waned, especially in Africa.[590] This is in part, due to the tension inherent in the Statute, between State interests and treaty obligations.

Chapter one argued that the flaws within the complementarity regime form the core of the tension between the ICC and the African Union. The research proceeded from two assumptions. The first assumption is that by expanding the ability of States to deal with international crimes nationally, the tension that is currently developing between States and the Court may be relieved. This is because the efficacy of the complementarity regime and of international law enforcement in general depends largely on cooperation of Member States. For instance, States have resources such as the police force to locate and apprehend suspects

[589] See S Odero "Politics of International Criminal Justice, the International Criminal Court's Arrest Warrant for Al Bashir and the African Union's Neo-colonial Conspirator Thesis" in C Murungu and J Biegon (eds.) *Prosecuting International Crimes in Africa* (2011) 145 at 156.

[590] The Arab League's Foreign Ministers at their meeting in Cairo on July 19, 2008 argued that the ICC undermines state's sovereignty and is a mechanism of neo-colonial policy used by the west against free and weak countries in response to ICC's involvement in Sudan. They called the ICC's move a dangerous precedent which undermines Sudan's sovereignty. The African Continent has been known for its formidable support since the negotiation history of the Statute. The first signatory of the Rome Statute, Senegal, came from Africa. Also, more than a third that 60% of African countries are members to the Rome Statute.

and collect evidence; tasks which are made easier by the locality of the proceedings. The second assumption is that the flaws and shortcomings of the regime would be effectively addressed to pave way for a functional international criminal justice system. Closely linked to the first assumption, the thesis observed that the credibility of the regime depends on a positive approach to the principle of complementarity, one that encourages national prosecution. Although the system may be dogged by problems common to domestic judicial systems, the thesis argued that putting a monitoring system in place would exert pressure on domestic prosecutors and encourage them to show greater zeal in ending impunity.

Chapter two examined the principle of complementarity from a contextual perspective, by exploring its origin, historical, philosophical, legal and practical development before its culmination into the Rome Statute. It was found that the principle is based on international legal principles such as the absolute duty of States to prosecute international crimes nationally, the *pacta sunt servanda,* which requires States to observe their treaty obligations without reservation. Moreover, the development of complementarity shows a tentative consensus as article 17 represents a "refined" model to the ones that preceded it. The thesis found that this development captured four major closely interrelated models: *optional* complementarity; the Nuremberg "occasional" complementarity; the International Law Committee complementarity model and the Rome Statute model.[591] Moreover, their analysis showed a stark pattern between the models, regarding the manner in which they seek to regulate the relationship between international and national courts. The ultimate Rome Statute model embodied in article 17 mirrors these features.

A comparison of these models and the philosophical, political and legal issues that underpin each revealed that the principle's underlying premise is the primacy of domestic judiciaries: with the international tribunals being courts of last resort. Also apparent in the earlier models is States' insistence on giving the tribunals of each era limited and defined authority, to protect their sovereignty. Since its inception in international criminal law, complementarity reflects a paradigm shift from the sovereignty preserving models to the Rome Statute's carefully crafted model that preserves both sovereignty of States and the credibility of international criminal justice system. This is evidenced by the modalities through which each

[591] See chapter 2 section 2.1, 1. See also M El Zeidy *The Principle of Complementarity: Origin, Development and Practice* (2008) 6-7. He opines that the four major complementarity models have emerged since the Peace Treaties up to the Rome Statute: *optional* complementarity; the *Nuremberg Discretionary* complementarity; the *International Law Committee* complementarity model and the *Rome Statute* model.

model was applied as influenced by the political, historical, philosophical, practical and legal circumstances of their time. The Rome Statute model relies on domestic courts to administer the ends of international criminal justice, with the Court only stepping in to supplement lack of justice. Although this arrangement seeks to preserve sovereignty of States, classical notions of unconstrained sovereignty no longer apply in international relations. Philosophically, complementarity puts the administration of justice in the hands of those with a closer link to the case and ensures that the process is legitimate through the admissibility test in article 17 of the Rome Statute.[592] To this end, the thesis has concluded that the development of complementarity was phased and that these developments have refined the principle, so that the Rome Statute model represents a "delicate balance" between the concept of sovereignty of States and a credible international criminal system, a balance that has unfortunately been disturbed in practice.

The thesis went on to critically analyse article 17 of the Rome Statute in the third chapter. A careful scrutiny of the interplay between the ICC and national courts, from the letter of article 17 and the Court's jurisprudence, was undertaken. The tension that has surfaced in practice between the Court and African States, it was observed, emanates from the inherent conflict in the Statute. It was discovered that the tension is due to not only the lacuna in article 17 but also the Court's deviation from the textual approach therein, to a stringent and purely technical interpretation of the admissibility criterion. The thesis observed that complementarity has experienced a terminological shift in practice due to the Court's deviation from the two-tiered admissibility test under article 17 in practice, and the importation of the strict judge-made "same person, same conduct" test into the unwillingness criteria. Article 17 was also found to be deficient as it fails to set out a standard criminal code for all States to follow for appropriate prosecution of Rome Statute crimes.

Chapter three further elucidated the pragmatic shift in the Court's interpretation and application of complementarity in State Party referrals. It is argued therefore that the fact that the ICC endorses referrals without restraint instead of encouraging States to prosecute nationally may undermine its credibility. The Court appears to have radically shifted from the basic complementary jurisdiction predicates that require deference to national courts, and has assumed a competitive role for jurisdiction. The thesis also noted the dependence of the

[592] See M Newton "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?" *Santa Clara Journal of International Law* (2010) 8 141 (noting that complementarity "reflects the reality that justice must be rooted in the perceptions and perspectives of the domestic population that hosts the victims of the crimes to represent an authentic and inherent virtue").

complementarity regime on Member States' cooperation and the dangers posed by jurisdictional conflicts. For instance, it was observed that the establishment by the African Union, of complementary international criminal jurisdiction for the same crimes proscribed by the Rome Statute might undermine the International Criminal Court's relevance in Africa in light of the recent anti-ICC resolutions adopted by the AU.[593]

The discussion in chapter four focused on a positivist approach to the principle of complementarity. The chapter advocated for a policy of complementarity whose main objective is to assist States in the best way possible to prosecute international crimes within their courts. This, it was noted, will help ensure regular function of the international criminal justice system at the municipal level. While observing that not all States will be willing or able to genuinely prosecute, the chapter observed a certain trend in State party referrals where States voluntarily refer cases to the Court, only to challenge their admissibility later, and cautioned against complacency. Considering the budgetary and infrastructural constraints the Court faces, it was also found that the efficient prosecution of the most serious crimes of international concern stands a better chance in domestic courts.

5.2 Lessons and Conclusions

5.2.1 The Evolving Nature of Complementarity

One of the most important lessons in this thesis is that national courts are the best hope for an expeditious international criminal justice system. However, since complacent States sometimes hide behind the veil of State sovereignty, the Rome Statute has designed a system of checks and balances designed to strike a balance between sovereignty and the quest to end impunity for the most serious crimes of international concern.[594] This has at its centre, the principle of complementarity. The discussion in chapter two illustrated the evolving nature of the principle of complementarity as it evolved to the all-encompassing Rome Statute model. It was observed that the earlier models were more inclined towards protecting sovereignty because the primary concern of States was loss of sovereignty through arbitrary decision-

[593] See the African Union's Sirte Resolution of non-cooperation with the ICC regarding the arrest and surrender of al Bashir in July 2009 in Libya in response to the Security Council's refusal to defer the case against Al Bashir in *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (IC*C) Doc. Assembly/AU/13(XIII) Assembly/AU/Dec.245(XIII) Rev.1 Page 2 para 10 provides: "… 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 El Bashir of The Sudan."

[594] See O Triffterer 2ed. *Commentary on the Rome Statute of the International Criminal Law: Observer's Notes, Article by Article* (2008) 41.

making by the international tribunals.[595] Complementarity as envisaged by article 17 of the Rome Statute gives States leeway to prosecute international crimes within their courts. The evolution of complementarity has tentatively modified the underlying precepts of the doctrine of sovereignty of States so that classical notions of sovereignty need to be modified. Maogoto and Kindiki argue that State sovereignty is no longer seen as a political ideology but more of a duty on sovereign nation States to honour their international duties and protect their citizenry.[596] The duty to exercise criminal jurisdiction over international crimes is also an act of sovereignty, which is preserved by the principle of complementarity, since it prioritizes domestic jurisdiction. These developments are important because the underlying premise for complementarity and the philosophy behind this foundational principle is to place the administration of justice in the hands of the domestic population closely linked to the cases.[597] Therefore, complementarity has developed so that it does not only give States leeway to prosecute international crimes but also acts as an implicit threat that they will lose their sovereign rights if and when the ICC intervenes, in the event of their failing to prosecute nationally. This carrot and stick mechanism safeguards against complacency, and ensures that perpetrators of the worst atrocities do not go unpunished.

5.2.2 Regionalism: Implications of the African Court of Justice' Complementary Jurisdiction

In chapter three, the thesis demonstrated the advantages of regionalising the enforcement of international law. However, the thesis cautioned against legal fragmentation, a development that could undermine the work of international judicial bodies. This phenomenon was analysed in light of the African Union's recent establishment of the African Court of Justice and Human Rights with complementary jurisdiction to try the crimes in the Rome Statute.[598] While the issue of regionalisation of international law enforcement is not unprecedented, the thesis acknowledges that the politically and legally bold move by the AU, amid the controversies surrounding ICC's involvement in Africa, may have far-reaching ramifications

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[595] See chapter 2 section 2.4.2 for a comparison of the earlier models with the Rome Statute model of complementarity.

[596] See JN Maogoto and K Kindiki "A People Betrayed – The Darfur Crisis and International Law: Rethinking the Westphalian Sovereignty in the 21st Century" (2007) 2 available at http://works.bepress.com/jackson_maogoto/40 (last accessed 27 July 2012).

[597] See Newton 2010 *Santa Clara Journal of International Law* 141.

[598] The African Union's Draft Protocol on the Statute of the African Court of Justice and Human Rights was drafted and presented at the 12th African Union Annual Summit in Addis Ababa, Ethiopia. It was later adopted at the Meeting of Government Experts and Ministers of Justice/Attorneys in Ethiopia in May 2012 and it gives the merged African Court of Justice and Human Rights powers to prosecute among others, genocide, war crimes. Crimes against humanity and aggression should an Au Member State with jurisdiction fail to prosecute them.

for the Court. This argument is based on the recent AU's anti-ICC campaigns that preceded the adoption of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which endows the African Court with complementary jurisdiction.[599] African States, under the aegis of the African Union, have adopted several reactionary anti-ICC exercises to voice their displeasure with the Court over its involvement in Africa. Some African countries such as Mali, Chad, and Kenya have thus far abdicated their duty to cooperate with the ICC by failing on numerous occasions to apprehend President al Bashir.

Most recently, the government of Kenya has lobbied for support for withdrawal from the ICC after failed attempts to challenge the Court's jurisdiction and prosecute the cases against Kenyan officials nationally.[600] The Kenyan parliament also passed a motion for withdrawal from the ICC just before the commencement of the trials against the vice president William Ruto and the president, Uhuru Kenyatta.[601] The African Union is also pushing for deferment or postponement of the trials against Ruto and Kenyatta, as well as Bashir's, under article 16 of the Rome Statute. These issues were discussed at the 15th Extraordinary Session of the Assembly of States of the African Union on ICC held in Addis Ababa from October 11 to 12th 2013.[602] The thesis cautions that this kind of "negative" regionalism, in light of the strained AU-ICC relationship, may undermine the relevance of the Court in Africa. The issue of the African Court's complementary jurisdiction can potentially taint the relationship between African States, the AU, the ICC and the Security Council since the AU Protocol does not resolve the question of which court would have primacy. Overall, the AU's resolve to create this arm of the African Court will most likely complicate matters for Member States to both institutions.

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[599] Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters (7 to 11 and 14 to 15 May 2012), Addis Ababa, Ethiopia Exp/Min/IV/Rev.7.

[600] See "Kenya's Threat to Withdraw from the ICC: What Will SA Do?" *Daily Maverick* 29 November 2013. Available at http://www.dailymaverick.co.za/article/2013-10-08-kenyas-threat-to-withdraw-from-the-icc-what-will-sa-do/#.Uphni9IW1FU (accessed 29 November 2013).

[601] See "Kenya's Threat to Withdraw from the ICC: What Will SA Do?" *Daily Maverick* 29 November 2013. Available at http://www.dailymaverick.co.za/article/2013-10-08-kenyas-threat-to-withdraw-from-the-icc-what-will-sa-do/#.Uphni9IW1FU (accessed 29 November 2013). The ICC has postponed Kenyatta's trial to February 2014 after the President publicly announced that he would not cooperate if they were tried at the same time. See "ICC Postpones Kenya President Kenyatta's Trial Date" *13 Forum Ecomonique International Sur L'Afrique* 29 November 2013. Available at http://www.panapress.com/iCC-postpones-Kenya-President-Kenyatta-s-trial-date--15-885721-32-lang2-index.html (accessed 29 July 2013).

[602] The issues discussed at the Extraordinary Session of the Assembly of the African Union included among others, Decision on Africa's Relations with the ICC. See Decision on Africa's Relations with the International Criminal Court Ext/Assembly/AU/Dec.1-2 (Oct.2013).

5.2.3 The Threshold of On-going National Proceedings

Useful insights were made into the principle of complementarity in the discussion on the referral of the situation in Uganda and the Prosecutor's investigation of the situation in Kenya. The cases of Uganda and Kenya provided useful examples of cases where States intend to or actually refer cases to the ICC only to challenge their admissibility at a subsequent stage. In both cases, the ICC intervened years after the conflicts had begun, when there were still no domestic efforts to prosecute those responsible. The analysis of the Appeal's Chamber decision in the *Prosecutor v. Ruto, Kosgey & Sang*[603] revealed that an abstract investigation or a mere undertaking to prosecute does not meet the criterion in article 17 (1) (a) that "the case is being investigate" by a State that has jurisdiction.[604] The Appeals Chamber stated that in the absence of concrete evidence that the Kenyan government is indeed investigating the cases, its claim that it is investigating or the prospect of opening investigations in future is insufficient. The two countries' political complacency, in the face of the atrocities, raises serious questions regarding the genuineness of their intent to prosecute. It is in light of this lesson that the thesis suggests that if a State wishes to prosecute nationally, it should in all seriousness, take concrete steps towards prosecuting and not wait until the ICC invokes its complementary jurisdiction.

Most importantly, to give effect to their right to primary jurisdiction, States should seek to incorporate the Rome Statute into their own legal systems and amend their legislation so that it is in conformity with the Rome Statute. For instance, the fact that Uganda's Amnesty laws are still in force in Uganda, yet the Rome Statute does not recognise immunities, contradicts Uganda's intention to prosecute nationally. Moreover, the fact that Uganda preferred alternative measures of dispute resolution to prosecution may be understood as an attempt to evade the Court and accountability for the atrocities. It brings Uganda's "ability" or "willingness" to prosecute genuinely into question. It is argued therefore that, before States refer cases to the Court, they should at least make efforts to prosecute nationally as it is not legally tenable to refer cases to the Court only to challenge their admissibility at a later stage. The thesis suggests that this could be achieved through participatory dialogue in which States

[603] *Prosecutor v. Ruto, Kosgey & Sang*, (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 Case No. ICC-01/09-01/11 OA (30 August 2011).

[604] See section 3.2.2 page 62 above for a general discussion. See also the Chambers comments on evidence of inactivity in *Muthaura Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) para 59.

work with the Court to identify and remedy whatever challenges hinder their progress. Additionally, States need to show respect and commitment to the complementarity process, if a State has referred the situation to the Court, with the intention that the suspects implicated therein be held accountable, they cannot be heard to challenge the validity of the proceedings before the Court. It is not tenable for States to refer cases and subsequently attempt to withdraw their referrals; it would simply reduce the complementarity process to a regime subject to whims of Member States. On the other hand, where a State communicates its intention to refer a situation to the Court, the ICC prosecutor has to make inquiries and engage in a participatory dialogue with the State in question, to find out if the incompetence that has motivated the referral cannot be 'cured'. This will ensure that States appreciate the consequences of renouncing their jurisdiction by way of a referral to the Court and also help the Court bridge the impunity gap in appropriate cases.

5. 3 Specific Conclusions

From the foregoing, the thesis drew the following specific conclusions:

1. That the principle of complementarity, as an organising principle, is thus far the only hope for resolving the controversies surrounding the work of the ICC in Africa, which have manifested in jurisdictional conflicts between the Court and States since it delineates jurisdictional responsibilities.

2. The relationship between the ICC and States may be corroded in part by flaws of the complementarity regime relating to the lacunae in the scope of article 17 and its interpretation and application in practice. This is because the chapeau of Article 17 leaves open certain questions regarding unwillingness. This is evident from the article's failure to provide clear guidelines, evidenced by lack of a standard prosecutorial policy and definition of the ambiguous phrase "unjustified delay" leaves the regime significantly deficient.

3. The Court's interpretation and application of complementarity in practice has shifted from prioritising domestic prosecution of international crimes to prosecutions by the Court itself, an approach that is self-defeating and threatens to undermine the Court's integrity in the long run. The Court's interpretation of the "same person, same conduct" in practice is more stringent and as such makes it difficult for States to satisfy. The Court's future viability depends on, among others, a healthy relationship

between the ICC and States, cooperation and commitment to the fight against impunity for the core crimes.

4. The establishment of a section of the African Court with complementary jurisdiction to try, among others, the Rome Statute crimes, comes at a point when support for the ICC has waned in Africa. Although this is not unprecedented, it does little to repair the fragile ICC-Africa relationship. This bold move by the AU threatens to derail and impede the fledgling Court's efforts to fight impunity within the continent. Legal fragmentation in this sense is a growing concern in international criminal law.

5. The adoption of a positive approach to complementarity is imperative to ensure the proper functioning of the Rome Statute's criminal justice system and this may be achieved through encouraging and helping States prosecute nationally. The ICC, like other international judicial bodies, lacks the necessary enforcement mechanisms for a criminal justice system to be wholly effective. The Court therefore has to work hand in hand with States to make up for this.

5.4 Recommendations

In light of the foregoing conclusions, the thesis makes recommendations aimed at alleviating the existing and growing tension between the ICC and States. These recommendations advocate for adoption of a policy of positive complementarity to ensure effective prosecution of the Rome Statute crimes within domestic courts, without compromising international justice processes.

5.4.1 Reiterating States' Duty to Prosecute International Crimes: Tightening the Rules of the Game

The thesis has established that it is trite in customary international law that States have a duty to prosecute and punish international crimes. The Rome Statute reiterates this concept through the principle of complementarity that gives States first priority in prosecuting the core crimes listed by article 5 of the Statute. It is important that the complementarity regime established by article 17 encourage States to commit to their duty to prosecute international crimes. Analysis of jurisprudence of the Court in State Party referrals showed that States might hide behind their right to refer situations to the ICC so as to avoid the political and financial costs of prosecution. Although the Statute allows State party referrals of situations to the Court without restraint, there must be a mechanism in place to ensure States only refer

cases to the Court in exceptional circumstances, where a State is indeed not in a position to prosecute. Most importantly, the Court should encourage States to implement the provisions of the Rome Statute within their legal systems so that they are in a position to prosecute satisfactorily the Rome Statute crimes. The Court has to handle referrals in such a manner that excludes the possibility of States just referring cases to avoid the financial burden or for political gain. The Court has to satisfy itself that necessary measures were taken at the national level to try those responsible before the decision to refer the situation was made. By ensuring that the referral is motivated not by a will to abdicate the duty to prosecute but a willingness by an 'unable' State to have those responsible punished, the Court would be implementing a policy of positive complementarity.

5.4.2 Developing the Text of Article 17: The Need to Establish a Standard Criminal Policy

Article 17 was an attempt to secure the independence of the ICC, by limiting its jurisdiction, and preserving sovereignty powers of States, through prioritization of domestic jurisdiction. However, the thesis discovered that this delicate balance has been disturbed in practice, the relationship between African States and the ICC regarding these issues is unsettling.[605] As noted in chapter three above, the crux of this problem, among others, emanates from the textual deficiencies of the provisions that delineate jurisdictional powers between the Court and domestic courts.[606] The Rome Statute does not have basic standard prosecutorial guidelines to help guide States as to acceptable investigatory or trial proceedings. The Statute has to set a 'baseline' of conduct that a State has to conform to for it to act in accordance with the ICC's constitution of acceptable proceedings. Being a supranational institution, the ICC justice system comprises of differing prosecutorial policies of each of the Member States. It is important therefore that the Rome Statute sets a standardized approach on issues of prosecution because with very differing legal systems, each State will rely on its usual criminal procedures, and this has roots that run back to the problem of impunity. There is also a risk of the core crimes being treated as ordinary crimes.

Furthermore, it is imperative for any prosecutorial authority to have a uniform criminal policy particularly if it comprises varied domestic judicial systems from across the world. The issue

[605] The ICC has been criticized for its prioritization of African states and for breaching the complementary principle in practice in Darfur where President Al Bashir, an incumbent head of state of a Non-Member Sudan, was indicted pursuant to the United Nations Security Council referral in 2005.
[606] These deficiencies are clearly outlined in chapter 3 section 3.5 26-29 above.

of establishing a uniform criminal policy may seem an arduous task given the local peculiarities emanating from each domestic State, however, the ICC could come up with basic internationally recognised prosecutorial guidelines. A defined standard policy will put all judicial bodies on an equal standing, a sham trial in one domestic court would be a sham trial in another if it fails to follow the ICC's uniform blueprint of genuine proceedings. Furthermore, this thesis discovered a loophole in Article 17 of the Rome Statute, as it does not define what constitutes an unjustified delay to bring the perpetrator to justice. This leaves the interpretation of unjustified delay open to broad interpretations as the very differing legal systems may interpret unjust delay quite differently depending on their substantive laws. It is therefore recommended that a standard prescription period be included within the admissibility criterion. The Court should also address these deficiencies by creatively interpreting the existing rules and filling in the gaps to avoid these controversies. This way, if a State will not have initiated investigations within that period, it will be a clear case of an unreasonably long delay to initiate proceedings

Moreover, there seems to be a paradigm shift from the sovereignty preserving aim of the principle of complementarity to a system that makes it hard for States to prosecute in their own courts. The importation of the "same person, same conduct" renders the criteria for unwillingness too technical and could exclude the jurisdiction of good willing States.[607] Situations like the *Lubanga* decision, where the accused was prosecuted by the ICC for conscripting child soldiers, and escaped prosecution for a more serious crime like genocide, for which he was charged by the DR Congo have to be avoided.[608] Instead of giving the Court power to intervene based on a specific set of facts that was overlooked by national Courts, to the detriment of a more serious allegation, article 17 may be developed to let the Court

[607] See Newton 2010 *Santa Clara Journal of International Law* 142 (noting that "(t)he Court has already demonstrated a trend away from a purely textualist approach in interpreting the admissibility criteria found in Article **17,** which from some perspectives could be seen as validation of the larger criticisms of the ICC itself").

[608] See *Prosecutor v Thomas Lubanga Dyilo* Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006 ICC-01/04-01/06 (OA4) (14 December 2006). The accused was arrested on charges of genocide and crimes against humanity in the DR Congo, a case which was referred to the ICC by the government. Lubanga challenged its admissibility before the ICC arguing he had already been charged with those crimes in DR Congo. The Appeals Chamber held that the conduct he was charged of did not cover the crimes he committed in Borogo, which formed the crux of the ICC charges and dismissed his claim. This was the case despite the fact that there was evidence of far more serious crimes than those he committed in Borogo and he was not held accountable for these because then, his claim of the *ne bis in idem* rule would stand. Although he has been found guilty and sentenced to 20 years imprisonment by the ICC, he escaped conviction for other more serious crimes like genocide.

intervene by way of supplementing the evidence already within the domestic court's possession. The ICC should address these deficiencies by creatively interpreting the existing rules and filling in the gaps to avoid these controversies.

Furthermore, the Court must follow a standardised procedure for deferring to domestic courts. There must be clear guidelines to show when a situation could better be handled by states because in some instances it may appear that the Court favours political expediency that may even compromise the administration of justice. So far, the jurisprudence of the ICC has made it clear that before a determination of unwillingness or inability to prosecute is made, existent of actual national proceedings and whether those proceedings involved the subject before the ICC must first be determined. The State should also be required to furnish evidence showing significant domestic proceedings into a matter, not just allege the existence of such evidence.

5.4.3 National Capacity Building

The eight situations under investigation by the ICC have come through various avenues. These include two referrals by a Security Council Resolution (Libya and Sudan); five State party referrals (Uganda, the DR Congo, the Central African Republic, Mali and Cote D'Ivore) and one investigated by the prosecutor of his own volition, the Situation in Kenya. Although an array of issues arose from these cases, the thesis discovered that each of the States were either unwilling or unable to prosecute. Considering the concerned States' efforts to amend their legal systems and challenge admissibility of their cases before the ICC, adoption of a policy of positive complementarity is necessary. The thesis therefore suggests the OTP, pursuant to the powers of the Prosecutor in article 53(1) of the Rome Statute, has a powerful and influential position to help States strengthen the capacity of their judicial systems. The complementarity regime should be developed to accommodate State's sensitivities by encouraging domestic prosecution. In recommending the adoption of national capacity building mechanisms, the thesis strengthens its previous acknowledgement of the significance of developing the text of article 17. This could assuage state's fears that the ICC is merely paying lip service to complementarity and arbitrarily superseding national jurisdiction.

The regime should also be geared towards assisting States to commit to their duty to prosecute, through a monitoring system. Instead of seeming to arbitrarily superseding the

jurisdiction of willing and able States on technicalities, the OTP should encourage national prosecution and closely monitor the proceedings to make sure that those who are responsible are held accountable. Another key element is the development of anti-impunity measures within the national legal framework in order to ensure effective investigations and prosecutions: investigations of crimes timeously, follow-ups on complaints, interviewing of witnesses and suspects and conducting forensic analysis. It is therefore essential for the ICC to encourage the effective implementation of the Rome Statute nationally. Enactment and/or development of existing progressive legislation should become a priority, as this will put national legal systems in line with the Rome Statute, thereby enabling States to exercise their jurisdiction.

Closely linked to the enactment of implementing legislation is the need to establish a training programme geared towards efficient investigations, interviewing of suspects and victims, and conducting international criminal proceedings. The specific training of investigators, prosecutors, human rights activists, victims, witnesses and panellists will facilitate transfer of legal expertise. Encouraging incorporation of the ICC's Legal Tools into national systems can also help empower national actors. This application gives ready access to a plethora of international criminal justice resources.[609] This way, the training process could be achieved cost-effectively, while increasing the capacity of national legal by exposing them to effective methodologies for prosecuting international crimes.

A healthy partnership of cooperation and consultation between the ICC and Member States where both the ICC and national judicial systems work hand-in-hand, instead of against each other, will solve anti-cooperation issues that have dogged the ICC since the indictment of al Bashir in 2009. The international criminal justice system will be centralized within the municipal system, with the ICC playing a supervisory role and assisting national judiciaries in fighting impunity for the core crimes of international concern. The philosophy behind this is that national courts have a stronger nexus to the situation and can effectively deal and

[609] The ICC's Legal Tools is an online programme that offers a wide range of legal materials and references that are aimed at developing international criminal justice processes for the core crimes. It comprises the Legal tools Database and Website (http://www.legal-tools.org); the Case Matrix application (offers guidelines for organising evidence for the Rome Statute crimes); and digests on international criminal law and procedure and laws of evidence. The search engine gives access to decisions, indictments of international judicial bodies including the ICC, treaties and other relevant decisions. See M Bergsmo *et al* "Complementarity After Kampala: Capacity Building and the ICC's Legal Tools" (2010) 2 *Goettingen Journal of International Law* 791 at 804-806 for a comprehensive account.

timeously prosecute. This way, the Court will be help assist States conduct satisfactory proceedings through technical assistance and supervision. This will not only give the State in question a sense of ownership of the process but will also make sure the victims and people closely linked to the case feel part of the process.

5.5 Concluding Remarks

African States and the AU have proven to be lacking in their attempts to ensure accountability for international crimes committed during insurgencies within the continent for decades, despite their insistence that the current ICC investigations are merely anti-African. In all the situations before the Court, there is no coherent evidence that the States concerned took steps to prosecute nationally. As complementarity is still evolving, the Court has engaged in a "system of trial and error" in an attempt to bridge the gaps between the textual flaws of complementarity and its practical implications. However, the hostile attitude by the AU is nothing short of unconstructive. In any event, the Union's attempts to undermine the relevance of the Court in the continent by adding complementary jurisdiction on the African Court of Justice, will likely make matters worse for the Court and victims of the core crimes. This move will not only divert the already insufficient funds from other urgent regional matters but also leaves members to both the Rome Statute and the AU in an unnecessarily difficult situation, regarding the primacy of each system. On the other hand, the ICC should take a more nuanced approach to complementarity to help effectively solve the problems faced by States in prosecuting the Rome Statute crimes. Additionally, the dialogue between the Court, States and regional bodies such as the AU must improve so that all parties are actively involved. This will create a common understanding of the evolving dynamics of complementarity and clarify what is expected of each party.

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