The application of the principle of complementarity by the International Criminal Court prosecutor in the case of Uhuru Muigai Kenyatta

by

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submitted in accordance with the requirements

for the degree of

DOCTOR OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF ANGELO DUBE

OCTOBER 2020

PLAGIARISM DECLARATION

I declare that `*The application of complementarity by the International Criminal Court Prosecutor in the case of Uhuru Muigai Kenyatta'* is my own work and all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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EMMANUEL MAPHOSA

DATE: October 2020

ACKNOWLEDGEMENTS

To the One who directs my steps and gives me daily strength, the Omniscient God, my Lord and Saviour, Jesus Christ. I am indebted and humbled to have extracted knowledge from you, the source, which I dissected and compiled in this thesis.

To my beautiful family, wife Moshibudi Maphosa, and sons Reinhard and Melusi, your love, endurance and belief inspired me to produce this work. Ke a leboga. Ngiyabonga.

To my supervisor, Prof Angelo Dube, your supervision, guidance and encouragement gave me insight into legal and technical aspects of doctoral research. You restored hope continuously by believing in me.

To Dr Nazreen Shaik-Permanov, a million thanks for your guidance in the earlier phases of the thesis.

To Thuli Maphosa, Jacqueline Mhlanga and Felix Dube, thank you for your assistance when I prepared the thesis document.

To my pastors, Mpumelelo and Thobeka Dlamini, thank you for your prayers.

To Let's Edit, for assisting with the editing of this thesis.

DEDICATION

To my wife and sons, for being the pillar of my life.

To my heroine and my mother, Lesia Maphosa, for always investing in my success.

To the brothers and sisters in Africa who long for prosperity and respect for human rights.

ABSTRACT

The principle of complementarity is a tool used to punish the commission of core international crimes. A concerted approach is required to combat war crimes, genocide, crimes against humanity and aggression. The Prosecutor of the International Criminal Court needs to fully appreciate the express and implied discretionary powers of states to ensure all possible accountability mechanisms are explored. Failure by the Prosecutor to do so results in missed opportunities to capitalise on various options related to the proper application of complementarity. Therefore, there is a need for consultations to establish that the International Criminal Court and prosecutions can no longer exist without competing alternatives preferred by states. The current misunderstandings on the application of complementarity are rooted in unresolved state and prosecutorial discretions. The endangering of state discretion threatens the integrity and credibility of the International Criminal Court. The unaddressed question of state discretion is also at the centre of disputes between the African Union and the International Criminal Court. Grey areas in the application of complementarity are clearly visible through the inconsistency and diversity of the International Criminal Court decisions and frequent prosecutorial policy proclamations. As a result, prosecutorial discretion needs to be checked. Prosecutorial discretion is checked at the United Nations, International Criminal Court and state levels. The checks at regional level and by non-prosecutorial options need to be explored. The call is for the International Criminal Court not to neglect the legal-political environment which the Court operates in. The environment is essential in demarcating the exercise of discretions. The *Kenyatta* case is illustrative of the need to invent an interpretation that reflects the evolving theory to practice reality. The development or amendment of a prosecutorial policy is desirable to give guidance on the value, circumstances and priority accorded to justice. The policy should be comprehensive enough to accommodate mechanisms which advocate for strengthened state discretion. For instance, African Union instruments and treaties reveal that the respect of state discretion is one of the core principles of the African Union system.

KEYWORDS

Admissibility, African Court, African Union, Alternative forms of justice, Complementarity, Jurisdiction, Immunity, Impunity, Investigation, International crimes, International Criminal Court, Prosecutor, Prosecutorial discretion, Regional mechanisms, Sovereignty, State discretion

LIST OF ABBREVIATIONS AND ACRONYMS

AC	Appeals Chamber of the International Criminal Court
APRM	African Peer Review Mechanism
ASF	African Standby Force
ASP	Assembly of State Parties
AU	African Union
AU PSC	African Union Peace and Security Council
CAR	Central Africa Republic
CIPEV	Commission of Inquiry on Post-Election Violence
DRC	Democratic Republic of Congo
EAC	East African Community
EACJ	East African Court of Justice
EALA	East African Legislative Assembly
ECCC	Extraordinary Chambers in the Courts of Cambodia
EU	European Union
FEC	Far Eastern Commission
IAC	International Armed Conflict
IACHR	Inter-American Commission on Human Rights
IAPL	International Association of Penal Law
ICA	International Crimes Act
ICC	International Criminal Court

ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILA	International Law Association
ILC	International Law Commission
IMT	International Military Tribunal for Nuremberg
IMTFE	International Military Tribunal for the Far East
JPL	Justice and Peace Law
KNCHR	Kenya National Commission on Human Rights
KNHREC	Kenya National Human Rights and Equality Commission
LRA	Lord's Resistance Army
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organisation
NIAC	Non-International Armed Conflict
OAS	Organization of American States
OAU	Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights
OTP	Office of the Prosecutor
PCIJ	Permanent Court of International Justice

PSO	Peace Support Operations
PTC	Pre-Trial Chamber
R2P	Responsibility to Protect
RUF	Revolutionary United Front
SADC	Southern Africa Development Community
SCSL	Special Court of Sierra Leone
STK	Special Tribunal for Kenya
TRC	Truth and Reconciliation Commission
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNWCC	United Nations Commission for the Investigation of War Crimes

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CHAPTER 1

OVERVIEW OF THE STUDY

1.1 Introductory remarks

The International Criminal Court (ICC or Court) is a permanent international court created to investigate and prosecute international crimes, namely, the crime of genocide, crimes against humanity, war crimes and crime of aggression.[1] In terms of the Rome Statute of the ICC (Rome Statute), the crime of genocide is committed with intent to eliminate a particular group; crimes against humanity are committed against a civilian population in a widespread or systematic manner, while war crimes are committed during armed conflicts, mainly as part of a plan or policy of an armed force or group.[2] On the other hand, the Rome Statute defines the crime of aggression within the context of the Charter of the United Nations (UN Charter). The crime is committed when a state attacks another.[3]

The main objectives of the ICC are to end impunity and contribute to the prevention of international crimes.[4] The Black's Law Dictionary defines 'impunity' as exemption or protection from penalty or punishment.[5] The use of the word 'contribute' denotes that the ICC does not act in isolation in dealing with international crimes. Other mechanisms or actors play their part as well in this cause. The word also indicates that the Court should welcome any mechanism that leads to the prevention of international crimes. Beyond the frontline objectives of ending impunity and advocacy for international criminal justice, the Rome Statute is mindful of the need to preserve cohesion among states.[6] Thus, the Court is designed to operate in an international relations arena. The arena is governed by fundamental theories, namely, the realist, institutionalist, liberalist, constructivist and legalist theories.[7]

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[1] Rome Statute of the International Criminal Court (Rome Statute) arts 1 & 5.
[2] n 1 above, arts 6(1), 7(1) & 8(1).
[3] n 1 above, art 8*bis* & Preamble para 7.
[4] n 1 above, Preamble para 5.
[5] Black's Law Dictionary 891.
[6] n 1 above, Preamble paras 1 & 7.
[7] K Abbot 'International relations theory, international law and the regime governing atrocities in internal conflict' (1999) 93(2) *American Journal of International Law* 364 - 367.

Realism is conservative of state sovereignty.[8] Institutionalism advocates for a co-ordinated approach to international law.[9] Liberalism creates space for individuals and private actors to contribute to international politics.[10] Constructivism provides for a normative approach to create checks and balances for states in light of existing rights and duties.[11] Legalism puts an emphasis on the separation of law and politics.[12] Each theory has a distinct function in explaining issues of primacy and discretion, international co-operation, interface between law and politics, and minimum requirements for the enforcement of international justice. The theories are referred to in some portions of this study, as they contribute to literature and understanding of complementarity.

The ICC is triune in as far as it is an independent institution, complements national jurisdictions and operates within the United Nations (UN) system.[13] As an independent institution, the Court strives to thwart political or other interference in its proceedings.[14] It is relegated to a supporting role in view of the primacy and obligation of states to address international crimes.[15] Further, the Rome Statute embraces the need to prevent serious crimes, as these result in global instability and insecurity.[16] The Court refrains from substituting the United Nations Security Council (UNSC) on politically inspired interventions.[17]

The inclusion of both the UNSC and states in the operations of the Court supports the inseparability of law and politics.[18] It is on this basis that other political actors, such as regional organisations, may demonstrate that the UN system incorporates them. It is also on this basis that states may resort to other means that are not necessarily legal in nature to address international crimes. The use of state discretion is vital in preserving the primacy of states and in facilitating the intervention of a secondary forum

[8] J Asin 'Pursing Al Bashir in South Africa: between apology and utopia' in HJ van der Merwe & G Kemp (eds) *International criminal justice in Africa: issues, challenges and prospects* (2016) 9 -10.
[9] CJ Alvarez *International organizations as law-makers* (2005) 25; Asin (n 8 above) 10.
[10] Abbot (n 7 above) 366.
[11] Asin (n 8 above) 10.
[12] J Maogoto *War crimes and realpolitik: international justice from World War I to the 21st century* (2004) 10 - 11.
[13] n 1 above, Preamble paras 7 -10.
[14] n 1 above, arts 40 & 42.
[15] n 1 above, Preamble paras 4 & 6.
[16] n 1 above, Preamble paras 3 & 5.
[17] n 1 above, art 15*bis* (6) & Preamble paras 7 - 9.
[18] J Shklar *Legalism: law, morals and political trials* (1986) 123.

considering competing jurisdictional or decision-making actors. Of interest in this study is the rationale for resorting to alternative forms of justice other than prosecutions and the preference of regional mechanisms ahead of the ICC.

The longevity and sustainability of the Court will largely depend on its ability to balance the sovereign rights of states and its duty to intervene. An overemphasis on ending impunity and failure to satisfactorily operate in a legal-political environment may limit the Court's effectiveness in playing an auxiliary role to states. The Court is a creation of a political compromise and it would be naive for it to divorce itself from political considerations.[19] To be a success, the Court should extend its reach beyond states and the UN and incorporate regional organisations such as the African Union (AU). Such organisations have the capacity to bring added value on issues of referrals or deferrals, co-operation and prosecution or resolution of international crimes. The Court's success will be attained when increased state ownership of international crimes allows states to cede ownership to any forum of choice.

Anchoring the ICC is the principle of complementarity, a principle that prefers prosecution by national jurisdictions.[20] The practice differs from earlier international criminal tribunals that exercised primacy over national courts.[21] The unwillingness or inability,[22] or inaction,[23] of states with jurisdiction triggers the intervention of the ICC. Put another way, the primary role of investigating and prosecuting international crimes is vested in states and the ICC intervenes as a court of last resort. The ICC plays a secondary role when states neglect their primary role.[24] The principle therefore defines and demarcates the ICC-states relationship.[25]

In almost every attempt or actual creation of international criminal tribunals – whether permanent or *ad hoc* – the desire among states had been the existence of a

[19] MM El Zeidy 'The principle of complementarity: a new machinery to implement international criminal law' (2002) 23 *Michigan Journal of International Law* 906.
[20] n 1 above, Preamble para 10, arts 1 &17.
[21] See Statute of the International Criminal Tribunal of the Former Yugoslavia (Statute of the ICTY); Statute of the International Criminal Tribunal for Rwanda (Statute of the ICTR); Statute of the Special Court for Sierra Leone (Statute of the SCSL).
[22] n 1 above, art 17(1); El Zeidy (n 19 above) 869.
[23] NN Jurdi *International criminal courts and national courts: a contentious relationship* (2011) 37.
[24] JK Kleffner 'Complementarity as a catalyst for compliance' in JK Kleffner & G Kor (eds) *Complementary views on complementarity* (2006) 79 - 80.
[25] MC Bassiouni 'Policy perspectives favoring the establishment of the International Criminal Court' (1999) 52 *Journal of International Affairs* 798.

complementary system. The main question had been on who enjoys primacy between states and an international forum. At least from the fifteenth century, the creators of international forums envisaged a states-international forum relationship,[26] as well as a states-international forum-regional forum relationship.[27] This historically multifaceted appearance of complementarity shows that the principle is not rigid but dynamic both in its description and application. Owing to its technicalities, the term 'complementarity' had to wait until the Rome Conference established the ICC to be expressly mentioned in an international criminal tribunal statute. The Rome Statute itself provides for a descriptive rather than a definitive mention of the term.[28]

Complementarity heavily depends on the exercise of discretion by three triggering actors, namely, states, ICC Prosecutor (the Prosecutor) and the UNSC. Ordinarily, the first exercise of discretion is given to states with jurisdiction. States exercise jurisdictions prior to and after the intervention of the Court. Before the Court intervenes, states can either institute national proceedings or authorise the intervention of the ICC.[29] After the intervention of the ICC, states may, *inter alia*, request the Court to defer the investigation to their jurisdiction.[30] The Prosecutor has the discretion to accede to or decline such a request based on admissibility, interests of justice or reasonableness.[31]

The UNSC may refer or request deferral of situations or cases from both state and non-state parties based on the preservation of international peace and security.[32] The UNSC may also provide guidance to the ICC when there is non-compliance with requests for co-operation by a state.[33] The UN is involved in the operations of the Court because of the international nature of crimes under the Rome Statute. Since the same crimes are of serious concern to regions where they occur, it is not ambitious to involve regional organisations in the operations of the ICC.

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[26] CM Bassiouni 'International criminal justice in historical perspective: the tension between states' interests and the pursuit for justice' in A Cassese (ed) *The Oxford Companion to International Criminal Justice* (2009) 132.
[27] Charter of the United Nations (UN Charter) art 52.
[28] El Zeidy (n 19 above) 896.
[29] n 1 above, art 14.
[30] n 1 above, art 18(2).
[31] n 1 above, arts 15(3) & 53(1).
[32] n 1 above, arts 13(b) & 16.
[33] n 1 above, art 87(7).

The Preamble to the Rome Statute strongly entrenches the relationship between the Court and national and international systems. The complementary role of the Court is reflected in both the letter and spirit of the Rome Statute. The letter is easily extracted from the Preamble as well as in articles 1 and 17 which clearly make the Court secondary to national jurisdictions. The purposes, principles and the system of the UN on complementarity are easy to understand in the Rome Statute.[34] This study seeks to show that the Court has limited its practice to express provisions of the Rome Statute, hence its failure to fully appreciate innovative efforts of states such as the use of regional mechanisms and the invocation of alternative forms of justice in matters of international crimes. The Court justifies its disregard of directives from regional mechanisms on the grounds of preventing political interference in its work.

The UN works with states and regional institutions for purposes of international peace and security.[35] Regional organisations and other agencies often complement states and the UNSC to enhance the achievement of the ideals of the UN Charter, hence the submission for states and the UNSC to make referrals to regional organisations, where appropriate.[36] As a matter of principle, the UN Charter encourages states to utilise existing regional mechanisms before they refer disputes to the UNSC.[37] The stance is inspired by the realisation that regional institutions are in positions to better understand the context and culture of their member states.[38]

A continent such as Africa, which has a long history of external aggression and imperialism, and which continues to raise allegations of neo-imperialism and accuses the UN of bias, will most likely be comfortable using regional efforts before it requests international intervention. The African Charter on Human and Peoples' Rights (ACHPR or African Charter), the main instrument on human rights in the continent, explicitly requires a conceptualisation of human rights that reflects African values.[39] Therefore, the Court should look beyond the Rome Statute and invite regional organisations for partnership in areas of mutual benefit.

[34] n 1 above, Preamble.
[35] n 27 above, art 1.
[36] n 27 above, art 52.
[37] n 27 above, art 52(2).
[38] GW Mugwanya 'Realizing universal human rights norms through regional human rights mechanisms: reinvigorating the African system' (1999) 10 *Indiana International and Comparative Law Review* 42.
[39] African Charter on Human and Peoples Rights (African Charter) Preamble paras 3 - 4.

The Rome Statute demonstrates a deficiency when it partly relies on the UNSC to enforce international criminal justice, thereby enabling permanent members with veto powers to derail investigations and prosecutions to protect their interests. This politicisation of justice has been one of the causes of bias in the prosecution of international crimes for over a century. For instance, after World War I, the Allies or Allied powers prevented the prosecution of Turkish officials, as they considered Turkey to be a strategic partner.[40]

Since the UN system is susceptible to politically motivated referrals to the ICC,[41] regional organisations may act as a buffer against unwarranted intrusion into the affairs of states. The AU allows participatory processes to ensure that the voice of affected states is heard.

The Court may have to accept a political compromise in future, since African states intend to give an AU mechanism jurisdiction over international crimes. Many scholars have written on the AU's existing and proposed mechanisms as alternatives to the ICC. Proponents argue that the AU has a right to intervene in member states' affairs under the Constitutive Act of the AU (the Constitutive Act),[42] the precedent created by the Extraordinary African Chambers (Extraordinary Chambers),[43] and opportunities presented by the proposed Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol).[44]

The Constitutive Act allows the AU to flex its political muscles to preserve regional peace and security,[45] just like the Rome Statute allows the UNSC to intervene to preserve peace and security at a global scale.[46] The establishment of the Extraordinary Chambers and the Malabo Protocol illustrate an African approach to prosecutions. Some scholars are convinced that the Extraordinary Chambers demonstrated the capability of the AU to prosecute international crimes when it empowered Senegal to

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[40] MC Bassiouni 'From Versailles to Rwanda in seventy-five years: the need to establish a permanent international criminal court' (1997) 10 *Harvard Human Rights Journal* 17.
[41] WA Schabas 'United States hostility to the International Criminal Court: it's all about the Security Council' (2004) 15 *European Journal of International Law* 715.
[42] D Kuwali 'Humanitarian rights: enforcement of international humanitarian law by the African Court of Human Rights' (2011) *African Yearbook on International Humanitarian Law* 169.
[43] B Nthahiraja 'The present and future of universal jurisdiction in Africa: lessons from the Hissène Habré case' in van der Merwe & Kemp (n 8 above) 23.
[44] Nthahiraja (n 43 above) 9.
[45] Constitutive Act of the African Union (Constitutive Act) art 4(h).
[46] n 1 above, art 13.

try Habré on its behalf.[47] A complementary relationship existed between Senegal and the AU because the latter preferred the former as a forum of adjudication. Prior to the establishment of the Extraordinary Chambers, three options were considered: Senegal or Chad jurisdiction; an *ad hoc* Africa criminal tribunal; or an African state jurisdiction.[48] The Extraordinary Chambers and the Malabo Protocol are hints on Africa's future approach in the prosecution of international crimes.

Some scholars have visualised the complementary relationship an African judicial mechanism will have with the ICC.[49] Undoubtedly, literature has laid a foundation on the rationale of alternative forums to fight impunity. However, literature does not propose adequate procedural steps to annex these forums to the ICC complementarity system.

Ideally, a system that operates on discretion and interstate politics should be backed not only by a legally binding mechanism but also by a strong policy. A policy will translate complementarity as understood at the international level into regional and contextual realities, thereby creating a better understanding of obligations, powers and authority between the ICC and states. Although the Office of the Prosecutor (OTP) has made great strides in developing a prosecutorial policy, this study seeks to demonstrate that the existing policy needs to be revised. Alternatively, this study will seek to show the need for the development of a new policy to strengthen and cure defects. The study seeks to demonstrate that the policy should be comprehensive, to allow states to incorporate as many partners and approaches as possible in the advancement of the complementarity project. Some of the partners already operate in some form of complementarity with states. On the other hand, alternative forms of justice have been used successfully in some post-conflict societies.[50]

In their discretion, African states can make the envisaged participation of the AU in the ICC prosecution processes a reality. This study outlines that state discretion should not only be limited to the power to adjudicate or not to adjudicate over ICC crimes but

[47] See for example Nthahiraja (n 43 above).
[48] AU 'Report of the Committee of eminent African jurists on the case of Hissène Habré' (July 2006) 5.
[49] See for example M du Plessis 'Implications of the AU decision to give the African Court jurisdiction over international crimes' June 2012 http://www.issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf (accessed 15 March 2018).
[50] SA Williams & WA Schabas 'Article 17 issues of admissibility' in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (2008).

also that discretion should empower states to decide on the best approaches to tackling international crimes. The OTP policy should reflect innovative abilities of states to contribute to the complementarity project. The ICC should operate in subordination to the discretion of states in a genuinely complementary system. The UNSC must also be regionally sensitive by allowing the AU to exhaust its remedies before triggering the UNSC referrals to the ICC.

A comprehensive policy will minimise tensions between the ICC and states. The existing policy intends to assist states to conduct proceedings themselves after evaluating their performance and potential. A revised or new policy should outline that the assistance rendered to states extends to partners identified by states in the case of regional mechanisms. This study addresses the question of state discretion in two forms. First, it demonstrates how states can use their discretion to give effect to an interpretation and application of complementarity that is broader than the interpretation and application of the ICC. Secondly, the study shows how states can play a catalytic role to ensure the incorporation of regional mechanisms as an alternative to the ICC.

The study uses the Kenyan situation, particularly the *Kenyatta* case, as a case study because the case raises several issues that need attention considering the continuous evolution of the principle of complementarity. Regarding the Kenyan situation, the ICC missed an opportunity to reaffirm the desirability of an approach that encompasses the spirit of the Rome Statute.

To date, the Court has applied the principle of complementarity mainly in line with the letter of the Rome Statute. This study unpacks the spirit of the Rome Statute derived from the UN Charter and argues that such encompasses the desire among states for collective and harmonised decisions to balance the interests of peace, security and justice. These interests are among the objectives of the Rome Statute. The study shows that there is a 'silent or implied' jurisdiction of international and regional mechanisms under the Rome Statute. The current scholarship is not sufficient for the implied jurisdiction. The Kenyan situation also raises issues of discretionary powers, different approaches to justice and the incorporation of regional mechanisms in international criminal justice.

This study recommends frequent use of alternative forms of justice and the inclusion of regional mechanisms to widen the scope of state discretion. It is recommended that after giving states primacy, the Rome Statute should leave it to states to identify crimes to be prosecuted, necessary forms of justice within the circumstances and partners needed to assist the states to execute their duties. The discretion will enable states to involve regional mechanisms in the prosecution of international crimes and to adopt approaches that suit national interests and security. Since the Preamble to the Rome Statute favours an interpretation that conforms to the UN Charter, international peace and security, as well as cohesion among nations, are paramount. To achieve these, there is a need for a consolidated effort of the UN, regional organisations and states.

Given that the Vienna Convention on the Law of Treaties (the Vienna Convention) obligates the Court to adopt the aforesaid interpretation, the Court should consider the context and the broader objectives of the Rome Statute.[51] The involvement of regional organisations in the creation phase of the ICC is a motivation for their involvement in the operational and prosecutorial aspects of the Court's work.[52] Arguably, the Court acknowledges the importance of a collective and harmonised voice when developing international criminal justice.[53] However, an official recognition of regional organisations as competent forums in the administration of justice is outstanding.

The Court operates an international law system and is accordingly prone to challenges of enforcement, co-operation and implementation.[54] This study advances proposals on how the Court, in recognition of state discretion, can utilise the growing strength of regional mechanisms, specifically in Africa, and embrace state preferences on complementarity to strengthen the enforcement mechanisms of international criminal justice. The Court needs as many arms of enforcement as the Rome Statute permits.

[51] See Vienna Convention on the Law of Treaties (Vienna Convention) art 31(1).
[52] M du Plessis 'A critical appraisal to Africa's response to the world's first permanent international criminal court' PhD thesis, University of KwaZulu-Natal, 2011 79.
[53] n 1 above, art 87.
[54] D Fleck 'Enforcement of international humanitarian law' in D Fleck (ed) *The handbook of international humanitarian law* (2008) 675.

1.2 Contextual background

The creation of the ICC was welcomed with enthusiasm and great expectation. The creation was seen as a positive step towards universal human rights and rule of law.[55] The Court became the first permanent international criminal tribunal,[56] and thus marked a departure from the practice of *ad hoc* tribunals started at Nuremberg.[57] It realised a century-long ambition for a permanent criminal judicial mechanism and ignited hopes for the end of impunity.[58] With complementarity as one of its most identifiable features, the Court was closely scrutinised from the onset.

In early years, the Prosecutor set a yardstick to measure the success of the Court. The Prosecutor's view was that a strong capability of national jurisdictions to prosecute international crimes was a crucial indicator of the success of the Court.[59] Although positive complementarity was a later addition to the ICC prosecutorial policy, the first Prosecutor set the tone for the policy at the Court's infancy. Positive complementarity is meant to encourage and strengthen national jurisdictions to retain primacy in international crimes.[60] The policy aims to facilitate technical assistance to states.[61]

To date, 22 cases from nine states have been brought before the ICC.[62] Four state parties to the Rome Statute, namely, Uganda, the Democratic Republic of Congo (DRC), the Central Africa Republic (CAR) and Mali have referred cases to the Court, while the situations in Darfur (Sudan) and Libya were referred to the Court by the UNSC.[63] The Prosecutor was also granted authorisation to investigate crimes committed in Kenya and Côte d'Ivoire on own initiative.[64] From this point, this section

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[55] UN 'Statement of the Secretary-General says establishment of the International Criminal Court is a major step in march towards universal human rights, rule of law' 20 July 1998 http://www.un.org/press/en/1998/19980720.l2890.html (accessed 15 March 2018).
[56] n 1 above, art 1.
[57] BS Brown 'Primacy or complementarity: reconciling the jurisdiction of national courts and international criminal tribunals' (1998) 23 *Yale Journal of International Law* 426.
[58] n 55 above.
[59] OTP 'Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor' 16 June 2003 http://www.icc-cpi.int (accessed 15 March 2018).
[60] WW Burke-White 'Proactive complementarity: the International Criminal Court and national courts in the Rome system of justice' (2008) 49 *Harvard International Journal* 54.
[61] NN Jurdi 'Some lessons on complementarity of the International Criminal Court Review Conference' (2010) 34 *South African Yearbook of International Law* 30.
[62] http://www.icc-cpi.int/EN (accessed 15 March 2018).
[63] n 62 above.
[64] *Situation in the Republic of Kenya* (31 March 2010) 01/09-19-Corr. ICC; *Situation in the Republic of Côte d'Ivoire* (3 October 2011) 02/11 ICC.

presents an overview of Kenya and ICC following a disputed presidential election in 2007.

Kenya ratified the Rome Statute in 2005.[65] After the 2007 presidential elections, violence erupted in Kenya.[66] An independent body, the Commission of Inquiry on Post-Election Violence (the Waki Commission or CIPEV), investigated the post-election violence.[67] The Waki Commission drew a list of suspects alleged to have masterminded the violence[68] and proposed the establishment of a special domestic tribunal to punish the wrongdoing.[69]

To expedite the creation of a special tribunal, the Kenyan Parliament debated the Constitution of Kenya (Amendment) Bill in February 2009[70] and rejected the Bill on two occasions.[71] The rejection of the Bill left no accountability mechanism, hence Kofi Annan, who was at the time the chairman of the AU Panel of Eminent African Personalities, recommended the intervention of the ICC.[72]

The Prosecutor began a preliminary examination for Kenya in February 2008.[73] Notably, this was before the failed attempt to establish a special tribunal. After a year, the Prosecutor justified the initiation of an investigation.[74] The Prosecutor pointed out the Kenyan government's inactivity.[75] In 2009, the Prosecutor informed the ICC President of an intention to initiate proceedings in Kenya.[76] On 31 March 2010, the Pre-Trial Chamber of the ICC (PTC) authorised the Prosecutor to commence formal investigations in Kenya.[77]

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[65] http://www.treaties.un.org (accessed10 February 2017).
[66] See Crisis Group Africa report 'Kenya in crisis' 21 February 2008; 'Commission of Enquiry into Post-Election Violence' 15 October 2008.
[67] International Center for Transitional Justice 'The Kenyan Commission of inquiry into post-election violence' 17 December 2008 http://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf (accessed 10 February 2017).
[68] http://www.dialoguekenya.org/docs/PEV%20Report.pdf (accessed 10 February 2017).
[69] n 68 above, 484.
[70] TO Hansen 'The policy requirement in crimes against humanity: lessons from and for the case of Kenya (2011) 43 *George Washington International Law Review* 1 - 3.
[71] Hansen (n 70 above).
[72] X Rice 'Annan hands ICC list of perpetrators of post-election violence in Kenya' 9 July 2009 http://www.theguardian.com/world/2009/jul/09/international-criminal-court-kofi-annan (accessed 15 March 2018).
[73] http://www.icc-cpi.int/CourtRecords/CR2009_08645.pdf (accessed 31 March 2018).
[74] n 73 above.
[75] n 73 above.
[76] *Situation in the Republic of Kenya* (26 November 2009) 01/09-3 EO PT ICC 4.
[77] *Situation in the Republic of Kenya* (31 March 2010) 01/09 ICC para 18.

The PTC concurred with the Prosecutor on the admissibility of the Kenyan situation.[78] The PTC stated that there were no national proceedings in Kenya or a third state.[79] Kenya launched an admissibility challenge before the Appeals Chamber of the ICC (AC), pursuant to article 19(2)(b) of the Rome Statute,[80] which empowers a state to challenge admissibility based on past or existing national action. Kenya argued in its appeal that it fulfilled article 17(1)(a) of the Rome Statute, as it was willing and able to investigate and prosecute.

The AC confirmed the PTC decision[81] through the use of the *same person* and *same conduct* test.[82] The test demands that national courts prosecute persons identified by the ICC who substantially committed the type of crimes identified by the ICC.[83] The second part of the test makes it difficult for national courts to claim admissibility over a case when they intend to proceed with a crime not mentioned in the Rome Statute.

The Court also dismissed the *Kenyatta* case due to the failure of Kenya to prove the existence of investigative steps at the national level.[84] The Court held that state inaction rendered the case automatically admissible before the Court.[85] However, the Court overlooked that the proposed special tribunal was not the only mechanism available to Kenya at national level. The Court also failed to consider the evolutionary nature of investigations. To safeguard the primacy of national proceedings under the complementarity regime, the Court should give states more discretionary powers on the choice of forum and institution of proceedings. Regarding investigations, the list of state efforts could range from preparation to the actual investigation of cases.[86] Only after exploring the lack of adequate effort can the ICC ideally declare inactivity.[87]

Difficulties associated with the determination of investigations by a state, particularly at the initiation stages, were acknowledged by the AC.[88] The AC stated that the genuineness of an investigation was not an issue in the admissibility determination

[78] n 77 above, para 80.
[79] n 77 above, para 185.
[80] *Situation in the Republic of Kenya* (30 August 2011) 01/09-02/11 OA ICC.
[81] n 80 above, para 123.
[82] n 80 above, para 46.
[83] n 80 above.
[84] n 80 above, para 40.
[85] *Prosecutor v Muthaura et al* (30 May 2011) 01/09/11 ICC.
[86] CC Jalloh 'Kenya vs the ICC Prosecutor' (2012) 53 *Harvard International Law Journal* 243.
[87] Jalloh (n 86 above) 236.
[88] n 80 above, para 38.

under consideration.[89] States should be allowed more discretion and independence to craft timelines and strategies in the earlier phases of an investigation.[90] The intervention of the Court may be premature if the Court starts a concurrent investigation when the state is in the process of setting systems to initiate its own investigation.[91]

The situation in Kenya showed a determination by the Prosecutor to take over proceedings from the Kenyan authorities.[92] Expressed differently, the Prosecutor was 'too eager' to investigate and prosecute instead of encouraging and supporting the efforts of the state to investigate the situation. As such, the Prosecutor intervened prematurely before the exhaustion of national efforts.[93]

States need more discretion than the Prosecutor to decide on cases under their jurisdiction.[94] The Court missed an opportunity to embrace positive complementarity by ignoring overtures from a state which welcomed assistance from it to investigate the alleged violations.[95] Instead, the Court treated co-operation and admissibility as separate matters.[96] Consultations between the Court and the state may include the provision of assistance on information requested by a state.[97] The Court and the state can resolve complementarity conflicts when co-operation and requests are granted by either party when appropriate.[98]

Considering that the *Kenyatta* case began admissibility challenges by states, a lenient and patient approach was required in the determination of the PTC.[99] The PTC should have shown flexibility in accepting documents filed late.[100] The condonation could have given Kenya more time to make oral hearings and file additional documents.[101] Complementarity obliges the ICC to promote national proceedings than to derail such

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[89] n 80 above, para 40.
[90] Kleffner (n 24 above).
[91] Kleffner (n 24 above).
[92] J Spilman 'Complementarity or competition: the effect of the ICC's decision in Kenya on complementarity and the article 17(1) inquiry' (2013) 10 *Richmond Journal of Global Law and Business Online* 14.
[93] n 1 above, arts 1 & 5.
[94] Kleffner (n 24 above).
[95] Burke-White (n 60 above) 53 - 108.
[96] *Situation in the Republic of Kenya* (30 May 2011) 01/09-02/11 ICC paras 28 - 38.
[97] n 1 above, art 93(10).
[98] C Stahn 'Libya, the International Criminal Court and complementarity: a test of shared responsibility (2012) 10 *Journal of International Criminal Justice* 325.
[99] Spilman (n 92 above).
[100] *Dissenting Opinion of Judge Uśacka* (30 September 2011) 01/09-02/11 OA ICC para 25.
[101] Spilman (n 92 above).

processes.[102] A thorough assessment of national efforts is important before a decision to deactivate state primacy is made.

The use of discretion by Kenya received support at AU and sub-regional level. The AU criticised the Court for endangering peace and security prospects in Kenya through the Court's assumed jurisdiction over the Kenyan situation.[103] The AU recommended the use of national or regional mechanisms to resolve the post-election violence.[104] The Kenyan debate is one of the contributors to the current attempts by the AU to empower the African Court on Human and Peoples' Rights (the African Court) with jurisdiction over international crimes.[105] Another notable attempt to take the Kenyan situation from the ICC was the resolution of the East African Legislative Assembly (EALA), a wing of the East African Community (EAC). The EALA resolution of 28 April 2012 proposed the transfer of Kenyan cases from the ICC to the East African Court of Justice (EACJ), supposedly in the interests of justice.[106] The EALA was so determined that it called for an amendment to the EAC Treaty to give the EACJ jurisdiction over the Kenyan cases.[107] The EALA believed that the cases before the ICC were also a contravention of the EAC Treaty.[108]

1.3 Problem statement

Notwithstanding the controversy on its proper application, complementarity is indispensable to the operations of the Court.[109] The challenges faced by the ICC when it applies the principle in practice call for scholarly research in the pursuit of a universally (hopefully) accepted approach.[110] Since new issues continue to arise on admissibility, the jurisprudence of the Court needs to develop to meet these demands. The Court decisions prior to the *Kenyatta* case failed to give clear guidance on the

[102] Spilman (n 92 above).
[103] AU Assembly 'Sixteenth Ordinary Session' 30 – 31 January 2011 http://www.goo.gl/qXvsY1.
[104] n 103 above.
[105] A Nossiter & M Simons 'African leaders grant themselves immunity in proposed court' 2 July 2014 http://www.nytimes.com/2014/07/03/world/africa/african-leaders-grant-themselves-immunity-in-proposed-court.html (accessed 1 February 2017).
[106] EALA 'Motion on deferring Kenyan cases to the East Africa Court' 28 April 2012 http://www.eala.org/new/index.php/media-centre/press-releases/571-defer-the kenyan-icc-case-eala-states (accessed on 8 February 2017).
[107] n 106 above.
[108] n 106 above.
[109] Kleffner (n 24) 81 - 83.
[110] LE Carter 'The future of the International Criminal Court: complementarity as a strength or weakness' (2013) 12 *Washington University Global Studies Law Review* 457.

proper application of complementarity. The ensuing misunderstanding widened after the case.[111]

The ICC made several attempts since its inception to promote an understanding of the criteria used for determining the admissibility of a case. In the *Katanga* case,[112] the AC clarified the purpose of complementarity. The AC identified complementarity as a balancing act that ensures respect of sovereign rights and the need to end impunity.[113] The ICC acknowledges the right of states to exercise jurisdiction in their domain.[114] However, the Court is yet to determine the extent to which states are entitled to use their discretion and primacy rights to either stop the intervention of the Court or to give direction on jurisdictional matters.[115]

The scope and meaning of complementarity presently lacks full appreciation in legal scholarship.[116] There is a need to address the question of state discretion to reduce ongoing frictions between the Court and political actors. Clarity on the issue of state discretion will give effect to the rebuttable presumption that states are willing and able to administer justice under their jurisdiction.[117] A rebuttal requires one to establish that a state failed to utilise both judicial and non-judicial mechanisms at its disposal to address a situation. In addition, it must be established that regional mechanisms are also unwilling or unable to assist a state to bring perpetrators to book. The presumption can be viewed as a bedrock of the principle of complementarity.[118]

The ICC cannot persuasively contend against the use of alternative forms of justice or regional mechanisms because it is secondary in operation. The Court has not been able to synchronise its duty to intervene in state affairs with the UN system that allows political entities and non-judicial approaches at national, regional and international level.

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[111] B Batros 'The evolution of the ICC jurisprudence on admissibility' in C Stahn & MM El Zeidy (eds) *The International Criminal Court: from theory to practice* (2010) 558.
[112] *Prosecutor v Katanga & Chu*i (25 September 2009) 01/04-01/07 ICC OA8.
[113] *Katanga & Chui* (n 112 above).
[114] Kleffner (n 24 above).
[115] MA Newton 'The complementarity conundrum: are we watching evolution or evisceration (2010) 8 *Santa Clara Journal of International Law* 145 - 146.
[116] El Zeidy (n 19 above) 896.
[117] n 80 above, para 27.
[118] Newton (n 115 above).

In its first decision on complementarity, the Court introduced the *same person* and *same conduct* test to determine admissibility.[119] Using this test, the *Lubanga* case was held admissible because the same conduct was not investigated by the national authorities.[120] The Court viewed the warrants of arrest by competent DRC authorities against the accused to contain different crimes from those preferred by the ICC.[121] Inadvertently, the Court laid a foundation with legal cracks on what constitutes the 'same' conduct.[122] Inconclusiveness on the issue of same conduct has prompted the Court to tailor its wording to the concept in its rulings by using terms such as 'substantially the same conduct'.[123] The Court has also invested time to discuss the same person requirement.[124]

Recent decisions regarding situations in Libya and Kenya show that the question on the practical application of complementarity is still unsettled.[125] In Libya's admissibility challenge, the Court emphasised on state action and state ability and willingness to institute national proceedings.[126] The Court addressed Libya's 'inability' to prosecute Gaddafi effectively.[127] However, the Court did not consider the element of 'unwillingness'.[128] The Libyan scenario shows that issues of activity, willingness and ability should be addressed together due to the need for a holistic approach to complementarity.[129] For instance, a state that is unable to initiate proceedings due to resource constraints may be willing to do so.[130] The Court may assist such a state to carry out national proceedings.[131]

The Kenyan scenario was the first opportunity to fully address complementarity.[132] Kenya became the first state to allege inadmissibility of a case and it cited its capacity

[119] *Prosecutor v Lubanga* (09 March 2006) 01/04-01/06-8-Corr ICC paras 19 - 33.
[120] *Lubanga* (n 119 above) para 55.
[121] *Lubanga* (n 119 above).
[122] Jurdi (n 23 above) 69.
[123] Jalloh (n 86 above) 229; *Prosecutor v Gaddafi & Al-Senussi* (2 April 2013) (01/11-01/11) ICC.
[124] n 80 above, para 33.
[125] Carter (n 110 above) 456 - 458.
[126] *Prosecutor v Gaddafi & Al-Senussi* (31 May 2013) 01/11-01/11 ICC.
[127] *Gaddafi & Al-Senussi* (n 126 above) para 200.
[128] *Gaddafi & Al-Senussi* (n 126 above) para 138.
[129] KA Marshall 'Prevention and complementarity in the International Criminal Court: a positive approach (2010) 17(2) *Human Rights Brief* 22.
[130] Marshall (n 129 above).
[131] n 1 above, art 93.
[132] *Prosecutor v Ruto et al* (30 August 2011) 01/09-01/11-307 ICC.

to adjudicate the cases before the ICC.[133] Kenya argued that legal reforms and steps were underway to enable national prosecutions.[134] Broadly, the alleged capacity included the use of alternative forms of justice and regional mechanisms. Also, it is noted that Kenya was the first state to be investigated by the ICC at the initiative of the Prosecutor.[135]

Despite strong arguments against the intervention of the ICC, Kenya failed to persuade the Court that it was ready to commence proceedings against perpetrators.[136] The Court addressed several legal and practical issues in the Kenyan situation.[137] From the onset, the lack of a precedent on admissibility challenges raised by states exposed the Court's unpreparedness to apply the principle of complementarity.[138] The AC acknowledged that it was the first time deciding on the necessity of a state to investigate same persons in a case under dispute.[139] However, the Court missed the rapport between complementarity and co-operation when faced with proposals and requests for assistance from Kenya.[140] Carter maintains that the most ideal use of complementarity is in circumstances where the principle enhances prosecution by national courts.[141]

The *Kenyatta* case is important in the evolving nature of complementarity, since the case impacts the Court's jurisprudence.[142] The case reinforced the debate on whether the jurisprudence of the Court 'is one case behind'.[143] The Court seems to interpret the principle differently from case to case.[144] The *Kenyatta* case revealed the need for the Court to proactively develop a comprehensive jurisprudence to enhance a better understanding of the principle of complementarity.[145]

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[133] J Trahan 'Is complementarity the right approach to the International Criminal Court's crime of aggression: considering the problem of overzealous national court prosecutions' (2012) 45 *Cornell International Law Journal* 569 - 601.
[134] n 77 above, paras 12 - 15.
[135] n 77 above.
[136] n 80 above, para 121.
[137] Jalloh (n 86 above) 229.
[138] Jalloh (n 86 above) 243.
[139] n 80 above, para 34.
[140] Spilman (n 92 above) 21 - 23.
[141] Carter (n 110 above) 459.
[142] Jalloh (n 86 above) 236.
[143] Jalloh (n 86 above) 243.
[144] Jalloh (n 86 above) 243.
[145] Jalloh (n 86 above) 243.

Although the parameters for the Court to exercise jurisdiction are well defined,[146] the extent to which it reacts to jurisdictional conflicts remains blurred.[147] The Court should consider the extent of its jurisdiction in the Rome Statute in light of practical cases. The Court has restricted the tests to determine admissibility by putting less weight on the circumstances of each case.[148] A holistic approach is thus necessary in the application of complementarity in order to avoid unwarranted exclusion of national jurisdictions in the prosecution and adjudication of cases.[149]

An authorisation for a *proprio motu* investigation obliges the Prosecutor to prove a *prima facie* case.[150] It is the duty of the Prosecutor to prove that a state is acting in bad faith and is protecting the accused from accountability.[151] In other words, the standard of proof generally rests with the Prosecutor and not the concerned state. The state's duty is to share relevant information with the Court, leaving it to the Prosecutor to convince the Court of the unwillingness or inability of the state to initiate proceedings.[152]

While the PTC deliberated on the justification for the Prosecutor's intervention, the burden of proof was shifted to the state.[153] Prior to the Kenyan situation, the proof of admissibility rested on the Prosecutor.[154] In the Kenyan situation, the Court may have erroneously interpreted the duty or discretion to disclose information by the state under rule 51 of the Rules of Procedure and Evidence (the Rules of the Court) as a duty to prove the existence of national investigations.[155] The approach adopted by the Court on evidentiary requirements would make it difficult for states to retain a case, particularly in the preliminary stages of investigations.[156] In the preliminary stages of investigations, states have limited documents and often initiate legal reforms in the process.[157]

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[146] n 1 above, art 17.
[147] Brown (n 57 above) 383 - 387.
[148] Jalloh (n 86 above) 236 - 237.
[149] Spilman (n 92 above) 16.
[150] n 1 above, art 15(3).
[151] Spilman (n 92 above) 15 - 17.
[152] Rules of Procedure and Evidence (Rules of the Court) rule 51.
[153] *Prosecutor v Muthaura et al* (30 August 2011) 01/09-02/11 OA) ICC para 2.
[154] El Zeidy (n 19 above) 869.
[155] El Zeidy (n 19 above) 869.
[156] Spilman (n 92 above) 15.
[157] Spilman (n 92 above) 12.

The Rome Statute does not refer to the relationships of the Court and states with regional jurisdictions. As seen in the *Kenyatta* case, the Court must deal with cases where states or regional bodies request deference to regional courts.[158] Regional courts are better placed than national courts and ICC in certain circumstances. For example, an aggrieved state may be 'too willing' to try the crime of aggression against citizens of an invading state.[159] A regional court is also preferable than the ICC because of its understanding of regional issues and the need to ensure long-lasting peace in the region.[160]

The attainment of sustainable peace should involve the participation of victims whose testimony and contribution to international criminal justice approaches are central to the nuances of victim-desired justice. The *Kenyatta* case revealed that the witnesses remain at risk of being threatened or killed, despite protecting legislation at the ICC and national levels.[161] Perhaps, the time has come for the ICC and states, in their quest to strengthen their own victim/witness systems, to collaborate with regional mechanisms and tap into the experiences of these mechanisms. Considering that the threat to witnesses is real in Africa and international criminal tribunals are limited in mitigating the threat, Mahony advocates for a forum that understands a context in its entirety and contends as follows:

> Where insecurity is apparent, the threat to participating witnesses, or witnesses who are perceived to participate, in criminal justice processes is intensified. Such circumstances are apparent in states where the capacity of law enforcement is lower than that of criminal groups. These circumstances are even more evident in states that suffer from armed conflict. This differentiates African witnesses in high profile cases from those protected in Western states. Very high threat levels, including in some cases the deployment of the state apparatus, face witnesses in cases before international criminal tribunals. The relative impunity with which the accused are alleged to have committed crimes points to a high likelihood that they would give such orders again in order to prevent proceedings against them. Understanding and evaluating the threat requires a thorough insight into the crimes committed, the political, social, cultural,

[158] n 106 above.
[159] Trahan (n 133 above) 583 - 587.
[160] Trahan (n 133 above) 569 - 601.
[161] See for example JR Njeri 'Witness protection: the missing cornerstone in Africa's criminal justice systems' 1 September 2014 http://www.issafrica.org/iss-today/witness-protection-the-missing-cornerstone-in-africas-criminal-justice-systems (accessed 1 October 2020).

> security and economic context in which they occurred, and the way in which this context has changed and might continue to change in the future.[162]

In line with the principle of complementarity, states should be allowed to propose an alternative forum to complement their efforts.[163] The state's ownership of proceedings should be preserved until all available mechanisms proposed by a state are proved insufficient to make the case inadmissible before the Court.[164] The Court must open itself to proposed mechanisms to allow an enhanced application of complementarity.

The existing practice and policy of the OTP is to liberate complementarity from the restrictions imposed by the Rome Statute.[165] The OTP has shown that complementarity is a dynamic concept that needs continuous development and review.[166] To clarify the practical application of the principle, the OTP developed a policy paper to regulate its relationship with states.[167] From this view, important concepts such as positive complementarity emerge. The Court has also introduced new standards not expressly stated in the Rome Statute. Examples are requirements of 'inaction' and '*same person* and *same conduct'.*[168] In view of the foregoing, nothing should bar the Court from embracing regional initiatives which assist states in their exercise of jurisdiction.

The Rome Statute leaves room for the Prosecutor not to investigate or prosecute in the interests of justice.[169] Cases may be transferred from the ICC to another forum in the interests of justice, or when states prefer non-judicial settlements.[170] The alternative forum under the current jurisprudence and practice of the Court will ordinarily be another state with jurisdiction over the crime. Thus, at the first level of the complementary relationship, an unwilling, unable or inactive state is defenceless against the Court's intervention. At the second level, the unwilling, unable or inactive Court needs to refer a case to a state. Complications arise at the second level when a

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[162] C Mahony 'The justice sector afterthought: witness protection in Africa' (2010) *Institute for Security Studies* 163 - 164.
[163] Trahan (n 133 above) 569 - 601.
[164] Stahn (n 98 above).
[165] OTP 'Report on prosecutorial strategy 2006' 14 September 2006 http://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-strategy-2006 (accessed 23 January 2017).
[166] n 165 above.
[167] OTP 'Paper on some policy issues before the Office of the Prosecutor' September 2003 http://www.icc-cpi.int/nr-030905_policy_paper.pdf (accessed 10 February 2017).
[168] WA Schabas *An introduction to the International Criminal Court* (2011) 190.
[169] n 1 above, art 53.
[170] n 106 above.

state initially made a referral. A *lacuna* occurs when neither the Court nor state(s) are prepared to take up the situation. For example, the Prosecutor may decline a situation of human rights violations because of failure to fulfil the gravity test or based on the interests of justice. Other states with jurisdiction may also be generally reluctant to intervene in the affairs of another state.[171]

A third level in the complementary relationship is therefore desirable, in the form of regional mechanisms to intervene when the first and second levels fail or are deemed inappropriate to institute proceedings. A mechanism such as the African Court can intervene to prosecute the violations. The third level may also be considered first or second at the discretion of a state. Regional organisations, such as the AU, have specific instruments that authorise them to intervene in the affairs of member states.[172]

The Rome Statute in article 53(3) enables the Prosecutor to decline to prosecute, in circumstances in which the state or UNSC remain convinced that the Court should retain jurisdiction. The article is silent on which action the state or UNSC should take when the PTC upholds the Prosecutor's decision not to prosecute. Moreover, the article is silent on state or UNSC action when the Prosecutor decides not to prosecute after conducting an initial investigation. These gaps may defeat the objective of the Rome Statute to attain justice for victims of international crimes, since there will be no forum to help them.

In the event that the Prosecutor, the Court and the state(s) may be unwilling or unprepared, a policy should be developed to provide a third level of complementarity. While there is a need to respect state and prosecutorial discretions not to investigate and prosecute crimes, an option of deferral to a regional forum should be ideally made available. Proceedings outside usual jurisdictions in the Rome Statute would install strong pillars for complementarity that will not be easily broken. An amended or new prosecutorial policy should define the three-tier complementarity system: states, Court and regional mechanisms. The policy should also clarify the right of states to use alternative forms of justice *in lieu* of prosecutions.

[171] n 1 above, Preamble para 8.
[172] n 45 above.

1.4 Relevance and objectives of the study

Complementarity is foundational to the existence and operations of the ICC. The Court is heavily dependent on the proper application of the complementarity regime to maintain its integrity and justify its interventions.[173] This study advances the view that in a developing system, such as the ICC, consultation rather than confrontation between the Court and states is key for the preservation of the principle of complementarity. The study stresses the need for the respect of both the letter and spirit of complementarity. Both misreadings and misinterpretations may lead to absurdity and affect the legitimacy of the Court. Also, they may lead to jurisdictional conflicts and undermine efforts for co-operation by states. The spirit of complementarity is particularly focused on the prevention of impunity and bringing justice rather than controversies on the forum to investigate and prosecute gross violations.

The study aims to:

- Provide a historical overview of international criminal tribunals.
- Explore the history of complementarity.
- Discuss the development of the ICC's complementarity jurisprudence.
- Examine the ICC's approach on the application of complementarity and the gaps thereof.
- Suggest options and proffer recommendations on the application of complementarity.
- Show that complementarity should operate in full regard of state discretion.

1.5 Scope of the study

The investigation of the post-election violence in Kenya in 2008 began with the establishment of the Waki Commission whose proposal for the establishment of a domestic tribunal to prosecute the perpetrators was rejected by parliament. The creation of the Waki Commission was part of national mechanisms to investigate the violence in Kenya. In addition, Kenya took legal and political steps to bar the ICC from exercising jurisdiction and made judicial reforms which included the adoption of a new

[173] MJ Struett *The politics of constructing the International Criminal Court* (2008) 154.

Constitution[174] and amendments to the Witness Protection (Amendment) Act.[175] On the political front, Kenya secured the support of the AU and later the EAC in a bid to convince the UNSC to facilitate deferrals in view of complementarity and reconciliation initiatives.[176] All the efforts were in vain, as both the UNSC and the ICC made unfavourable responses.

The study considers whether Kenya could have used judicial or non-judicial national and regional mechanisms as alternatives to the ICC in the *Kenyatta* case. The study also looks at the motivation of the Court in retaining jurisdiction in the case against opposition by the government of Kenya. The study analyses the prosecutorial and state discretions to advance core arguments on the use of state discretion as a determinant to the application of complementarity.

The study covers the period from the establishment of the Waki Commission on 28 February 2008 to the withdrawal of charges against Kenyatta by the ICC on 5 December 2014. The analysis is based on available materials for the period under discussion. While the study examines complementarity in general, it uses the *Kenyatta* case as a case study to highlight current challenges faced by the ICC. The study also looks at the prospects for the Court regarding the direction for complementarity.

The study does not analyse debates on the AU forums, including threats and actual withdrawals from the ICC by some ICC member states during and after the Kenyatta debacle. Another study is best suited for this purpose. This limitation applies so as to maintain the focus of the study – the application of complementarity. Although the study provides a brief discussion of the debates (due to their link to the Prosecutor's application of complementarity and proposals for prosecutions by regional mechanisms), the short discussions should not be understood as a focus of this study.

1.6 Limitations of the study

The jurisprudence of the ICC is at its earlier stages of development, since the Court has adjudicated few cases and currently less than a handful of cases are under prosecution. The jurisprudence of the Court is developing in many areas. Although

[174] Constitution of the Republic of Kenya, 2010.
[175] Witness Protection (Amendment) Act, 2010.
[176] LM Wanyeki 'The International Criminal Court's cases in Kenya: origin and impact' (2012) *Institute for Security Studies Paper* 13.

much has been written about the principle of complementarity, gaps appear in the operationalisation of the principle. Complementarity as a legal concept is gradually gaining relevance and recognition. With the establishment of mechanisms such as the complementarity project under the Grotius Centre for International Legal Studies, the principle is growing fast, hence the need to address areas that need attention to ensure further development of the principle.[177]

Notwithstanding scholarly initiatives on unpacking the principle of complementarity, more research is necessary to resolve some dilemmas on the application of complementarity. The existing academic writing does not sufficiently address all controversial questions pertaining to the application of the principle by the Court. The importance of state discretion in resolving jurisdictional conflicts is yet to be fully visited by scholars. Owing to this gap, the secondary sources used mainly discuss prosecutorial discretion in the ICC practice.

To a lesser extent, the wide geographical gap between the two jurisdictions of interest, namely, Kenya and ICC, also limit the study. Notwithstanding, in a theoretical study the proximity factor does not substantially impact the quality of the research negatively. On the other hand, states such as South Africa have reduced their support to the Court more specifically based on the issue that the Court has been targeting African leaders. Therefore, this study is deprived of useful insights and perspectives from such states on international criminal justice. The states may reserve their current arguments against the Court in the next few years to regional and UN forums instead of assisting the Court to find a lasting solution to the application of complementarity and other global challenges to end impunity.

1.7 The relationship of the ICC, states and regional organisations in international law

In an age of armed conflicts and instability, regional organisations increasingly contribute to international peace, security and order.[178] The AU is growing its influence on laws, rules of engagement, status and conduct of troops, and common doctrines on the timing of the deployment of peacekeepers. Regional instruments, such as the

[177] http://www.postconflictjustice.com (accessed 31 March 2018).
[178] FL Morrison 'The role of regional organizations in the enforcement of international law' in J Delbrück (ed) *Allocation of law enforcement authority in the international system* (1995) 43.

Constitutive Act and the African Charter, show a desire by Africa to provide an African perspective to international law. Therefore, the AU has made great strides to 'Africanise' international law.[179]

The African continent is on a drive to provide 'African solutions to African problems'. This study argues that the ICC and its member states should embrace regional organisations as partners in the development and application of international law to collectively contribute to the formulation of policies and initiatives to enhance the promotion and enforcement of international criminal justice. Currently, states and regional organisations are separated because states either act on individual capacity or as representatives of their regional groupings. During the First Review Conference of the Rome Statute, states made individual presentations with Kenya and Spain advancing regional positions on behalf of the AU and the European Union (EU) respectively.[180]

1.8 The potential relationship between the ICC and regional organisations

The study proposes a model relationship for the ICC and regional organisations. The study shows the need for a policy to incorporate regional organisations into the complementarity project. The OTP has developed a policy to strengthen the principle of complementarity. However, the policy is not adequate; hence, there is a need to develop complementarity further through either amending the current policy or developing a new one to reflect the role of regional organisations.

1.9 Research question(s)

Is there a need for statutory and normative (de)activations to ensure that the supremacy of state discretion is adequately considered in the exercise of power by the ICC Prosecutor?

In addition to the above central question, the following research sub-questions guide this study:

[179] Nthahiraja (n 43 above) 14 - 16.
[180] http://crimeofaggression.info/documents/6/Review-Conference-offiical-records-ENG.pdf (accessed 31 March 2018).

- To what extent did the scenario in Kenya strengthen the argument that the ICC Prosecutor should be guided by a context analysis and realities in determining an appropriate response to international crimes?
- What is the feasibility of using non-prosecutorial mechanisms instead of prosecutorial mechanisms in a system that is designed to prevent impunity? Can such use possibly occur without compromising on criminal accountability?
- To what extent can the inclusion of regional mechanisms in the ICC system enhance the realisation of effective international criminal justice? What compromises should the ICC make to cope and/or cooperate with parallel complementary mechanisms?

1.10 Current scholarship, methodology and structure of this study

This study reviews literature on the following:

- the Rome Statute and other human rights and humanitarian law treaties;
- the case law of regional and international criminal tribunals, as well as of relevant domestic courts;
- scholarly works on international law;
- reports of governments, intergovernmental and non-governmental organisations on steps taken by Kenya to ensure deferral to national courts in the *Kenyatta* case and beyond;
- official documents of the ICC; and
- dialogue with experts on the subject under discussion.

Scholars wrote about the inevitability of ensuring accountability in an international forum prior to the creation of the ICC. Academics discussed the envisaged operations of a permanent international court and projected contribution in ending impunity.[181] When the establishment of the ICC became inevitable, the proposed court was scrutinised more, with more interest in the principle of complementarity. The international criminal justice system exalted international criminal tribunals above national courts before the establishment of the ICC.[182]

[181] See for example JT Holmes T*he International Criminal Court: the making of the Rome Statute - issues, negotiations, results* (1999).
[182] Statute of the ICTY (n 25 above) art 9(2); Statute of the ICTR (n 25 above) art 8(2).

The establishment of the ICC was a long process, hence the continued debates on some of its key principles such as complementarity.[183] The first Prosecutor of the ICC contributed to the complementarity debate upon assumption of office in 2003. He highlighted the importance of complementarity as follows:

> As a consequence of complementarity, the number of cases that reach the Court should not be the measure of 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.[184]

In view of the foregoing, several accomplished scholars extensively discussed the principle of complementarity and covered its historical and current development. These scholars scrutinised the application of the principle by the ICC in various cases before the Court, particularly. However, the scholarly work does not specifically address the research question of this study. The Rome Statute does not expressly mention the role of regional mechanisms or alternative forms of justice. Furthermore, the potential relationship between the Court and regional mechanisms has been discussed only recently. Therefore, scholarship is relatively insubstantial in this area.

To the extent that the relationship between the ICC and regional institutions is discussed in scholarships, academics are yet to fully appreciate the provisions which operationalise the partnership of regional mechanisms in the complementarity project. The examination of the discretion of states fails to address the aspect that regional instruments are broad enough to activate the operations of regional mechanisms.

The current scholarship concentrates on how existing and developing regional systems can be used to prosecute international crimes. A failure to appreciate that the Rome Statute impliedly includes the use of regional mechanisms requires the amendment of the Rome Statute to define and provide for their role. The operations of the Court consider provisions, principles and rules of international law.[185] However, it is not clear what should happen if an amendment in terms of article 121 of the Rome Statute does not enjoy the support of all states. The result may be devastating, as some states may withdraw their support from the Court.

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[183] MC Bassiouni *The Statute of the International Criminal Court, a documentary history* (1998) 5.
[184] n 59 above.
[185] n 1 above, art 21.

It is undesirable to ignore international politics in this study, although the study is primarily from an international criminal law perspective. Whereas most states in Africa are expected to welcome the involvement of regional mechanisms to complement states, as evidenced by their push for 'Africanisation', it is not certain that other regional groupings or non-African states will embrace the proposition. The other regional groupings and states may prefer the Court to AU systems in the light of the developing jurisprudence of the AU that grants immunities to persons in certain political positions.

This study prefers an amendment to the prosecutorial policy, as opposed to the amendment of the Rome Statute. An amendment to the Rome Statute may adversely impact the Court in several ways. First, an amendment to the Rome Statute may create a legally binding obligation on states to accept the role of regional mechanisms,[186] whereas a prosecutorial policy may be viewed as a guiding instrument because of its 'soft' nature. Secondly, withdrawals from the Rome Statute are permitted under certain circumstances if a state party is not agreeable to an amendment.[187] Thirdly, an amendment may bind all the state parties.[188] The situation differs when amendments are effected on the category of crimes under the Rome Statute.[189] Such amendments only bind those states which accept the amendment and must be inserted on the jurisdiction section of the Rome Statute. The effect of this is seen, for example, on the AU's approach to the crime of aggression.

An expanded definition of aggression under the proposed Malabo Protocol concerns some states. The Rome Statute definition does not qualify material support to a warring party as an act of aggression.[190] The Malabo Protocol expands the definition in the Rome Statute to qualify the provision of material support as an act of aggression.[191] States providing material support to armed groups fighting unpopular and oppressive governments, and states supporting governments fighting armed groups, would no doubt oppose classification as direct participation in hostilities. If ratified in its current

[186] n 1 above, art 121(4).
[187] n 1 above, art 121(6).
[188] n 1 above, art 121(4).
[189] n 1 above, arts 4 & 5.
[190] n 1 above, art 8*bis*.
[191] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), art 28M.

form, the Malabo Protocol will give the African Court jurisdiction to hold states accountable for aggression by merely providing material support to belligerents.

This study further demonstrates that an amendment to the Rome Statute is not desirable, since the provisions of the Rome Statute are enough to allow regional mechanisms to participate in the complementarity project. Strengthening the existing prosecutorial policy on complementarity will create fewer complications for the Court and possibly avert withdrawals from the ICC. As the study shows, states may find it difficult to subject themselves to a system that threatens their interests. Economic, political, security and strategic interests come into play when states provide material support during armed conflicts and other forms of armed violence.

Two critical issues need to be activated and extensively defined to allow regional mechanisms to participate in the ICC complementarity project without causing anxiety regarding the impact of an amendment. These include the nature of state discretion in relation to transferring or exercising primacy, and the intention of the Rome Statute drafters when creating a complementary system that incorporates the UN. The UN Charter provides for regional action in regional challenges.[192] Both the UNSC and states utilise regional mechanisms to settle local disputes. By implication, regional mechanisms may be utilised in the ICC system whose Preamble resembles the UN system.

To this end, the study provides the first critical and in-depth appraisal of the two aforementioned issues. The study ascertains the potential for states and the ICC to develop a comprehensive policy that defines the role and limitations of regional mechanisms in the complementarity project. The discussion that follows is an analysis of the main scholarly views.

Some scholars have discussed how complementarity has been endorsed by the international community as the best mechanism to regulate an international judicial body such as the ICC.[193] However, criticisms against the principle abound, hence calls for an evaluation of the effectiveness of the Rome Statute in the implementation of complementarity.[194] International criminal justice requires some ‘normalisation’, to

[192] n 27 above, arts 52 - 54.
[193] See for example Holmes (n 181 above) 41.
[194] Newton (n 115 above).

borrow phrasing from Mégret, on the need for an explicit procedure for punishing persons suspected of international crimes.[195] Newton asserts that the lack of a legally binding definition of complementarity destabilises the balance between domestic courts and the ICC. [196]

While Schabas acknowledges that the intention of the ICC is to operate in a complementary relationship with national jurisdictions, he submits that the relationship is not truly complementary.[197] Schabas views the ICC and national jurisdictions as competing systems which are often hostile to each other.[198] He further notes that obligations imposed by the principle of complementarity rest on states which must embrace the principle as both a right and a duty.[199] He observes that the Court has expanded admissibility requirements.[200] The new component is that of inaction, determined through a consideration of whether the national system has 'remained inactive'.[201] He explains the ICC's approach in cases where the state with jurisdiction over a case is inactive.[202] In such situations, the Court does not examine the issues of inability or unwillingness.[203] The Court's reading of article 17 is in opposition to the presumption of state primacy over cases.[204]

Jurdi advocates for the express inclusion of the 'inaction' scenario by amending the Rome Statute.[205] 'Inaction' denotes the so-called uncontested jurisdiction when a case is automatically admissible for failure of the concerned state to investigate and prosecute the case.[206] An amendment will strengthen the jurisprudence of the Court and enhance clarity on the application of complementarity.[207]

[195] F Mégret 'In defense of hybridity: towards a representational theory of international criminal justice' (2005) 38 *Cornell International Law Journal* 725.
[196] Newton (n 115 above) 133.
[197] Schabas (n 168 above) 190 - 191.
[198] Schabas (n 168 above) 190 - 191.
[199] Schabas (n 168 above) 190 - 191.
[200] Schabas (n 168 above).
[201] Schabas (n 168 above) 190.
[202] Schabas (n 168 above) 190.
[203] Schabas (n 168 above) 190.
[204] Schabas (n 168 above) 190.
[205] Jurdi (n 23 above) 37.
[206] http://www.icc-cpi.int/about/otp/Pages/otp-policies.aspx (accessed 23 January 2017).
[207] Jurdi (n 23 above) 37.

Carter contributes to the discussion on the weaknesses and strengths of the principle of complementarity and notes that the principle preserves the sovereignty of states.[208] This strength enables states to play a more prominent role in the adjudication of international crimes.[209] However, Carter raises two major concerns on the principle of complementarity. The first challenge arises because complementarity emanates from the structure of the ICC. The second comes into play due to the complications in domestication.[210]

On the other hand, Kleffner applauds complementarity for the creation of a legal platform through which the Court engages states when it prosecutes international crimes.[211] However, Kleffner expresses concern for the possibility of abuse when the principle is invoked. Kleffner also fears the negative impact the principle may have on the efficiency of ICC proceedings, and destruction of evidence by states which the ICC intends to investigate.[212]

Some scholars acknowledge tensions caused by admissibility challenges and the choice of cases made by the Prosecutor.[213] Holmes observes that the Court must recognise jurisdictional conflict and craft ways to solve the conflict when implementing the principle of complementarity.[214] Holmes states that inability is derived from facts but concedes the difficulties of determining the threshold.[215] Phillippe substantiates the view of Holmes by indicating that complementarity should be analysed from the legal texts and national context.[216] However, Phillippe does not explain how national legal systems may influence the implementation of the principle of complementarity.

Scholars also discuss discretionary powers, prosecutorial policies and strategies, including positive complementarity, and the focus on same persons and conduct. According to Jurdi, an exhaustive list of 'unwillingness' was intended to limit the Court

[208] Carter (n 110 above) 459; JK Kleffner Complementarity in the Rome Statute and National Criminal Jurisdictions (2008) 95 - 97.
[209] Carter (n 110 above) 459.
[210] Carter (n 110 above) 455.
[211] Kleffner (n 24 above) 83.
[212] Kleffner (n 24 above) 41.
[213] See for example Carter (n 110 above) 455.
[214] JT Holmes 'Complementarity: national courts versus the ICC' in A Cassese *et al* (eds) *The Rome Statute of the International Criminal Court: a commentary* (2002) 671.
[215] Holmes (n 214 above) 677.
[216] X Phillippe 'The principles of universal jurisdiction' (2006) 88 *International Review of the Red Cross* 384.

from exercising broad discretionary powers.[217] Newton supports the view and states that the original intent of complementarity prohibits the ICC from replacing the discretion of domestic officials.[218] Newton advises that the development of the ICC jurisprudence and practice should not frustrate prosecutorial discretion at domestic level.[219] The Court's respect of state discretion will enhance the confidence and co-operation of states with the ICC.[220] In the view of Cassese, even when prosecutorial discretion at the ICC level is enshrined, its exercise can be reviewed by a referring state or by the PTC.[221]

Burke-White examines the legal mandate and provides a framework for positive complementarity.[222] Under the policy of positive complementarity, the ICC co-operates with the national authorities, both as useful resources and primary enforcers of international criminal law.[223] Thus, complementarity makes consultation between the Court and states obligatory.[224]

Several scholars do not consider the *same person* and *same conduct* test appropriate. Schabas challenges the test, arguing the Court should not be rigid on similar crimes but should compare the weight of charges preferred by the Court and states.[225] Stahn does not fully embrace the test. In general, Stahn is mindful of the arguments made by critics and acknowledges that the test limits state discretion and leaves the ICC at the forefront when there a dispute with a state over jurisdiction.[226] Stahn questions the rationale for resorting to a strict approach in functioning legal systems such as Kenya and in post-conflict environments undergoing judicial reforms such as Libya.[227]

For Du Plessis, complementarity carries a presumption of state action.[228] Among other contributions, Du Plessis discusses complementarity in the context of the efforts of the AU to regionalise prosecutions. The African Court has the potential to complement the

[217] Jurdi (n 23 above) 42.
[218] Newton (n 115 above) 163.
[219] Newton (n 115 above) 163.
[220] Newton (n 115 above) 116.
[221] A Cassese 'Statute of the International Criminal Court: some preliminary reflections' (1999) 10 *European Journal of International Law* 162.
[222] Burke-White (n 60 above).
[223] Burke-White (n 60 above) 54.
[224] Trahan (n 113 above) 583 - 587.
[225] Schabas (n 168 above) 190.
[226] Stahn (n 98 above) 6.
[227] Stahn (n 98 above) 6.
[228] Du Plessis (n 52 above) 5.

work of the ICC.[229] Du Plessis gives an example of the African Court's condemnation and order to Libya to stop violations of human rights in 2011.[230] The co-existence of the ICC and the African Court may pose the question: Which court enjoys primacy?[231] Du Plessis does not discuss whether a complementary relationship between the Court and regional mechanisms can be detected. This study answers the question through a detailed appraisal of the position of the regional mechanisms in the Rome Statute.

1.11 Overview of the chapters

Chapter 1

The first chapter gives an overview, scope and relevance of the study with the objective of laying a strong foundation for subsequent chapters. The chapter outlines the background to the study, including the research question, which the study aims to answer. Current challenges faced by the ICC in the application of complementarity are discussed. The role of regional organisations in the development and enforcement of international law is explored, as well as their complementary role to domestic jurisdictions. Further, a discussion on the current efforts to strengthen the complementarity project and the gap to be filled thereof is also presented.

Chapter 2

The chapter presents an overview of international criminal tribunals for an understanding on the rationale for the ICC. The formation of the ICC contextualises the complexities of forming the Court. Compromises were made on important provisions for the ICC to be established. The sticky issues pre-ICC continue to creep in from time to time. The historical background clarifies the root causes of some challenges facing the ICC. The historical background enhances an understanding of the approach to issues such as complementarity.

[229] Du Plessis (n 52 above) 7.
[230] Du Plessis (n 52 above) 8.
[231] M du Plessis 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights jurisdiction over international crimes' 27 August 2012 http://www.ejiltalk.org/a-case-of-negative-regional complementarity-over-international crimes/ (accessed 8 February 2017).

Chapter 3

The core of the third chapter is a discussion of the application of complementarity in international criminal law. Complementarity is not expressly defined in the Rome Statute and neither was it defined in international criminal law before the Court came into existence. Despite the failure to define the concept, the Rome Statute can be accredited with further development of complementarity. To ensure a better understanding of the concept, this chapter starts by providing a historical understanding of the notion of complementarity. The chapter then delves into the contemporary understanding of the principle as enunciated by the ICC's jurisprudence.

Chapter 4

The fourth chapter gives a legal overview of the *Kenyatta* case. The chapter outlines the understanding of the case from both Kenyan and ICC perspectives. The two understood the application of the principle of complementarity differently, hence their different approaches to the case. Factors that lead to different perspectives are discussed. The chapter suggests how to reconcile the differences for the mutual benefit of states, the ICC and other stakeholders. The basis of the discussion is the interpretation of the Rome Statute.

Chapter 5

This chapter discusses discretionary powers enjoyed by states. The discretionary powers of the Prosecutor and the UNSC are also discussed to promote an understanding of how these relate or affect the discretion of states. The chapter first outlines the primacy and discretion of states in internal affairs. The chapter refers to the Preamble of the Rome Statute to show that national measures and international co-operation co-exist in a complementary system.

Measures at national level include the domestic implementation of the Rome Statute and crafting policies to facilitate prosecutions. Several national implementing pieces of legislation show that states embrace enlarged powers when enacting their pieces of legislation. For example, the national legislation may provide for universal jurisdiction. This chapter aims to demonstrate that states have various options in the administration of international criminal justice. In this regard, states are free to involve regional

mechanisms. The sought-for international co-operation by states may involve requests for technical assistance to strengthen their national measures.

Chapter 6

The sixth chapter examines the role of regional and international organisations in the ICC system. It outlines the influence of international and regional politics in the complementarity project. The chapter shows that international law is always subject to legal-political debates which should always not only be understood but balanced. The Rome Statute was born out of a desire to balance states and international interests. The chapter employs legal philosophy and different theories in international relations. International organisations are key actors in the maintenance of peace, security and stability of nations.

The chapter proceeds to outline the implied jurisdiction of regional mechanisms under the Rome Statute. This jurisdiction needs to be activated for a clear understanding at both the Court and national level. The chapter refers to various AU mechanisms to show how states may be attracted to use these mechanisms as an alternative to the ICC. The chapter looks at the advantages and challenges of involving the mechanisms in the complementarity project. The position taken in the chapter is for the incorporation of AU mechanisms to strengthen some of the current gaps in the application of complementarity.

Chapter 7

This chapter gives a summary of the main points discussed in the first six chapters and makes recommendations to strengthen state discretion. The chapter concludes that the lack of clarity in the Rome Statute justifies a prosecutorial policy to expressly mention the extent to which states can exercise discretion. Considering that states may not be comfortable with hard law nuances, an amendment to the Rome Statute is discouraged in this chapter. The recognition by the Prosecutor of the broad discretion enjoyed by states to choose the approach and forum of addressing international crimes is foundational to the operationalisation of regional mechanisms and other forms of justice. Non-legal rules, in the form of a prosecutorial policy, can be developed or strengthened to influence ICC practice.

1.12 Note on citations

This study prefers acronyms and other abridged forms to refer to treaties, organisations and reports. When a source is referred to for the first time, a full citation is used. In subsequent references to the same source, abbreviated forms are used. A comprehensive list of all abbreviations and acronyms used in the study is provided at the beginning, while a bibliography is inserted at the end of the study. Footnote and bibliographical references follow the *PULP guide: Finding legal information in South Africa*.[232]

[232] http://www.pulp.up.ac.za.

CHAPTER 2

ICC IN HISTORICAL PERSPECTIVE

2.1 Introduction

States and international criminal tribunals share responsibility in the administration of international criminal justice. This is a transition from the erstwhile absolute right of states to try crimes under their jurisdiction.[1] The transition substituted and complemented the sovereign control of states in pursuit of the global goal to end impunity for serious crimes in international law.[2] Prior to the transition, national courts often suffered from ineffectiveness, imbalance and partiality when they prosecuted politically connected and powerful persons.[3] To bridge the justice vacuum, it became desirable to create alternative mechanisms to complement national courts.[4] From the fifteenth century, the world witnessed both successful and failed attempts to create an international criminal court.[5]

The twentieth century was a turning point in the push for a permanent international criminal court.[6] The century witnessed impunity, politicisation of justice and shortcomings of *ad hoc* tribunals.[7] Prior to the establishment of the ICC, the call for international criminal justice was more reactive than proactive. Attempts at international judicialisation were more prevalent following the end of the First and Second World Wars. However, political interference made international prosecutions difficult and to be marred with imperfections.[8] Generally, the prosecutions were targeted against defeated armies and their powerless former combatants who bore the brunt of the international community, leading to outcries over the victors' vengeance.[9]

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[1] BN *Schiff Building the International Criminal Court* (2008) 69.
[2] MM El Zeidy 'The principle of complementarity: a new machinery to implement international criminal law' (2002) 23 *Michigan Journal of International Law* 870.
[3] WA Schabas *An introduction to the International Criminal Court* (2007) 1.
[4] WA Schabas *An introduction to the International Criminal Court* (2011) 1.
[5] MC Bassiouni 'From Versailles to Rwanda in seventy-five years: the need to establish a permanent international criminal court' (1997) 10 *Harvard Human Rights Journal* 11.
[6] Bassiouni (n 5 above).
[7] Bassiouni (n 5 above).
[8] Bassiouni (n 5 above).
[9] Schabas (n 4 above).

Since its formation was not connected to a specific war, the ICC became a proactive development of international criminal justice.

Arguably, the internationalisation of crimes leaped into a new dimension with the adoption of the Rome Statute in 1998 when the ICC was created.[10] The establishment of the ICC followed a long-complicated process. For centuries, political considerations frustrated the birth of the Court.[11] Therefore, the ICC is the product of centuries of advocacy for a permanent international criminal tribunal.[12] The Court is a result of a legal pregnancy that manifested but could not fully develop for a long time. After several near-misses and false starts, the ICC finally came into being.[13]

This chapter discusses the historical background on the formation of the ICC and reveals efforts that contributed to the establishment of the Court. The chapter briefly visits history from the late fifteenth to the early twentieth centuries and analyses successive failures to create an international criminal court. The chapter also explores the approach of states in the aftermath of the First and Second World Wars. Thereafter, the chapter focuses on the atrocities in the former Yugoslavia and Rwanda in the late twentieth century. The international community rode on the momentum created by the above events and eventually established the ICC in 1998.[14] The ICC was born when conditions were conducive and states were ready to balance the notion of sovereignty with the need for international criminal justice.[15] Considering that the study focuses in part on the role and potential of Africa in international criminal justice, this chapter refers to the Special Court for Sierra Leone (SCSL) to broaden the understanding of complementarity from an African perspective. Although the SCSL did not contribute to complementarity pre-Rome Statute, its contribution to post-Rome Statute is invaluable.

The reluctance of the international community to establish a permanent international criminal court was detrimental to justice, particularly in the twentieth century. This chapter highlights that the slow pace in formulating the court was largely due to international political divisions and lack of sustained pressure from relevant actors and

[10] See Rome Statute of the International Criminal Court (Rome Statute).
[11] Schabas (n 4 above).
[12] Schiff (n 1 above) 2.
[13] LN Sadat 'The International Criminal Court: past, present and future' (2014) *Harris Institute Working Paper* 1.
[14] Schabas (n 4 above) 5.
[15] Schiff (n 1 above) 79.

states.[16] The chapter highlights the evolution of international law from state-oriented responsibility to individual-oriented responsibility[17] as an inspiration for the creation of the ICC.[18]

2.2 The prosecution of crimes prior to the codification of International Humanitarian Law

2.2.1 The Breisach trial

The debut international criminal trial was against Peter von Hagenbach in 1474.[19] Hagenbach was charged under the principle of individual responsibility after he carried out manifestly unlawful orders from the Duke of Burgundy, a French head of state.[20] The alleged offences occurred during the occupation of the German city of Breisach by France. The crimes committed included sacking, rape, pillaging and burning of the city in retaliation of rebellion by residents of the city.[21] The attacks were viewed as a violation of divine and human laws.[22] The trial had an international flavour, as 26 Holy Roman Empire judges presided over the case.[23] The trial laid a foundation for future discussions on trials at the international arena. International criminal tribunals often refer to the trial to address some issues they encounter.[24]

2.3 International Humanitarian Law and proposed international prosecutions

2.3.1 The birth of international humanitarian law

The experience of Henry Dunant at the Battle of Solferino in 1859 led to the formation of the International Committee of the Red Cross (ICRC) in 1863 and the adoption of the First Geneva Convention in 1864.[25] From its inception, the ICRC has committed to

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[16] Schabas (n 4 above).
[17] MJ Struett *The politics of constructing the International Criminal Court* (2008) 62.
[18] Struett (n 17 above).
[19] CM Bassiouni 'International criminal justice in historical perspective: the tension between states' interests and the pursuit for justice' in A Cassese (ed) *The Oxford Companion to International Criminal Justice* (2009) 132.
[20] H Martin *The history of France from the earliest period until 1789* (1841).
[21] Martin (n 20 above).
[22] CM Bassiouni 'Perspectives on international criminal justice' (2010) 50 *Virginia Journal of International Criminal Law* 269 - 298.
[23] JF Kirk *History of Charles the Bold Duke of Burgundy* (1864) 499.
[24] MM El Zeidy *The principle of complementarity in international criminal law: origin, development and practice* (2008) 211.
[25] H Dunant *A memory of Solferino* (1939) 129 - 131.

the promotion of international humanitarian law (IHL) or law of war, which is a body of public international law that protects civilians and combatants who no longer take part in hostilities.[26] IHL lays down rules of warfare and regulates weapons and tactics. The development of IHL in the second half of the nineteenth century signalled the need to prosecute humanitarian abuses.[27] Moynier, one of the founders of the ICRC, was the first to propose an international criminal court to prosecute violations of the law of war following the Franco-Persian War.[28] Moynier contended that provisions of international law which protected victims of war at the time were fairly strong but needed complementation by a criminal court mechanism.[29] However, he abandoned his call due to the lack of endorsement of his proposal.[30]

2.3.2 The Hague Conventions and enforcement of international norms

A decade after the adoption of the First Geneva Convention to protect the wounded and sick on the battlefield,[31] the Brussels Protocol of 1874 was drafted to regulate the conduct of those fighting in the field.[32] The Protocol influenced the Institute of International Law to draft the 'Manual on the Laws of War on Land' in 1880.[33] The Manual was used as a model during meetings which culminated in the adoption of The Hague Conventions of 1899 and 1907. At the invitation of Czar Nicholas II, the 1899 and 1907 Conferences were held. The Conferences defined the scope of IHL.[34] International law on state obligations and enforcement of international norms owe its evolution partly to the adoption of The Hague Conventions.[35] For the first time, an international convention imposed liability on states for breaches of international law by

[26] http://www.icrc.org (accessed 16 March 2018).
[27] Schabas (n 4 above) 2.
[28] CK Hall 'The first proposal for an international criminal court' (1998) 322 *International Review of the Red Cross* 2.
[29] M Glasius *The International Criminal Court* (2006) 7.
[30] Glasius (n 29 above) 6.
[31] The First Geneva Convention for the Amelioration of the Wounded in the Armies in the Field (First Geneva Convention).
[32] The Brussels Protocol on the Laws and Customs of War (Brussels Protocol).
[33] MN Schimitt *Essays on law and war at the fault lines* (2011) 93.
[34] LN Sadat *The International Criminal Court and the transformation of international law: justice for the new millennium* (2002) 22 - 23.
[35] Schabas (n 3 above) 2.

their armed forces.[36] The Hague Conventions were a major step towards the codification of laws in an international treaty.[37]

2.4 The First World War and the emergence of international tribunals

The First World War exposed the weaknesses of international law and illustrated the need to strengthen the legal framework and judicial mechanisms to punish violations of the law of war.[38] The war changed the perception of some states which had opposed a proposal for an international criminal court in 1907. In 1918, Scandinavian countries (Denmark, Norway and Sweden) produced a joint document with detailed provisions for an international criminal court.[39]

When the League of Nations was established,[40] Scandinavian countries made submissions to the Secretariat of the League.[41] Neutral states, such as Switzerland, also supported an international criminal court.[42] Neutral states met with the Commission of Inquiry constituted by the League in March 1919 to discuss the proposed draft Covenant.[43] Switzerland believed that the time was ripe to pursue the international project of justice.[44] The Netherlands was interested in proposals by Scandinavian countries and the neutral states. She called a conference to discuss the several draft documents.[45] The conference produced a draft document referred to as the 'five-power plan.'[46] The document was influential in the drafting of the final treaty of the Permanent Court of International Justice (PCIJ).[47]

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[36] L Green 'War crimes, crimes against humanity, and command responsibility' (1997) 2 *Naval War College Review* 389.
[37] Schabas (n 3 above) 2.
[38] SR *Roach Politicizing the International Criminal Court: the convergence of politics, ethics and law* (2006) 23.
[39] MO Hudson *The Permanent Court of International Justice 1920 - 1942* (1943) 94.
[40] The League of Nations operated between 1919 and 1946.
[41] Hudson (n 39 above) 113.
[42] Hudson (n 39 above) 98.
[43] Hudson (n 39 above) 98; DH Miller 'The drafting of the covenant' (1928) *The American historical review* 600.
[44] Miller (n 43 above).
[45] Miller (n 43 above).
[46] Miller (n 43 above).
[47] Hudson (n 39 above) 113.

2.4.1 Treaty of Versailles and Leipzig trials

The discontent of the public during the First World War in England and other states made European powers to rethink the criminal prosecution of instigators of the war and perpetrators of war crimes.[48] At the end of the First World War, the Allies[49] looked at both the *jus ad bellum*[50] and *jus in bello*[51] aspects of the war. *Jus ad bellum* refers to justifications for the war, whereas *jus in bello* denotes the application of IHL in the conduct of hostilities. The Allies preferred approaches to punish Germany for its role during the First World War. First, the Allies proposed territorial losses, the payment of reparations, demilitarisation and limits on Germany's rearmament.[52] Second, the Allies debated an international criminal court to punish the instigators of war.[53]

The Allies were unprepared for violations committed during the First World War. When the War ended, they had no precedent to investigate and prosecute. A hurried response resulted in the set-up of a fifteen-member Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties in 1919. The Commission concluded that Germans committed 895 serious crimes.[54] The doctrine of command responsibility was born when a recommendation was made by the Commission to try Kaiser Wilhelm II and other commanders for ordering the commission of crimes by German forces.[55]

The Commission proposed an Allied 'High Tribunal' to try violations.[56] The Commission also recommended the primacy of an international tribunal.[57] At the Paris Conference, the Allies deliberated on the desirability and legality of the proposed trials.[58] The United States of America (USA) and Japan opposed the formation of a Tribunal. USA was

[48] Schabas (n 4 above).
[49] http://www.britannica.com/topic/Allied-Powers-international-alliance (accessed 5 November 2016).
[50] Treaty of Versailles art 227.
[51] n 50 above, arts 228 & 229.
[52] Schiff (n 1 above) 22.
[53] Schiff (n 1 above) 22.
[54] 'Report of the Commission presented to the Preliminary Peace Conference' (1920) *95 Journal of International Law* 123.
[55] n 54 above,116 -121.
[56] n 54 above, 122.
[57] n 54 above, 14.
[58] Schabas (n 4 above).

ignorant of the existence of an international convention to give the Tribunal jurisdiction over war crimes.[59] USA rejected *ex post facto* justice.[60]

Furthermore, USA argued against the prosecution of the German head of state and saw the prosecution as an interference with state sovereignty.[61] Japan questioned whether the law provided for penal sanctions of violations of the law of war.[62] France and Britain were undecided and uninterested in pursuing prosecutions. Most Allied states feared political upheaval in Germany in response to the prosecution of the Kaiser.[63]

After intense deliberations, the Allies voted in favour of prosecutions. However, prosecutions proposed by the Allies through the Treaty of Versailles of 1919 were detached from the findings of the Commission.[64] The Treaty empowered military tribunals to undertake prosecutions.[65] The Commission had preferred a special tribunal rather than a high tribunal.[66] The special tribunal was never constituted. Also, the victors failed to implement the provisions of the Treaty on prosecutions.[67] The lack of co-operation by states curtailed and confined the prosecutions to a national level.[68] The German Supreme Court in Leipzig was empowered to exercise jurisdiction over Germans accused of crimes committed during World War I.[69]

Features of primary jurisdiction of the state emerged when the Allies allowed Germany to try German war criminals.[70] The ensuing Leipzig trials took place between 1921 and 1923.[71] Out of 901 accused war criminals identified for indictment, strong evidence was found against only 16. Although 13 convictions were secured, the proceedings were criticised for bias, shielding the accused from responsibility, lenient sentences

[59] n 54 above, 144 -146.
[60] Schabas (n 4 above).
[61] LS Wexler 'The proposed permanent international court: an appraisal' (1999) 29 *Cornell International Law Journal* 670.
[62] n 54 above, 152.
[63] Schiff (n 1 above) 22.
[64] Bassiouni (n 5 above) 18.
[65] n 50 above, art 228.
[66] Bassiouni (n 5 above) 18.
[67] Bassiouni (n 5 above) 19.
[68] Bassiouni (n 5 above) 19.
[69] C Mullins *The Leipzig trials: an account of the war criminals' trials and a study of the German mentality* (1921) 98 - 112.
[70] El Zeidy (n 24 above) 22.
[71] C Kreß 'Versailles-Nuremberg-The Hague: Germany and international criminal law' (2006) 40 *The International Lawyer* 16 - 20.

and the compromise of justice for political expediency.[72] Therefore, questions arose on whether it was a wise decision to allow Germany to try its own personnel for war crimes.[73] During the negotiations and drafting of the Treaty of Versailles, Germany had protested about the one-sided criminal trials.[74] Germany's prosecution of war criminals underlined the integral and essential part played by national courts in the enforcement of international criminal law. These early developments showed the importance of paying due regard to state jurisdiction over crimes occurring in a state, by or against a citizen of a state.[75]

The challenges in the practical application of the Treaty of Versailles showed that it was premature to establish an international criminal court at the time. States had not overcome political hurdles to create conditions necessary for the proper functioning of international tribunals.[76] Germany preferred prosecution by German courts, as it found the Treaty of Versailles unacceptable and because it characterised the Treaty as a serious intrusion into its sovereignty.[77] By objecting to foreign prosecution, Germany demonstrated the value states attach to their discretion regarding entitlement to prosecute crimes under their jurisdiction.

Germany also objected the unfair treatment, as only persons from the losing side were to be tried for crimes which were not punishable at the time of commission.[78] The prosecutions were widely regarded as victors' justice and as an illustration of revenge instead of a genuine desire for accountability of perpetrators and appeasement of the victims.[79] The Netherlands refused to surrender Kaiser Wilhelm II to the Allies for prosecution, making his trial impossible.[80] The Netherlands politically considered the Kaiser's situation and asserted that the charges against him were retroactive criminal

[72] Bassiouni (n 5 above) 20.
[73] HS Levie 'The history and status of the International Criminal Court' (2000) 75 *International Law Studies* 249.
[74] Levie (n 73 above).
[75] A Dube *Universal jurisdiction in respect of international crimes: theory and practice in Africa* (2016) 43.
[76] Bassiouni (n 5 above) 12.
[77] C Stahn & MM El Zeidy *The International Criminal Court and complementarity: from theory to practice* (2011) 77-78.
[78] Stahn & El Zeidy (n 77 above).
[79] Dube (n 75 above).
[80] MC Bassiouni 'World War I: The war to end all wars and the rebirth of a handicapped international criminal justice system' (2002) 30 *Denver Journal of International Law and Policy* 269 - 273.

law.[81] The norm of state sovereignty remained absolute after the failure to try the Kaiser and other Germans.[82]

2.4.2 Early genocide cases

The crimes against the laws of humanity allegedly committed by Turkish officials were also brought to the attention of the 1919 Commission which recommended prosecutions.[83] Some Turkish officials were alleged to have massacred thousands of Armenian civilians in 1915. The Allies decided to forgo the prosecution despite earlier threats. The Allies had expressed an intention to prosecute members and agents of the Ottoman Empire who were implicated in the massacres.[84] A promising start, marked by the adoption of the Treaty of Sèvres in 1920,[85] proved futile because the treaty was not ratified.[86] The Treaty focused on the prosecution of war crimes.[87]

The replacement of the Treaty of Sèvres with the Treaty of Lausanne of 1923 promoted impunity.[88] The Treaty of Lausanne granted amnesty for all offences committed between 1 August 1914 and 20 November 1922.[89] As a result, no prosecutions took place.[90] The Allies saw Turkey as an important strategic partner. Hence, the Allies considered an alliance with Turkey important.[91] The alliance was meant to prevent communist expansion from Russia and to ensure stability in Turkey.[92] Again, political considerations overpowered the needs of criminal justice for war crimes and other violations of IHL.

The Joint Declaration by the Allies on Turkish crimes against the Armenians was one of the precursors to the acknowledgment of genocide as an international crime. The Declaration was an acceptance that new crimes beyond crimes against humanity and

[81] Schabas (n 3 above).
[82] Roach (n 38 above) 20 - 21.
[83] Bassiouni (n 5 above) 16; Levie (n 73 above).
[84] http://ww1blog.osborneink.com/?p=8142 (accessed 16 November 2016).
[85] Treaty of Sévres.
[86] Schabas (n 4 above).
[87] n 84 above.
[88] Treaty of Lausanne.
[89] MC Bassiouni 'The time has come for an International Criminal Court' (1991) 1 *Indiana International and Comparative Law Review* 2 - 4.
[90] WA Schabas *An Introduction to the International Criminal Court* (2004) 3 - 4.
[91] Bassiouni (n 5 above) 17.
[92] Bassiouni (n 5 above) 17.

civilisation had been committed.[93] The genocidal intent was clear because the massacres were against thousands of civilians of Armenian descent.[94]

In the 1930s, massacres of Arameans in Iraq were committed.[95] The atrocities showed that the time had come for the international community to pay special attention to the killing of people based on ethnicity. International law scholars began to elaborate further on the scope of the genocidal crimes. In 1933, Polish prosecutor Rafael Lemkin requested the League of Nations Conference to define and prosecute barbarity at the international level.[96] Lemkin engaged in activism both as a Polish diplomat and during exile in USA.[97] It was no surprise that Lemkin propounded a detailed definition and explanation of the crime of genocide in a seminal book in 1944.[98] His scholarly writings and advocacy were incorporated in the drafting of the Genocide Convention.[99]

2.4.3 Jurists proposals

Debates on the proposed court aroused appetite among many international lawyers.[100] Several jurists devoted their attention to the desired court after the atrocities of the First World War.[101] In 1920, the Advisory Committee of Jurists met in The Hague and prepared a draft statute of the PCIJ and submitted a resolution to the League of Nations.[102] The resolution proposed the establishment of an all-inclusive High Court of International Justice.[103] The proposed court would exercise jurisdiction over breaches of international public order and other crimes committed against the universal law of nations.[104]

The proposal revealed that a separate international criminal court was on the cards.[105] However, hopes of this were dashed when the Third Committee of the Assembly of the

[93] Schabas (n 4 above) 3.
[94] Schiff (n 1 above) 20 - 21.
[95] Schiff (n 1 above) 20 - 21.
[96] Schiff (n 1 above) 20 - 21.
[97] S Power *A problem from hell: America and the age of genocide* (2004) 42 - 43.
[98] R Lemkin *Axis rule in occupied Europe: laws of occupation, analysis of Government, proposals for redress* (1944) chapter IX.
[99] Schiff (n 1 above) 20 - 21.
[100] Schabas (n 3 above) 4 - 5.
[101] See Wexler (n 61 above) 689.
[102] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists on the Permanent Court of International Justice (1920) 1 *League of Nations-Legal* 503.
[103] Wexler (n 61 above).
[104] Hudson (n 39 above) 549 - 550; Wexler (n 61 above).
[105] Schiff (n 1 above) 22 - 23.

League of Nations and the Assembly itself reviewed the resolution. The two rejected the resolution because there was no binding international legal framework for the establishment of the proposed court. In the end, a Covenant of the League of Nations[106] only established a PCIJ with jurisdiction on cases between states.[107]

The PCIJ was dissolved in 1946 to pave the way for its successor, the International Court of Justice (ICJ).[108] The precedent of the PCIJ and ICJ show an action and redress-oriented approach for breaches of international law by states. In the *Chorzów Factory* case, the PCIJ stated that a breach of an obligation results in compensation.[109]

The PCIJ and ICJ consolidated foundations laid by the 1899 and 1907 Hague Conventions. The creation of the PCIJ and ICJ signalled a new approach to international law and international institutions and processes. The international criminal tribunals are modelled on the same desire but from an individual accountability perspective.

Two other attempts occurred within a few years after the rejection of the proposals of the Advisory Committee of Jurists. In 1926 and 1928, the International Law Association (ILA)[110] and International Association of Penal Law (IAPL)[111] produced draft statutes for an international court. The drafts envisaged a permanent international criminal court with jurisdiction over disputes between states and over individuals.[112] However, key players in the international community were still unprepared for an international criminal tribunal. They were also obsessed with state sovereignty; hence, they did not prioritise the two drafts.[113] It was apparent at that time that states were undecided on what needs to precede the other between an international criminal code and an international criminal court.[114] States were also unconvinced by the prospective

[106] http://www.icj-cji.org (accessed 5 November 2016).
[107] n 106 above.
[108] n 106 above.
[109] *Mayagna (Sumo) Indigenous Community of Awas Tingni v Nicaragua* IACHR (31 August 2001) Ser C/Doc 79 para 163.
[110] ILC 'Report of the Thirty-Fourth Conference on the permanent international criminal court' (1927) 182.
[111] UN Secretary General 'Historical survey of the question of international criminal jurisdiction' (1949) 15.
[112] International Association for Penal Law Draft Statute arts 35 & 36.
[113] Wexler (n 61 above) 671.
[114] ILC 'Report of the Thirty-Third Conference' (1925).

contribution of an international criminal court in the prevention of war. There were suggestions that the Court would frustrate reconciliation efforts.[115]

2.4.4 The 1937 proposal

Challenges experienced after the First World War did not deter the League of Nations from desiring a future international criminal court. The discussion on the establishment of the court was back on the agenda of the League in 1937. The League opened the Convention for the Creation of an International Criminal Court in Geneva for signature in 1937.[116] The court was to focus on the crime of terrorism.[117] Once again, the League failed to get a breakthrough. Hence, the 1937 draft did not materialise into an instrument. States diverted attention to the Spanish Civil War instead.[118]

2.5 Initiatives during and post-Second World War

2.5.1 Build up to post-Second World War period

The atrocities of the Second World War brought the idea of enforcing international criminal law back onto the agenda.[119] The Allies started with the Declaration of St. James[120] and the Moscow Declaration.[121] The Declarations targeted the prosecution of Nazis and other war criminals by an international criminal tribunal.[122] Prior to the two Declarations, the London International Assembly reaffirmed the commitment of the Allies to punish war crimes in an international criminal court. The London Agreement led to the Nuremberg trials.[123] In addition, several treaties signed by the Allies with Italy, Romania, Bulgaria, Hungary and Finland called for the punishment of war criminals.[124]

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[115] n 114 above.
[116] Convention on the Creation of an International Criminal Court; Hudson (n 39 above) 549.
[117] Convention for the Prevention and Punishment of Terrorism (Terrorism Convention).
[118] MC Bassiouni 'Historical survey: 1919-1998' (1999) 13 *Association Internationale de Droit penal, Erés Internationale de Droit penal, Erés* 14.
[119] Bassiouni (n 5 above) 22.
[120] United Nations Law Reports 'Resolution by Allied Governments condemning German terror and demanding retribution' 13 January 1942.
[121] Declaration of Moscow.
[122] Bassiouni (n 5 above) 23.
[123] Schabas (n 3 above)) 5.
[124] Struett (n 17 above) 49.

In preparation for post-war prosecution, the Allies established the UN Commission for the Investigation of War Crimes (UNWCC).[125] Among the achievements, the UNWCC developed a Draft Convention for the Establishment of a United Nations War Crimes Court. However, political consideration emasculated the effectiveness of the UNWCC to investigate and collect evidence of war crimes.[126] The evidence collected by the UNWCC was only relied upon by governments in national prosecutions.[127]

2.5.2 The formation of the International Military Tribunal and International Military Tribunal for the Far East

The International Military Tribunal (IMT) at Nuremberg was formed in August 1945 after the Allies agreed on procedural and substantive issues.[128] The IMT developed the positive law and a legal basis for international prosecution of crimes.[129] The IMT clarified arguments on state sovereignty when it stated that 'abstract entities' were liable for international crimes.[130] Some scholars conclude that due to the lessons of the IMT, a sense of belief arose among the members of the international community on the effectiveness of international law to deter crimes.[131]

The IMT exercised jurisdiction and prosecuted individuals who had acted in the interests of the Axis Powers (Germany, Italy, Japan).[132] The Tribunal progressively interpreted the law of war and limited the execution of manifestly illegal orders to mitigation.[133] The Nuremberg trials gave individuals an international legal personality and responsibility.[134] In the view of the IMT, the enforcement of international law was to be realised through punishing individuals for the crimes they committed.[135] This position was subsequently reaffirmed in *Tadic*[136] and decisions of other international criminal tribunals. Individual criminal responsibility is also emphasised in the Geneva

[125] Bassiouni (n 5 above) 22.
[126] Bassiouni (n 5 above) 22.
[127] Bassiouni (n 5 above) 23.
[128] Wexler (n 61 above) 671.
[129] Bassiouni (n 5 above) 26 - 28.
[130] Sadat (n 34 above) 29 - 30.
[131] See for example R Goldstone 'Historical evolution – from Nuremberg to the International Criminal Court' (2007) 25 *Penn State International Law Review* 763.
[132] Schabas (n 4 above) 63 - 89.
[133] Charter of the International Military Tribunal (IMT Charter) art 8; Bassiouni (n 5 above) 28.
[134] Sadat (n 34 above) 28.
[135] Judgment of the International Military Tribunal 'In the trial of the major war criminals: proceedings of the International Military Tribunal sitting at Nuremberg, Germany' (1950) 447.
[136] *Prosecutor v Tadic* IT-94-1-AR 72 (15 July 1999) paras 128 -137.

Conventions of 1949 and their Additional Protocols.[137] The principle of individual criminal responsibility is based on the term *nulla poena sine culpa*. This means that a determination should be made on whether a person was engaged or participated in an act before attaching criminal responsibility to such an individual.

The IMT was empowered through article 6 of the IMT Charter to try actions which endangered peace, violations of the laws of war and crimes against humanity. The prosecution of these crimes led to a dilemma. The IMT dismissed the arguments against *ex post facto* prosecutions because war crimes were codified in The Hague Conventions, while crimes against peace were prohibited in the 1928 Kellogg-Brand Pact.[138]

Prosecutions of World War II criminals were not limited to Nuremberg. The Allied Control Council Law Number 10 (CCL 10) authorised the Allied powers to exercise jurisdiction over similar crimes in their respective areas of occupation in Germany.[139] Under both Nuremberg and CCL 10, the political will made the trials possible.[140] The pre-1939 atrocities were also covered by the CCL 10 because crimes against humanity are not confined to wartime.[141]

The IMT preceded the formation of the International Military Tribunal for the Far East (IMTFE); the latter was formed in January 1946.[142] The IMTFE exercised jurisdiction over breaches of war and peace as well as crimes against humanity.[143] The IMTFE was a result of the work of the Far Eastern Commission (FEC) established by the Allies in December 1945.[144] The FEC had a political mandate to initiate and oversee Allied policies towards Japan and the Far East. The IMTFE, unlike the IMT, was not a creation of a treaty but an application of military law and procedures by respective

[137] See for example article 49 of the First Geneva Convention, article 50 of the Second Geneva Convention, article 129 of the Third Geneva Convention, article 146 of the Fourth Geneva Convention, and article 85 of Protocol I of 1977.
[138] The Kellogg-Brand Pact was an international treaty that prohibited the use of force to settle international disputes.
[139] H Olàsolo *The triggering procedure of the International Criminal Court* (2005) 2.
[140] Bassiouni (n 5 above) 29 - 30.
[141] Schabas (n 3 above) 7.
[142] Bassiouni (n 5 above) 32.
[143] Olàsolo (n 139 above).
[144] Bassiouni (n 5 above) 31.

Allied powers.[145] Therefore, there was no uniformity in the prosecution of accused persons.

Politics played a role in the selection and prosecution of cases before the IMTFE. Political instruction led to questionable and unfair trials and undue influence on military judges. States such as USA used the opportunity to advance their occupational policies.[146] The slow progress in creating the ICC was partly due to the failure of states to reconcile the establishment of the court and toning down on their policy interests.

The IMT and IMTFE were created on an *ad hoc* basis for a specific limited purpose. Their jurisdiction was restricted to trials of individuals alleged to have committed major crimes during the Second World War.[147] They catalysed the process of direct protection and entitlement to benefits of international law by individuals rather than enjoyment through their national states.[148] The landmark approach was reinforced in the practice of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and ICC.[149]

Notwithstanding that it took about 50 years to create a successor for the IMT and IMTFE, and over 50 years to create the ICC after the Second World War, the IMT and IMTFE trials are widely credited for rekindling the fire for the creation of a permanent criminal court.[150] The developments during the second half of the twentieth century were catalytic in the evolution of international criminal law.[151] The IMT trials were the first major trials in the development of international criminal prosecutions. The Nuremberg trials laid the foundation for international criminal prosecutions.[152]

Article 8 of the Charter of the IMT discouraged impunity and disregarded immunity. Immunity refers to an exemption from duties or obligations because of a certain status and office.[153] The Charter stated that no person was absolved from prosecution either on grounds of official capacity as head of state or who acted on superior orders. Judge

[145] Bassiouni (n 5 above) 38.
[146] Bassiouni (n 5 above) 38.
[147] Levie (n 73 above) 252.
[148] MN Shaw *International law* (2003) 45.
[149] Shaw (n 145 above).
[150] LS Sunga *The emerging system of international criminal law: developments in codification and implementation* (1997) 281.
[151] Goldstone (n 131 above) 764.
[152] Sunga (n 150 above) 281.
[153] Black's Law Dictionary 885.

Richard Goldstone observed that before Nuremberg, war criminals enjoyed 'effective immunity'[154] because prosecution was an exception and not a rule.[155] The IMT convicted 19 persons in a group of 24 defendants who appeared before it.[156]

The IMT and the IMTFE were models of victors' justice because they only tried perpetrators from the losers.[157] They were one-sided and to the detriment of the vanquished.[158] Bassiouni observed that the Japanese saw the trials as vengeance and justice for victors.[159] The recommendation of Sheldon Glueck was ignored as far as the prosecution of both sides at the IMT was concerned. In 1944, Glueck recommended the creation of an international criminal court to prosecute both sides and the development of an international penal code to facilitate the prosecutions.[160] His recommendation also highlighted crimes with a customary international law nature. He also argued against immunity based on official position.[161] The one-sided trials were due to political realities and time constraints which demanded urgent closure to the atrocities of the war.[162]

Interestingly, ICC trials are also viewed as targeted at weaker states.[163] Both the strengths and weaknesses of the IMT recur in the ICC system, making the former an important precedent in the development of the jurisprudence of the ICC. The IMT overcame obstacles of state sovereignty and opened room for external interference in the internal affairs of states.[164] This study later shows how the ICC dealt with issues of sovereignty.

2.5.3 The adoption of the Genocide Convention

The IMT trials introduced the crime of 'genocide'.[165] However, the judges of the IMT preferred convictions of crimes against humanity.[166] The few years following the end

[154] Goldstone (n 131 above) 764.
[155] Goldstone (n 131 above) 764.
[156] IM Scott *Crimes against humanity in the land of the free: can a truth and reconciliation commission heal racial conflict in America* (2014) 157.
[157] Wexler (n 61 above) 675; Sadat (n 34 above) 29.
[158] Sadat (n 34 above) 29.
[159] Bassiouni (n 5 above) 31 - 35.
[160] A Novak *The International Criminal Court: an introduction* (2015) 3.
[161] S Glueck *War criminals: their prosecution and punishment* (1944); Novak (n 157 above) 3.
[162] MC Bassiouni *Crimes against humanity in international criminal law* (1992) 11.
[163] Bassiouni (n 162 above).
[164] Wexler (n 61 above) 676.
[165] Schabas (n 4 above) 8.
[166] Schabas (n 4 above) 8.

of the Second World War led to urgent steps by the United Nations General Assembly (UNGA) to establish a legal framework and enforcement mechanisms for prosecution of international crimes.

The crime of genocide was revisited within weeks of the IMT trials.[167] The Convention for the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) was adopted by the UNGA in 1948.[168] Article 6 of the Genocide Convention provided for a permanent international criminal court. Accordingly, the UNGA was occupied with the establishment of the court as early as 1948. When it approved the Genocide Convention, the UNGA mandated the International Law Commission (ILC) to research on the possibility and rationale for the trial of international crimes by an international judicial organ.[169] The earlier vision of jurists on the possibility to create a criminal chamber of the ICJ once again manifested.[170]

2.5.4 The work of the International Law Commission

The ILC was established by the UNGA in 1947 to develop and codify international law.[171] The ILC drafted a code of offences and a framework for an international criminal court.[172] Resolution 177(II) required the ILC to prepare a draft code of offences in light of international law principles outlined in the IMT Statute.[173] A Romanian jurist, Vespasian Pella, wanted the international community to use the IMT and IMTFE momentum to agree on an international criminal court.[174]

To enhance its capacity and effectiveness, the ILC established a special committee and appointed a special rapporteur to prepare a draft code of offences.[175] The same approach was adopted to prepare a draft statute of a permanent international criminal court.[176] A special committee was appointed in 1950 and reconstituted in 1953. The majority of ILC members voted in favour of the creation of an international criminal

[167] Schabas (n 5 above) 8.
[168] Convention on the Prevention and Punishment of the Crime of Genocide.
[169] ILC 'Study on the question of an international criminal jurisdiction' (1948) 177.
[170] n 169 above.
[171] http://www.legal.un.org/ilc (accessed 1 February 2017).
[172] Bassiouni (n 5 above) 16.
[173] H Olàsolo (n 139 above) 2.
[174] VV Pella 'Towards an International Criminal Court' (1950) 44 A*merican Journal of International Law* 37 - 68.
[175] Struett (n 17 above) 61.
[176] H Olàsolo (n 139 above) 2.

court as a separate entity and supported a draft statute to that effect. However, a lack of clarity on the definition of aggression and the need for a comprehensive legal framework on offences delayed universal support for the concept of an international mechanism.[177]

Some members of the Committee, such as Ricardo Alfaro, saw the court as both 'desirable' and 'possible',[178] while some, such as Emil Sandström, viewed it as a possible and yet undesirable initiative.[179] The Committee draft of 1951 was based on the statute of the ICJ.[180]

The Committee gathered the views of states about the international criminal court project and concluded that states had reservations on the two ILC codification projects at the time.[181] The Committee produced further draft statutes in 1953 and 1954. However, the two drafts also failed to enjoy universal support.[182] The underlying reason was reluctance by states to surrender their sovereignty.[183] The question of sovereignty would delay meaningful debate on the court for about 40 years.[184] There was little hope for the birth of a tribunal with global coverage.[185]

The 1953 draft statute of an international criminal tribunal had important proposals. It proposed limited jurisdiction, increased state control and provided for the right of states to withdraw jurisdiction. The draft deprived the UN powers to institute proceedings. However, the draft retained the powers of the UN to stop proceedings in a case. A stay of proceedings or deferral type, such as in the Rome Statute, was proposed.[186] The draft valued the minimisation of political interference in cases before the proposed court and balanced possible criminal proceedings with the need for international cohesion.

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[177] S Katzenstein 'In the shadow of crisis: the creation of international courts in the twentieth century' (2014) 55 *Harvard International Law Journal* 189.
[178] ILC 'Question of international criminal jurisdiction' (1950) 2 *Yearbook of International Law Commission* 17.
[179] n 169 above, 21.
[180] http://www.legal.un.org (accessed 1 December 2016).
[181] Bassiouni (n 5 above) 50 - 52.
[182] Struett (n 17 above) 62.
[183] Struett (n 17 above) 61.
[184] Struett (n 17 above) 62.
[185] Green (n 36 above) 68.
[186] UNGA 'Report of the 1953 Committee on International Criminal Jurisdiction' (1954).

The 1954 draft statute contained a Draft Code of Offences Against the Peace and Security of Mankind (Draft Code). The UNGA mandated a committee composed of seventeen-member states, instead of the ILC, to determine the judicial enforcement of such a code.[187] The UNGA's approach was criticised for giving the 'wrong' people the right question. The UNGA expected jurists to deal with political questions and politicians to fine-tune legal documents.[188]

An unconvinced UNGA requested for further research on the draft code to enhance its understanding of the findings of the special committee.[189] Despite the submission of the draft code in 1954, it was not until 1996 that the draft code was adopted. The UNGA deemed it necessary to suspend discussions on the draft code and the draft statute to allow further submissions on the definition of aggression.[190] As the deadlock on the crime of aggression lingered, another attempt was made in 1973 to visualise the future international penal tribunal when the International Convention on the Suppression and Punishment of the Crime of Apartheid was adopted. The United Nations Ad Hoc Committee for South Africa engaged experts to use the template of the Apartheid Convention for an international court statute.[191]

The Committee finally agreed on the chapeau elements of aggression in 1974, leading the UNGA to adopt the definition of the crime in Resolution 3314 (XXIX).[192] However, the adoption of the definition did not translate into acceptance of the draft code of crimes. The ILC only concluded its first draft code of crimes against peace and security of humanity. The 'draft code of offences' was changed to a 'draft code of crimes' in 1991 and the amendment was submitted as such to the UNGA in 1996.[193]

[187] ILC 'International criminal jurisdiction 5th session' (1950).
[188] n 187 above.
[189] Olásolo (n 136 above).
[190] UNGA 'Resolution 898 (IX)' (1954) http//:www.legal.un.org/ilc/summaries/1_1.shtml (accessed 1 December 2016).
[191] MC Bassiouni & DH Derby 'Final report on the establishment of an international criminal court for the implementation of the Apartheid Convention and other relevant international instruments' (1981) 9 *Hofstra Law Review* 523.
[192] UNGA 'Resolution 3314' (1974) http://www.mefacts.com/cached.asp (accessed 1 December 2016).
[193] http://www.legal.un.org/ilc/texts/7_4.shtml (accessed 1 December 2016).

2.5.5 The Cold War derailment

The Cold War hampered the progress brought by the Nuremberg trials.[194] Political divisions in the UNSC made the creation of international tribunals difficult.[195] During the Cold War, the world lacked both a platform and the opportunity to debate a permanent international court. The international community had to wait for a change in the political context.[196] The pursuit of international criminal justice was overpowered by politics.[197] On the bright side, national prosecutions of crimes gained more recognition. Resultantly, extradition of offenders and state co-operation became effective means of dealing with crimes.[198]

During the Cold War, it was difficult for the UNSC to decide on issues which affected the international community. Communism conflicted with capitalism.[199] Two major powers, USA and the Soviet Union, represented the antagonistic forces of capitalism and communism respectively. Since both superpowers were members of the UNSC, they frustrated and vetoed most of each other's resolutions, as they viewed support for each other as the advancement of capitalism and communism.[200]

Competition between the superpowers for supremacy and defence of national pride stalled issues before the UNSC. The UN was virtually paralysed during the Cold War. Its effectiveness was severely curtailed.[201] The competition among UN members took the UN by surprise and without strategy to unite the conflicting members.[202] There was much mistrust between the eastern and western blocs. Both sides were uncertain on the purpose of an international criminal court.[203] The Cold War meant that hostile enemies, such as the Soviet Union and USA, were potential aggressors who needed

[194] MC Bassiouni *The Statute of the International Criminal Court: a documentary history* (1998)10 - 15.
[195] Schiff (n 1 above); Struett (n 17 above).
[196] A Franceschet 'Four cosmopolitan projects: the International Criminal Court in context' (2008) http://www.allacademic.com/meta/p251105 index (accessed 5 November 2016).
[197] MC Bassiouni (n 5 above) 50.
[198] Green (n 36 above) 68.
[199] Schiff (n 1 above) 38.
[200] WM Reisman 'The constitutional crisis in the United Nations' (1993) 87 *American Journal of International Law* 83 - 85; Bassiouni (n 5 above) 39.
[201] Reisman (n 200 above).
[202] Bassiouni (n 5 above) 49 - 52.
[203] Schiff (n 1 above) 38.

a clear definition of aggression before any movement on the statute of the court could occur.[204]

For USA thought the time was not ripe to perfect a definition of aggression. It argued that planners of aggression would exploit a prematurely adopted definition of aggression.[205] The fears were exacerbated by the Korean conflict and rumours of a repeat of victors' justice as in Nuremberg.[206] Panicking Western leaders became non-committal to prosecute war crimes.[207] During the Cold War, the ILC reports and draft codes fell dormant, only to be revived in the last decade of the twentieth century.[208]

2.6 The 'acceleration years' (1989 to 1998)

2.6.1 Drug offences reviving the international criminal court agenda

In 1989, Trinidad and Tobago and other Caribbean and Latin American states proposed international prosecutions for drug offences.[209] The states sought a forum to extradite and prosecute international narco-terrorists for cross-border drug trafficking.[210] The states viewed a mechanism such as an international criminal court as a possibility to address their drug issues.[211] Their proposal led to the UN deliberating on the creation of an international criminal court.

In response to the proposal, the UNGA tasked the ILC to draft a statute for the court.[212] The ILC adopted a draft code of crimes in 1991[213] and created a working group on the court in 1992.[214] There was a broad consensus within the ILC that the court was long overdue.[215] In the early 1990s, the work of the ILC received considerable attention,

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[204] Roach (n 38 above) 59.
[205] Struett (n 17 above) 59.
[206] Struett (n 17 above) 59.
[207] Struett (n 17 above) 59.
[208] Novak (n 160 above) 31 - 50.
[209] CL Blakesley 'Report on the obstacles to the creation of a permanent war crimes tribunal' (1995) *Fletcher Forum World Affairs* 901 - 911.
[210] Blakesley (n 209 above).
[211] UNGA 'Resolution 44/39' (1989).
[212] J Crawford 'The making of the Rome Statute' in P Sands (eds) *From Nuremberg to The Hague: the future of international criminal justice* (2003) 109.
[213] ILC 'Report on the work of forty-third session' (1991) 2 *Yearbook of International Law Commission* 1.
[214] ILC 'Report on the work of forty-fourth session' (1991) 2 *Yearbook of International Law Commission* 1.
[215] BB Ferencz 'An international criminal court: where they stand and where they're going' (1992) 30 *Columbia Journal of Transnational Law* 375 - 399.

unlike before when the ILC was relegated to the designation of rapporteurs and working groups who worked in vain, as their findings were largely disregarded.[216] In 1994, the ILC Draft Statute was ready.[217]

2.6.2 Ad hoc tribunals laying the foundation

The end of the Cold War eased political tensions between superpowers and shredded fears that some states would abuse international judicial institutions for political ends.[218] The UN revived its influence on international affairs and kept political deadlocks at a minimal.

The post-Cold War era witnessed the commission of heinous crimes in the former Yugoslavia and Rwanda. The UNSC responded by establishing the ICTY in 1993,[219] and the ICTR in 1994. [220] The tribunals had primacy over national courts.[221] The UNSC triggered its peremptory powers under Chapter VII of the UN Charter to establish the two *ad hoc* tribunals.[222]

The earlier glimpses for a permanent international criminal court suddenly regained momentum with the establishment of the *ad hoc* tribunals.[223] Many governments felt the edge and conviction to support the idea of a permanent international criminal court.[224] The *ad hoc* tribunals became the trigger and 'birth pains' before the ICC was born.

In the case of the former Yugoslavia, investigations were authorised through the UNSC Resolution 780 of 1992.[225] The UNSC decided on an international tribunal to prosecute crimes committed since 1991.[226] In the case of Rwanda, the UNSC Resolution 935 of 1994 established a Commission of Experts to investigate violations of the law in

[216] Levie (n 73 above) 253.
[217] Bassiouni (n 194 above).
[218] Schiff (n 1 above) 38.
[219] UNSC 'Resolution 827' (25 May 1993).
[220] UNSC 'Resolution 955' (1 June 1994).
[221] ICTY Statute art 9; ICTR Statute art 8.
[222] ICTY Statute Preamble; ICTR Statute Preamble.
[223] R Cryer *et al An Introduction to international criminal Law and procedure* (2014) 127.
[224] P Kirsch & V Oosteveld 'Negotiating an institution for the twenty-first century: multilateral diplomacy and the International Criminal Court' (2000) 46 *McGill Law Journal* 1141.
[225] UNSC 'Resolution 780' (1992).
[226] Levie (n 73 above) 252.

Rwanda.[227] The reports of the Commission resulted in the establishment of a tribunal.[228]

A combination of strong political will and participation made the establishment of the ICTY and ICTR possible.[229] This shows the importance of political will in the prosecution of international crimes. To the contrary, a good measure of political opposition made the establishment of the ICC a long process.[230]

The ICTY burst into prominence with the arrest, transfer and prosecution of Tadić.[231] The primacy of the ICTY was brought under scrutiny when Tadić challenged its consistency with international law.[232] The Appeals Chamber of the ICTY emphasised that the interests of states are subordinate to international mechanisms which promote and protect human rights.[233] The Appeals Chamber also stated the importance of international criminal tribunals such as the ICTY to avoid the trivialisation of international crimes and neglect of diligent prosecutions.[234] The *Tadić* case showed reluctance by persons and states to be tried outside state jurisdiction.

The ICTR made groundbreaking prosecution and sentences for the crime of genocide. The *Akayesu*[235] case was the first in which an international tribunal tried and convicted a person for genocide.[236] The indictment of Akayesu came at an opportune time and provided a precedent for deliberations at the Rome Conference on the crime of genocide.

The establishments of the ICTY and ICTR were precursors to the formation of the ICC.[237] The ICC signalled a shift from *ad hoc* legalism towards a permanent international penal system. When it established the ICTY and ICTR, the international community demonstrated willingness to end impunity. Before, prosecutions by

[227] UNSC 'Resolution 935' (1994).
[228] Bassiouni (n 5 above) 46.
[229] Goldstone (n 131 above) 766.
[230] Goldstone (n 131 above) 766.
[231] *Prosecutor v Tadić* (2 October 1995) IT-94-1-T.
[232] *Tadic* (n 231 above).
[233] *Tadic* (n 231 above).
[234] *Tadic* (n 231 above).
[235] *Prosecutor v Jean Paul Akayesu* (2 September 1998) ICTR-96-4-T.
[236] M Swart 'Judicial making at the *ad hoc* tribunals: the creative use of sources of international law and adventurous interpretation' (2010) http://www.zaoerv.de/, 475 (accessed 28 March 2017).
[237] El Zeidy (n 2 above) 889.

international criminal tribunals were motivated by revenge against defeated states.[238] The rationale of the ICC augurs well with that of the ICTY and ICTR. Primacy, as espoused in the statutes of both the ICTY and ICTR, was reshaped into complementarity in the ICC system.[239]

The lack of universal recognition of *ad hoc* tribunals aroused interest for a permanent institution that would not be subjected to similar shortcomings.[240] The ICTY exercised territorial jurisdiction for crimes in the former Yugoslavia,[241] while the ICTR exercised both territorial and personal jurisdiction for crimes in Rwanda or by Rwandan nationals.[242] The limitation of jurisdiction to certain conflicts and lack of pre-existing statutes raised questions on the principles of legality and fairness in the *ad hoc* tribunals.[243] The a*d hoc* tribunals were also pressured to address situations within a constrained time frame; hence, they were susceptible to political manipulation.[244] Furthermore, the *ad hoc* tribunals were often inconsistent in the treatment of individuals who committed similar violations. The inconsistencies were caused by the different statutes which established the tribunals.[245]

A permanent international criminal court became necessary to build on the foundation of the *ad hoc* tribunals and counter their shortcomings.[246] However, the ICC is not immune to the shortcomings. Some of the challenges with the ICC include its considerable dependence on the UNSC and the states to refer cases to it, its subordination to the UNSC and alleged political interference by powerful states. The human and financial resource factor is another issue and much will depend on how the ICC's burden is reduced through its approach to complementarity. To its advantage, the ICC is permanent and as such has more time to work on its weaknesses and build a stronger and more effective mechanism.[247]

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[238] Cryer (n 223 above) 119.
[239] MA Newton 'Comparative complementarity: domestic jurisdiction consistent with the Rome Statute of the International Criminal Court' (2001) 167 *Military Law Review* 20.
[240] A Cassese *et al From Nuremberg to Rome: International Military Tribunals to the International Criminal Court. The Rome Statute of the International Criminal Court: a commentary* (2002) 18.
[241] WA Schabas & MC Bassiouni *The legislative history of the International Criminal Court* (2016) 69.
[242] Schabas & Bassiouni (n 238 above) 64 - 66.
[243] Bassiouni (n 5 above) 60.
[244] Bassiouni (n 5 above) 60 - 61.
[245] Bassiouni (n 5 above) 60.
[246] Sadat (n 34 above) 25.
[247] LE Carter 'The future of the International Criminal Court: complementarity as a strength or weakness' (2013) 12 *Washington University Global Studies Law Review* 458.

In 2002, the SCSL was established at the initiation of the national authorities in Sierra Leone and with the support of the UNSC.[248] The SCSL was a hybrid court with local and international features. Its Statute reflected past realities of conflict and the wounds inflicted on the populace.[249] In the formative years of the SCSL, the Sierra Leonean President Kabbah desired a 'court that will meet international standards for the trial of criminal cases, while at the same time having a mandate to administer a blend of international and domestic Sierra Leonean law on Sierra Leonean soil'.[250] The UN also preferred an international court founded on strong national values.[251] A Truth and Reconciliation Commission (TRC) was also established to operate alongside the SCSL.[252] Therefore, the administration of justice for Sierra Leone encompassed both criminal trials and national reconciliation.[253] This approach is preferred in Africa to settle conflicts on the continent. The SCSL was preferred ahead of the national courts in Sierra Leone.[254] The accused in Sierra Leone were prosecuted in respect of fair trials and due process of law.[255]

Notwithstanding that the SCSL was an international criminal tribunal and not an African regional court, the fact that the prosecution of its most profile indictee, Charles Taylor, occurred amid the peace-versus-justice dilemma, makes the SCSL relevant to current debates in Africa on the importance of regional courts.[256] As some scholars have observed, a truth commission was often relegated to second status in the fight against impunity.[257] In this regard, a regional court such as the one envisaged for Africa may bring equal appreciation of legal and non-legal mechanisms.

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[248] UNSC 'Resolution 1315' (14 August 2000).
[249] CC Jalloh 'The Contribution of the Special Court for Sierra Leone to the Development of International Law' (2007) 15 *African Journal of International and Comparative Law* 175 - 176.
[250] President of the Republic of Sierra Leone 'Annex to the letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council' 10 August 2000.
[251] UN Secretary-General 'Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone' 4 October 2000.
[252] Truth and Reconciliation Commission Act established the TRC.
[253] M Wierda *et al* 'Exploring the relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone' (2002) *The International Center for Transitional Justice*.
[254] CC Jalloh 'The contribution of the Special Court for Sierra Leone to the development of international law' (2007) 15 *African Journal of International and Comparative Law* 173.
[255] n 248 above, 1.
[256] CC Jalloh 'The law and politics of the Charles Taylor case' (2015) 43 *Denver Journal of International Law and Policy* 251 - 252.
[257] See for example CC Jalloh 'Special Court for Sierra Leone: achieving justice' 2011 (32) *Michigan Journal of International Law* 436; WA Schabas 'Internationalized Courts and their Relationship with Alternative Accountability Mechanisms: the case of Sierra Leone' in PR Romano *et al* (eds)

2.7 Conclusion

This chapter showed that an international criminal court was conceived for at least five centuries,[258] only to manifest with the adoption of the Rome Statute in 1998.[259] The twentieth century was marked by an increase in international crimes which warranted prosecutions as part of mechanisms to end impunity.[260] The international community adopted several international treaties to purge the continued commission of heinous crimes.[261] The ICC is a desire to respond more effectively to international crimes.

The push for the ICC capitalised on the growing desire for victims to get justice. Calls for mechanisms to end impunity were gaining momentum. The establishment of the ICC enhances permanency and consistency in the application of juridical principles against impunity for gross human rights violations.[262] Other international criminal tribunals addressed specific conflicts and varied in scope depending on the circumstances.[263]

The ICC was established to prosecute persons alleged to have committed crimes against humanity, peace and security, in addition to genocide and aggression.[264] The establishment of the Court was an international community acknowledgment for the need to preserve the rule of law[265] and provide a framework of global jurisdiction over perpetrators of serious crimes who would otherwise evade justice in their states.[266]

The chapter discussed the historical background towards the establishment of the ICC for several reasons. The understanding of international criminal justice and the emergence of the ICC contributes to this study in three ways: as starting points on accountability for international crimes; to outline how national and international courts

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Internationalized criminal courts and tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia (2004) 179 - 180.

[258] SL Jamison 'A permanent international criminal court: a proposal that overcomes past objections' (1995) 23 *Denver Journal of International Law and Policy* 421.

[259] http://www.treaties.un.org (accessed 17 October 2016).

[260] *Tadic* (n 231 above).

[261] I Brownlie *Principles of public international law* (2003).

[262] JH Armstead Jr 'The International Criminal Court: history, development and status' (1998) 38 *Santa Clara Law Review* 748.

[263] Armstead Jr (n 262 above) 748.

[264] X Philippe 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (2006) 88 *International Review of the Red Cross* 382.

[265] T Bingham *The rule of law* (2010) 3 - 6.

[266] El Zeidy (n 2 above) 870.

have co-operated over the years to end impunity; and as a background on the ICC's preferred approach of complementarity.

This chapter further gave a background on efforts towards international judicialisation of international crimes and ensuing challenges. Some of the challenges in achieving a common approach to the international judicialisation process manifest on the application of complementarity. The ICC is a result of years of hard work which saw the persistence of the international community against overwhelming odds.[267] The genesis of the ICC is vital in understanding the evolution of its practice to date. International criminal tribunals have been credited for shaping the development of international criminal law. The product of the ambitions and workload of many centuries has been the establishment of the ICC.

[267] L Sadat & SR Carden 'The new International Criminal Court: an uneasy revolution' (2000) 88 *Georgetown Law Journal* 381 - 474.

CHAPTER 3

THE MATTER OF COMPLEMENTARITY

3.1 Introduction

International criminal justice is built upon a relationship between national and international jurisdictions.[1] International adjudication forums proportionally balance national interests to preserve state sovereignty and international interests to end impunity. The Rome Statute gives states a primary role to address violations.[2] States which are unwilling and unable to act forfeit their powers to the ICC.

The interdependence of national and international jurisdictions makes the co-existence of the two systems complementary.[3] The interdependence obligates states and the ICC to function through co-operation and assistance.[4] The complementary relationship caters for jurisdictional gaps and encourages the intervention of the ICC when states fail to punish international crimes.[5] Consequently, the ICC supports national criminal systems.[6]

States highly esteem their sovereignty and rarely waive their exclusive jurisdiction for matters in their territories.[7] The principle of complementarity is premised on expected state action and regulation of absolute state autonomy.[8] The Rome Statute presumes that states have the capacity and interest to prosecute domestically.[9] The dormant jurisdiction of the ICC is activated when the presumption is waived.[10] Therefore, states are preferred forums for the prosecution of crimes. Notwithstanding, certain circumstances require states to defer cases to the ICC.[11]

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[1] MM El Zeidy 'The principle of complementarity: a new machinery to implement international criminal law' (2002) 23 *Michigan Journal of International Law* 889.
[2] Rome Statute of the International Criminal Court (Rome Statute) arts 1 & 17.
[3] n 2 above, Preamble para 10.
[4] M du Plessis *et al* 'African efforts to close the impunity gap: lessons for complementarity from national and regional actions' (2012) 241 *Institute of Security Studies Paper* 5.
[5] M du Plessis 'The long walk to accountability for international crimes: reflections from South Africa' (2014) *South African Journal of Criminal Justice* 407.
[6] Du Plessis *et al* (n 5 above) 4.
[7] El Zeidy (n 1 above) 870.
[8] SA Williams & WA Schabas 'Article 17: issues of admissibility' in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article* (1999) 20.
[9] Du Plessis *et al* (n 5 above) 5.
[10] H Olàsolo *The triggering procedure of the International Criminal Court* (2005) 39.
[11] Olàsolo (n 10 above).

The principle of complementarity is a double-edged sword.[12] On the one hand, complementarity assures national jurisdictions that their primacy is secured.[13] On the other hand, complementarity introduces an 'interventionist policy' that allows the ICC to assume jurisdiction over a case when the domestic jurisdiction fails to prosecute.[14] The principle of complementarity thus serves as the anchor of the ICC regime.[15] The principle regulates the entire ICC system.[16]

State parties accepted the Rome Statute owing to the insertion of complementarity provisions.[17] The principle of complementarity is described in detail in part 2 of the Rome Statute. Part 2 was the most contentious issue at the Rome negotiations. Today, part 2 is the bedrock of the Rome Statute.[18] That part includes, *inter alia*, the definition of crimes, the jurisdiction of the ICC, triggering mechanisms, complementarity and the roles of the Prosecutor and the UNSC.[19]

This chapter discusses the principle of complementarity as espoused in the Rome Statute and the practice of the ICC. The chapter begins with an outline of the historical development of the principle. The historical background enables an understanding of the roots of complementarity regime as practised by the ICC. This chapter demonstrates that long-standing debates and jurisprudence on the preferred forum to prosecute international crimes have been key in shaping complementarity. Different models of complementarity which emerged in the past are scrutinised in this chapter. This chapter further seeks to show that international criminal tribunals which preceded the ICC mostly endorsed the reverse side of the principle.[20] Historical circumstances undermined efforts at understanding the co-existence of national and international judicial systems.

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[12] MA Newton 'The complementarity conundrum: are we watching evolution or evisceration' (2010) 8 *Santa Clara Journal of International Law* 137.
[13] Newton (n 12 above).
[14] Newton (n 12 above).
[15] El Zeidy (n 1 above) 870; Du Plessis *et al* (n 5 above) 4.
[16] M Bergsmo 'Occasional remarks on certain state concerns about the jurisdictional reach of the International Criminal Court and their possible implications for the relationship between the Court and Security Council' (2000) 69 *Nordic Journal of International Law* 87.
[17] United Nations 'Report of the Ad Hoc Committee on the establishment of an international criminal court' GAOR 50th Sess. Suppl. No.22 (Doc.A/50/22) para 29.
[18] MC Bassiouni 'Negotiating the treaty of Rome on the establishment of an international criminal court' (1999) 32 *Cornell International Law Journal* 452 - 458.
[19] Bassiouni (n 18 above) 458.
[20] MA Newton 'Comparative complementarity: domestic jurisdiction consistent with the Rome Statute of the ICC' (2001) 167 *Military Law Review* 20.

This chapter proceeds to examine complementarity as enshrined in the Rome Statute and as understood in the practice of the ICC. The ICC model of complementarity often requires the application of complicated tests to determine the admissibility of cases. Complementarity is the most important component of the admissibility determination.[21] The Rome Statute provides guidelines and leaves room for flexibility in the interpretation of the principle.[22] The chapter also discusses emerging African practices as an illustration of how the ICC can appreciate the understanding of complementarity from the perspective of states which the Court seeks to assist.

Finally, this chapter discusses the contribution of scholars in shaping the understanding and development of complementarity by the ICC. The last part of the chapter focuses on positive and negative schools of thought on complementarity. The two schools of thought reveal the importance of a broader interpretation to meet the object and purpose of the Rome Statute.

3.2 The historical development of the principle of complementarity

Complementarity manifests itself in various forms. The forms of complementarity are drawn from statutes and the practices of international criminal tribunals over the twentieth century.[23] The historical development of the principle of complementarity shows that the principle is not static.[24] Instead, complementarity varies and should be interpreted based on the circumstances surrounding its application at a given time and place.[25]

The Rome Statute left the term 'complementarity' undefined, to allow the Court to adapt the interpretation of the principle. During informal debates and negotiations at the Rome Conference, states did not have adequate time to change positions on key concepts such as complementarity.[26] The negotiations compressed many issues within the allotted five weeks.[27] Most delegations had little time to scrutinise the draft

[21] WA Schabas *An introduction to the International Criminal Court* (2011) 190.
[22] n 2 above, art 17.
[23] El Zeidy (n 1 above).
[24] MM El Zeidy 'From primacy to complementarity and backwards: (re)-visiting rule 11*bis* of the ad hoc tribunals' (2008) 57 *The International and Comparative Law Quarterly* 415.
[25] El Zeidy (n 24 above).
[26] A Cassese 'The Statute of the International Criminal Court: some preliminary reflections' (1999) *European Journal of International* Law 145.
[27] Bassiouni (n 18 above) 444.

statute and had no opportunities to take sustainable positions on what they eventually agreed to in Rome.[28] Therefore, it is not surprising that today the interpretation and application of certain provisions of the Rome Statute are contested by states. For instance, the call by the AU to empower the UNGA to influence deferrals alongside the UNSC illustrates Africa's understanding that the UNSC does not enjoy monopoly over determinations on issues of international peace and security.[29] The AU position finds a basis on UNGA Resolution 377(v). The Resolution allows the UNGA to complement the UNSC when the latter is unable or unwilling to exercise its primary responsibility.

The principle of complementarity, as understood in the Rome Statute, was born out of compromise. The principle strikes a balance between the supranational power of the ICC and the sovereignty of states to function independently from external interference.[30] The compromises at the Rome Conference decentralised to the two-tier national and international systems.[31] Inevitably, the principle will open a hornet's nest because national and international jurisdictions are bound to compete for dominance.[32]

3.2.1 Origins of complementarity

The emergence of international criminal tribunals in the twentieth century stimulated discussions on the framework of the operations of institutions of international criminal justice. The tribunals contended with traditional norms which exalted the jurisdiction of states for violations in their territories.[33] The use of domestic forums to punish violations of international law is a time-honoured practice. The ideas of Hugo Grotius identified states as preferred forums to punish violations of norms.[34] The Westphalian Treaty, which entrenched the doctrine of state sovereignty, codified the position taken by Grotius.[35]

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[28] Bassiouni (n 18 above).
[29] D Akande 'Addressing the African Union's proposal to allow the UNGA to defer ICC prosecutions' 30 October 2010 http://www.ejiltalk.org/2010/10/ (accessed 30 April 2019).
[30] El Zeidy (n 1 above).
[31] 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* 600.
[32] Benzing (n 31 above) 593.
[33] A Cassese 'From Nuremberg to Rome: international military tribunals to the International Criminal Court' in A Cassese *et al* (eds) *The Rome Statute of the International Criminal Court: a commentary* (2002) 10-18; JT Holmes 'Complementarity: national courts versus ICC' in Cassese *et al* (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 670 - 671.
[34] Newton (n 20 above) 26.
[35] http://www.brittanica.com/event/Peace-of-Westphalia (accessed 7 May 2017).

Emphasis on state sovereignty often eluded justice for victims of atrocities.[36] An alternative mechanism became desirable to combat atrocities. International criminal justice became the means to make perpetrators answerable.[37] States often shielded persons accused of gross human rights violations from prosecution.[38] As the human rights movements emerged and strengthened in the twentieth century, traditional channels of justice which observed the sovereignty of states were challenged with proposals to advance and strengthen the global enforcement of human rights through a broader approach.[39] Hence, international criminal tribunals were born.

International criminal tribunals produced different models of complementarity. Mostly, the tribunals assumed inability and unwillingness of national courts to bring perpetrators to book.[40] Few of the tribunals adopted standards that were lopsided in favour of domestic courts.[41] In all cases, attempts were made to define the relationship between national and international courts when faced with jurisdictional preferences.[42]

3.2.2 Complementarity in the Treaty of Versailles

The principle of complementarity can be traced back to the Treaty of Versailles adopted at the end of the First World War.[43] The Treaty gave military tribunals supremacy over national jurisdictions. The victorious Allies allowed shared responsibility with Germany in the prosecution of offenders. The Allies tasked Germany with the prosecution of most offenders. The Allied High Tribunal was established to prosecute only those 'most responsible'.[44]

Pursuant to the Treaty of Versailles, Germany passed an enabling statute to prosecute offenders. Germany strongly argued in favour of using the doctrine of state sovereignty to retain jurisdiction over all the cases.[45] The basis of the argument was the

[36] A Cassese 'The International Criminal Court five years on: adante or moderato? in C Stahn & G Sluiter (eds) *The emerging practice of the International Criminal Court* (2009) 22 - 25.
[37] Cassese (n 36 above).
[38] Cassese (n 36 above).
[39] Cassese (n 36 above).
[40] J Pejic 'Accountability for international crimes: from conjecture to reality' (2002) 84 *International Review of the Red Cross* 15.
[41] BS Brown 'Primacy or complementarity: reconciling the jurisdiction of national courts and international criminal tribunals' (1998) 23 *Yale Journal of International Law* 383,387; El Zeidy (n 1 above) 869 - 878.
[42] El Zeidy (n 1 above) 870.
[43] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).
[44] El Zeidy (n 1 above) 873.
[45] El Zeidy (n 1 above) 875.

understanding that a conducive legal and justice environment in a state allows a state to exercise its primacy over cases.

The treaties of Sèvres and Lausanne between the Allied powers and Turkey were signed in the context of the Versailles Peace Settlement negotiations. Through the two treaties, the Allies declined prosecution of offences committed by Turkish authorities. The Allies deferred to Turkey the prosecutions of offenders for massacres committed by Turkish officials during the First World War.[46] The Allies considered Turkey's sovereignty and political stability when they adopted a non-interference position.[47] The decision by the Allies demonstrated the need to consider several practical factors before resorting to an international criminal tribunal.

3.2.3 Complementarity at the League of Nations Convention

Complementarity featured in the Convention for the Prevention and Punishment of Terrorism[48] negotiated by the League of Nations in 1937. However, the practical operation of the principle was not tested because the Convention never came into force. The Convention intended to give primacy to states. In addition, the Convention sought to give states absolute discretion on whether to prosecute perpetrators or to request the assistance of an international criminal court.[49] The Convention entirely left it to states to demonstrate their ability and to proceed with national prosecutions.[50]

3.2.4 The Nuremberg complementarity model

At Nuremberg, complementarity arose due to the need to share the burden between national and international jurisdictions after the Second World War.[51] When prosecuting Germans for atrocities committed during the War, the Allied powers used both national and international courts.[52] Arguably, the Allied powers assumed control of all the trials but decentralised the trials to different areas and levels of jurisdictions. Besides Nuremberg, the law of the Occupying powers applied in their respective areas

[46] El Zeidy (n 1 above) 873 - 874.
[47] El Zeidy (n 1 above) 873 - 874.
[48] Convention for the Prevention and Punishment of Terrorism, League of Nations (Terrorism Convention).
[49] M Adigun 'Implementing the complementarity principle of the Rome Statute of the International Criminal Court in Nigeria' PhD thesis, University of Witwatersrand, 2015 43.
[50] Adigun (n 49 above).
[51] El Zeidy (n 24 above) 405.
[52] Q Wright 'The law of the Nuremberg trial' (1974) 41 *American Journal of International Law* 38 - 45.

of occupation.[53] The second Nuremberg principle permitted the invocation of international law in the absence of national law to try international crimes.[54]

The IMT targeted the most responsible, whereas internal criminal jurisdictions prosecuted other criminals. Territorial jurisdiction was a major feature in the Moscow Declaration of 1943 and the London Declaration of 1945, both of which established the IMT.[55]

The CCL 10[56] enabled Allied powers to exercise jurisdiction when authorised by the IMT.[57] A notable feature was the co-operation between the IMT and national criminal jurisdictions.[58] The corollary for the principle of complementarity is co-operation.

The IMT complementarity model serves as an example of effective partnerships of national and international mechanisms.[59] The state parties to the IMT Charter welcomed the division of labour among themselves and proceeded with the application of complementarity in that vein.[60] Complementarity in the IMT was conspicuous for the lack of conflict between national sovereignty and international criminal justice.[61]

3.2.5 Complementarity in the International Court of Justice Statute

The ICJ was established by the UN Charter in 1946.[62] The ICJ has jurisdiction on legal disputes between states.[63] The ICJ and its predecessor, the PCIJ, significantly clarified international law. The ICJ is a constant reminder of the importance of international courts in the cohesion of states. Notably, the ICJ only imposes state obligations and

[53] P Benvenutti 'Complementarity of the International Criminal Court to national criminal jurisdictions' in F Lattanzi & WA Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* (1999) 24.
[54] Yearbook of the International Law Commission (1950) Vol.II 374 - 378.
[55] El Zeidy (n 1 above) 874.
[56] See BB Ferencz 'An international criminal court: a step towards world peace: a documentary history and analysis' (1980) 2 *Ocean Publications.*
[57] Olàsolo (n 10 above) 2.
[58] O Triffterer 'Preliminary remarks: the permanent international criminal court-ideal and reality' in Triffterer (n 8 above) 38.
[59] Triffterer (n 58 above).
[60] Triffterer (n 58 above).
[61] El Zeidy (n 1 above) 876.
[62] http://www.icj-cji.org (accessed 30 April 2019).
[63] Statute of the International Court of Justice (Statute of the ICJ) art 36(1).

not personal criminal liability.[64] The position differs from international criminal tribunals established since the end of the First World War.[65]

The jurisdiction of the ICJ is based on state referral, UNSC intervention and treaty obligations.[66] Generally, state parties should refer legal disputes to the ICJ. The position gives primacy to states to deal with disputes so that the UN only intervenes as a last resort. Probably, states drew lessons from the operations of the ICJ when they formulated the Rome Statute. In 1992, the report of the Working Group outlined the jurisdictional strategy for the ICC Statute and considered the invocation of jurisdiction such as the one under the ICJ Statute.[67]

3.2.6 The Genocide Convention and complementarity considerations

The relationship between national and international jurisdictions emerged when the Genocide Convention was drafted. During the discussions on the nature of an international tribunal to prosecute the crime of genocide, the opposition of most states to a tribunal with exclusive jurisdiction was apparent.[68] The preparatory documents of the Convention show that states exalted state sovereignty and only preferred international intervention for times when states would have failed to prosecute perpetrators of heinous crimes.[69]

USA and Uruguay were vocal in support of the incorporation of the complementarity principle in the Genocide Convention.[70] Advocacy for the inclusion of complementarity bore fruit when most of the Ad Hoc Committee members endorsed the proposal.[71] Two experts consulted by the Secretariat, Donnedieu de Vabres and Vespasian Pella, clarified how an international jurisdiction would function. They indicated that an international jurisdiction would be activated in cases of inability or unwillingness of national courts.[72]

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[64] n 63 above, arts 34 & 65.
[65] ICTY and ICTR Statutes.
[66] n 63 above, art 36.
[67] http://www.legal.un/ilc (accessed 5 November 2016).
[68] Basic Principles of a Convention on Genocide.
[69] United Nations 'Ad Hoc Committee on Genocide: summary record of the eight meeting' UN Doc.E/AC.25/SR.8 (17 April 1948).
[70] WA Schabas *Genocide in International Law: the crime of crimes* (2000) 373.
[71] n 69 above.
[72] Schabas (n 70 above) 369 - 370.

3.2.7 Ad hoc tribunals and reversed complementarity

In international criminal justice, the primacy system of the ICTY and ICTR is frequently compared with the complementarity system of the ICC. The statutes of the ICTY[73] and ICTR[74] gave jurisdiction to the tribunals and national courts. To address the serious violations committed in the former Yugoslavia and Rwanda, the statutes extended the jurisdiction of the tribunals beyond concurrence.[75] The UNSC justified the primacy of the ICTY and ICTR. [76]

Arguably, a three-pronged approach was adopted for Rwanda: the ICTR, the usual national courts, and the re-established traditional community courts (*gacaca*) specifically created to try some of the perpetrators of the genocide.[77] The approach allowed the prosecution of cases at both national and international level. The gravity of individual cases was the main determinant on the appropriate forum for crimes. Apart from that, the model resonated with complementarity, a dimension of universal jurisdiction manifested when national courts of Switzerland, Canada, Belgium, Cameroon and France prosecuted some offenders for crimes committed during the Rwandan genocide.[78]

The preference of the ICTY and ICTR over national courts enabled the tribunals to interfere with national proceedings at any stage.[79] The principle of primacy of international criminal tribunals obligated states to defer cases to the tribunals when asked to do so.[80] The jurisdiction of states over crimes committed in their territories was subordinated to the tribunals.[81]

The *ad hoc* tribunals assumed inability and unwillingness by national courts to prosecute crimes committed in Rwanda and the former Yugoslavia.[82] Doubts about fair

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[73] Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute) art 9.
[74] Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) art 8.
[75] El Zeidy (n 24 above) 403.
[76] El Zeidy (n 24 above) 403.
[77] K Lahiri 'Rwanda's gacaca courts a model for local justice in international crime?' (2009) 9 *International Criminal Law Review* 321 - 322.
[78] WA Schabas 'National courts finally begin to prosecute genocide, the crime of crimes' (2003) 1 J*ournal of International Criminal Justice* 47 - 50.
[79] WA Schabas *An introduction to the International Criminal Court* (2007) 175.
[80] *Prosecutor v Karadžić* (16 May 1995) ICTY T.Ch.
[81] Cassese (n 33 above) 667 - 671.
[82] J Pejic 'Accountability for international crimes: from conjecture to reality' (2002) 84 *International Review of the Red Cross* 15.

trials[83] and promotion of impunity[84] were major factors which convinced the international community to take cases away from national courts. For instance, in the *Tadić* case, the ICTY was apprehensive to the possibility that national courts would trivialise the crimes to the detriment of victims and the interests of justice.[85]

When an international criminal tribunal has a primary role in the prosecution of perpetrators of heinous crimes, it is irrelevant to consider the positioning and credibility of national forums.[86] However, the *Tadić* case challenged the consistency of the ICTY primacy with international law.[87] The Appeals Chamber of the ICTY emphasised that the interests of states are subordinate to the protection of human rights.[88] The *Tadić* case showed that persons accused of international crimes are reluctant to stand trial outside national courts. The reluctance commonly manifests when potential forums are availed to try an accused.

Challenges to the primary status of tribunals also arose in the ICTR. In the *Ntakirutimana* case,[89] a USA court refused to surrender the accused to the ICTR. The USA court justified its decision on grounds of inadequate evidence to warrant extradition. The court also questioned the constitutionality of handing over suspects by USA to the ICTR.[90] The decision was overturned on appeal, leading to the transfer of the accused to the ICTR. The *Ntakirutimana* case reflected the complications in the enforcement of primacy. The case was also a statement on the weakness of *ad hoc* tribunals in the implementation of the principle of complementarity.[91]

The tribunals were criticised for alleged insensitivity to local realities when they assumed primacy.[92] Mindful of such criticisms, the international community negotiated for complementarity at the Rome Conference.[93] The ICC complementarity model

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[83] A Cassese *International Criminal Law* (2003) 349.
[84] WA Schabas *The UN international tribunal, the former Yugoslavia, Rwanda and Sierra Leone* (2006) 126.
[85] *Prosecutor v Tadić* (2 October 1995) IT-94-1-AR72 para 58.
[86] F Lattanzi 'The complementarity character of the jurisdiction of the court with respect to national jurisdiction' in F Lattanzi (ed) *The International Criminal Court: comments on the Draft Statute* (1998) 892.
[87] *Tadic* (n 85 above) para 32.
[88] *Tadic* (n 85 above) para 32.
[89] *Ntakirutimana v Reno* (1997) United States District Court for the Southern District of Texas 6 - 20.
[90] *Ntakirutimana* (n 89 above).
[91] *Ntakirutimana* (n 89 above).
[92] L Raud 'Positioning hybrid tribunals in international criminal justice' (2009) 41 *New York University Journal of International Law and Politics* 1019.
[93] Raud (n 92 above); A Novak *The International Criminal Court: an introduction* (2015) 53.

contradicts the approaches of the ICTY and the ICTR. The Rome Statute assumes the ability and willingness of states to act and allows the intervention of the ICC in exceptional cases.[94]

Primacy differs from complementarity on the timing of interventions. Complementarity makes the ICC a court of last resort, whereas primacy made *ad hoc* tribunals courts of first instance. The ICC complementarity model provides stringent controls on the Prosecutor's exercise of discretion.[95]

The ICC only asserts jurisdiction when convinced that national courts have failed to exercise their primary jurisdiction.[96] *Ad hoc* tribunals, on the other hand, assume jurisdiction merely on the competence of the tribunals to hear cases.[97] The primacy of *ad hoc* tribunals has one striking similarity with complementarity of the ICC. At some stage, both concepts presume the inability and unwillingness of national courts to prosecute perpetrators of international crimes. Within this context, problems experienced in the application of primacy are detected during the application of complementarity.

It is challenging to ascertain the threshold for 'sham' proceedings in national courts.[98] The *ad hoc* tribunals selected cases based on the existence of concurrent jurisdiction with states. Unlike the ICC complementarity model, the tribunals did not have an admissibility criterion. The tribunals solely relied on prosecutorial discretion in cases which warranted prosecution before the tribunals.[99] The practice of the ICTY was silent on the criterion for the selection in *Tadić*,[100] *Mrkšić*[101] and *Re: The Republic of*

[94] TJ Holmes 'The principle of complementarity' in RS Lee (ed) *The International Criminal Court: the making of the Rome Statute, issues, negotiations, results* (1999) 41; SA Williams 'Issues of admissibility' in Triffterer (n 8 above) 383; Newton (n 20 above) 20; Holmes (n 33 above) 667; MM El Zeidy *The principle of complementarity in international criminal law: origin, development and practice (*2008).
[95] Novak (n 93 above).
[96] Olàsolo (n 10 above) 146 - 147.
[97] Lattanzi (n 86 above).
[98] El Zeidy (n 24 above) 407.
[99] El Zeidy (n 24 above) 408 - 409.
[100] *Tadic* (n 85 above) para 52.
[101] *Prosecutor v Mrkšić et al* (10 December 1998) IT-95-13-R61.

Macedonia[102] cases. Likewise, the ICTR applied automatic jurisdiction in *Musema*,[103] *Bagosora*[104] and *Radio Television Libre des Mille Collines SARL* cases.[105]

Schabas contends that the early practice of the ICTY was influenced by the desperation of the ICTY prosecutor to bring and prosecute cases before the tribunal. He mentions the unlikelihood of the ICTY prosecutor meddling with German attempts if Tadić had been arrested a decade later, when the tribunal had a massive caseload and intense pressure from the UNSC to conclude its operations.[106] Arguably, the Prosecutor has been 'too willing' to prosecute cases in the ICC. By implication, the current ICC prosecutorial policy may be partly shaped by the desire to have 'some' cases prosecuted by the ICC.

Despite the desire by the *ad hoc* tribunals to take as many cases as they could, the tribunals realised that national jurisdictions were key to the completion strategies of the tribunals and the eventual fulfilment of their mandates. Prosecutorial discretionary powers were often activated to ensure the proper functioning of the partnership between the tribunals and national courts.[107] The tribunals occasionally deferred cases to national courts as part of the division of labour and sharing of burden.[108]

In the *Djajić* and *Jorgić* cases, the ICTY acknowledged the competence of German authorities to preside over crimes subject to the jurisdiction of the ICTY.[109] These and other related cases led to a shift in the application of primacy. The two cases redefined the relationship between the two jurisdictions and transformed it from purely primacy to 'semi-complementary'.[110] Absolute primacy was further curtailed in June 2004 with the amendment of rule 11*bis*. The amended rule 11*bis* enabled national courts to play an increased role in the prosecution of crimes. The rule was a replica of the IMT complementarity system.[111] Although the amendment of rule 11*bis* occurred after

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[102] *Prosecutor v Re: The Republic of Macedonia* (4 October 2002) IT-02-55-MISC.6.
[103] *Prosecutor v Musema* (12 March 1996) ICTR-96-5-D.
[104] *Prosecutor v Bagosora* (17 May 1996) CTR-96-7-D.
[105] *Prosecutor v Radio Television Libre des Mille Collines SARL* (12 March 1996) ICRT-96-6-D.
[106] WA Schabas *An introduction to the International Criminal Court* (2004) 125 - 126.
[107] El Zeidy (n 24 above) 405.
[108] El Zeidy (n 24 above) 405.
[109] *Prosecutor v Djajić*, No 20/96, Supreme Court of Bavaria, 3rd Strafsenat (23 May 1997) (summarized in CJM Safferling (1998) 92 *American Journal of International Law* 528; *Prosecutor v Jorgić* The District Court of Düsseldorf (26 September 1997).
[110] El Zeidy (n 24 above) 405.
[111] Triffterer (n 58 above).

1998, the amendment is relevant to the evolution of the ICC complementarity system. As such, the practices of the *ad hoc* tribunals provide some lessons.

Through shared responsibility, the tribunals only dealt with persons most responsible for atrocities and deferred less serious cases to national courts.[112] However, states reserved their right to decline cases referred to them by the tribunals. The applicable standard was for a state to show willingness and preparedness to take over a case. The envisaged co-operation between national and international jurisdictions created a system of complementarity based on the distribution of functions.[113]

Complementarity was impliedly applied in the ICTY and ICTR without requirements and complicated tests reminiscent of the ICC system. Rule 11*bis* (A) (iii) and rule 11*bis* (F) of the *ad hoc* tribunals empowered the tribunals to evaluate the quality of prosecution by national jurisdictions. National courts were expected to undertake prosecutions diligently. When national courts failed in that regard, the tribunal was authorised to take over cases.[114] As such, the tribunals acted as courts of last resort similar to in the ICC complementarity system.

3.2.8 The construction of the ICC complementarity model

The 1994 ILC Draft Statute

Complementarity was one area of contestation in the making of the Rome Statute. The construction of the concept prior to the Rome Conference was made when the UNGA decided to debate the ILC Draft Statute in 1994. The ILC was initially inspired by the ICTY and ICTR systems of a court with 'primacy'.[115] Subsequent meetings of the Ad Hoc Committee and Preparatory Commission (PrepComm) introduced the complementarity concept.[116]

The Preamble of the revised ILC Draft Statute alluded to the complementary relationship between national criminal justice systems and the court.[117] It was apparent from the draft that complementarity was meant to operate in an impartial, reliable and

[112] El Zeidy (n 24 above) 410.
[113] Triffterer (n 58 above).
[114] El Zeidy (n 24 above) 413.
[115] Schabas (n 21 above) 16.
[116] Schabas (n 21 above) 16 - 18.
[117] Draft Statute for an International Criminal Court (Draft Statute) Preamble para 3.

depoliticised court which would exercise caution when evaluating the action of national justice systems.[118] The Preamble outlined the intervention of the international criminal court in the unavailability or ineffectiveness of national courts. The emphasis in the Preamble showed the importance of complementarity to the proposed international criminal court. The commentary of the ILC stated that the articles and provisions of the draft would be interpreted considering the Preamble.[119]

The 1994 ILC Draft Statute encompassed the forum for adjudication as well as aspects of criminal procedure and investigation.[120] As the reality dawned that the envisaged court will assist national courts, debates on jurisdictional and admissibility aspects became complex.[121] The preconditions to the exercise of jurisdiction were hotly debated.[122] It was difficult to find a universal ground on the elements of the jurisdiction of the court.[123] The 1994 ILC's proposal was restrictive in that the court was to operate on a consent basis and under the direction of the UNSC.[124] The proposal was deemed unprogressive, problematic and a threat to the establishment of the proposed court.[125]

Despite the criticisms, most features of the Rome Statute were contained in the 1994 ILC Draft Statute. The ILC draft esteemed state sovereignty, provided for state and UNSC referrals, and considered interests of justice to cater for peace and security demands.[126] Accordingly, the ILC draft embodied the concept of complementarity that was later developed further in the Rome Statute. However, the Rome Statute is a slight departure from the ILC draft in that it provides for *proprio motu* (bringing cases to the ICC at Prosecutor's own initiative) action by the Prosecutor.[127]

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[118] UN 'Report of the International Law Commission on the work of its Forty-Sixth Session' 2 May - 22 July 1994 UN Doc.A/49/10 art 35; Brown (n 41 above) 389.
[119] Triffterer (n 58 above) 3.
[120] n 118 above.
[121] P Kirsch & JT Holmes 'The Rome Conference on an International Criminal Court: the negotiating process' (1999) 93 *American Journal of International Law* 1 - 2.
[122] n 2 above, art 12.
[123] D Scheffer 'The United States and the International Criminal Court' (1999) 93 *American Journal of International Law* 12-21.
[124] LS Wexler 'First Committee report on jurisdiction, definition of crimes and complementarity' (1997) 13 *Nouvelles Etudes Pénales* 173.
[125] Wexler (n 124 above).
[126] El Zeidy (n 1 above) 891.
[127] n 2 above, art 15.

Complementarity in the eyes of the Preparatory Committee

The 1996 PrepComm draft addressed some of the shortcomings of the 1994 ILC draft.[128] The Committee of the Whole in Rome considered the findings of the PrepComm and subsequently broadened the exercise of jurisdiction.[129] However, the Rome Statute maintains the element of consent if, for example, non-state parties accept the jurisdiction of the Court.[130]

The Ad Hoc Committee meeting in 1995 and the first session of the PrepComm in 1996 made proposals to give the Prosecutor powers to trigger proceedings on his or her own initiative.[131] The 1994 ILC draft excluded the idea of *proprio motu* investigations. The PrepComm felt investigations should only commence under the authorisation of states or the UNSC.[132] Because of conflicting views, the proposal failed to gain adequate support.[133]

The redefined role of the Prosecutor was a sticking point and created a political and legal dilemma that needed resolution before the adoption of the final statute.[134] So sensitive was the issue that even vocal supporters of an independent Prosecutor needed time to appropriately define the role of the Prosecutor.[135] The PrepComm failed to resolve the issue of prosecutorial powers after a long debate in 1997.[136] Just like the debates on the role of the UNSC, a deadlock ensued on the role of the Prosecutor. Resultantly, the Rome negotiations were on the verge of collapse until a compromise was reached.[137]

Perspectives of the Rome Conference on complementarity

At the Rome Conference, states were ready to embrace a proactive Prosecutor as long as the exercise of such powers was free from political bias or bad faith.[138] On 6 July

[128] Wexler (n 124 above).
[129] Wexler (n 124 above) 173.
[130] n 2 above, art 12(3); See also Williams & Schabas (n 8 above) 547 - 550.
[131] Williams & Schabas (n 8 above) 565; 'Report of the Preparatory Committee' (1996) art 25.
[132] ILC Draft Statute (1994) art 90.
[133] Williams & WA Schabas (n 8 above) 565.
[134] M Bergsmo & J Pejić 'Article 15: Prosecutor' in Triffterer (n 8 above) 582.
[135] SAF de Gurmendi 'The role of the Prosecutor' in RS Lee (ed) *The International Criminal Court: the making of the Rome Statute, issues, negotiations, results* (1999) 177.
[136] E Wilmhurst 'Jurisdiction of the court' in Lee (n 135 above) 131.
[137] Williams & Schabas (n 8 above) 566.
[138] De Gurmendi (n 135 above) 181.

1998, the Committee of the Whole endorsed a Prosecutor who could initiate an investigation within a framework of imposed checks and balances.[139] The safeguards against abuse of prosecutorial function appeared in the final statute, as evidenced by articles 13 and 15.[140] The role given to the PTC to authorise investigations by the OTP is one of the checks and balances on prosecutorial discretion.[141] The Rome Statute also limits the powers of the Prosecutor to 'initiating' rather than 'starting' investigations.[142] In other words, the Prosecutor demonstrates a desire to investigate a particular situation, whereupon the PTC can authorise the Prosecutor to start the investigation.[143]

Strict admissibility tests were adopted to counter unwarranted ICC intrusion into national criminal justice systems.[144] Cases were to be inadmissible before the Court if a state with jurisdiction demonstrated that it investigated the case and had strong reasons not to proceed. Also, the ICC would reject cases if a state was in the process of investigating violations. In such situations, the Court needs to wait to avoid duplication of investigations. A matter would also be inadmissible if it is not of sufficient gravity for the Court to intervene.[145]

Regarding admissibility, the approach of the ICC, where a state adopts alternative forms of accountability, was extensively but not exhaustively discussed at the Rome Conference.[146] South Africa and a few other states wanted a permanent court not limited to criminal prosecutions in its evaluation of state action.[147] Instead, the states wanted a court that considers alternative forms of accountability, such as truth and reconciliation commissions.[148] The proposal for alternative forms of justice became unpopular when some delegations quoted unfavourable outcomes of amnesties, particularly from South America.[149]

[139] Williams & Schabas (n 8 above) 568.
[140] Williams & Schabas (n 8 above) 568.
[141] Bergsmo & Pejić (n 134 above).
[142] Bergsmo & Pejić (n 134 above) 585.
[143] Bergsmo & Pejić (n 134 above) 585.
[144] Schabas (n 21 above) 192.
[145] Schabas (n 21 above) 192.
[146] Williams & Schabas (n 8 above) 617.
[147] Williams & Schabas (n 8 above) 617.
[148] Williams & Schabas (n 8 above) 617.
[149] Williams & Schabas (n 8 above) 617.

Although other forms of accountability were not expressly included in the Rome Statute, the Preamble to the Rome Statute leaves room for states to use these forms. The ICC operates within the UN system.[150] The case of Sierra Leone is one example of how an international criminal tribunal can fully encompass the ideals of a UN system. As discussed in the previous chapter, two contemporaneous institutions were established in Sierra Leone. The two institutions dealt with post-conflict justice in Sierra Leone and served as models for simultaneous operation of an international court and a truth commission.[151] During the negotiation of the SCSL's legal framework, Kofi Annan mentioned a complementary relationship based on mutual support and respect between the SCSL and the TRC.[152] Chapter 5 of this study discusses alternative forms of justice in greater detail.

The notion of complementarity found in the Rome Statute went through several amendments, starting from the ILC Draft Statute. In all stages, the practical intricacies associated with the notion were apparent.[153] During the drafting process, some prominent international scholars identified loopholes of the complementarity mechanism. At the time, the prosecutor of the ICTY and ICTR, Louise Arthur, saw an imbalance in the application of the notion of complementarity and argued that weaker states were likely to be targeted for prosecution by the ICC.[154]

At the Rome Conference, the delegates compromised on technical aspects of complementarity to enable the adoption of the Rome Statute.[155] The most contested amendments were on key terms that regulate the application of complementarity. Issues with the terms were raised even before the Rome Conference and are discussed next. Subsequent chapters illustrate the concept of complementarity in the Rome Statute and the practice of the ICC.

[150] n 2 above, Preamble para 7.
[151] WA Schabas 'Truth commissions and courts working in parallel: the Sierra Leone experience' (2004) 98 *American Society of International Law* 189.
[152] Schabas (n 151 above).
[153] El Zeidy (n 1 above) 891.
[154] Schabas (n 21 above) 196.
[155] El Zeidy (n 1 above) 894.

'Unavailability or ineffectiveness' of national proceedings

The 1994 ILC draft proposed the intervention of an international criminal court when national judicial systems were unavailable or ineffective.[156] The 1995 Ad Hoc Committee argued that complementarity was not designed to replace national courts.[157] The Ad Hoc Committee conceded that complementarity was a complex issue that needed further discussion.[158] The 1996 Session of the PrepComm strengthened the argument on the primacy of states to conduct proceedings for crimes under their jurisdiction.[159] The test of unavailability and ineffectiveness was rejected during the 1996 session because the test was considered vague and ambiguous.[160] The rejection prompted the drafters to craft new criteria to clarify the function of the complementarity system. The revised criteria coined the terms 'unable' and 'unwilling'.[161]

A draft article on complementarity, introduced by the Coordinator of Informal Consultations, John Holmes, at the commencement of the session of the PrepComm in August 1997, received considerable support.[162] Stimulated by the developments of the 1996 session, the wording was improved through adoption of terms 'unwilling' and 'unable genuinely' in the draft.[163] The criteria to determine both 'unwillingness' and 'inability' was addressed in article 35. The 1997 session deemed it unnecessary for the draft statute to include complementarity.[164]

'Inability' and 'unwillingness' to investigate and prosecute

The definitions and technical aspects of the terms 'unable' and 'unwilling' remained complicated and unclear to some of the delegates until the Rome Conference.[165] All attempts were made to avoid subjectivity in the interpretation of the terms.[166] With

[156] Triffterer (n 58 above).
[157] MC Bassiouni International Criminal Court: compilation of the United Nations documents and draft ICC Statute before the Diplomatic Conference (1998) 722.
[158] Bassiouni (n 157 above).
[159] Triffterer (n 58 above) 3.
[160] UN 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Session' UN Doc. A/51/22 (1996) 3.
[161] El Zeidy (n 1 above) 893 - 894.
[162] Holmes (n 94 above) 45 - 46.
[163] El Zeidy (n 1 above) 894.
[164] Triffterer (n 58 above).
[165] Williams & Schabas (n 8 above) 390.
[166] Holmes (n 94 above) 49.

regard to unwillingness, some degree of subjectivity was made to give the proposed court flexibility in the interpretation of the terms.[167]

The term 'genuinely' was read-in to simplify the understanding of 'unwillingness'.[168] The 1994 ILC draft had used 'effectively' or 'diligently' in *lieu* of 'genuinely'.[169] Delegates were divided on the appropriate term. Despite strong arguments that the term 'genuinely' could lead to absurdity and uncertainty, it was nevertheless inserted in the Rome Statute.[170] Genuineness is not limited to the motives of a state but extends to situations in which state action, or lack thereof, reveals inability or unwillingness to proceed with investigation and prosecution.[171]

3.3 Complementarity in the Rome Statute

3.3.1 The concept of complementarity

The ICC-states relationship

The ICC was created at an era where international criminal tribunals enjoyed primacy. The Court had to manoeuvre its way to adopt new standards lopsided in favour of domestic courts.[172] The negotiators at the Rome Conference endorsed complementarity as the most preferred form for an international adjudicatory institution. Holmes highlights the vocality of states at Rome on the system that encouraged prosecutions through national courts, with the ICC playing a complementary role.[173]

The Rome Conference fell short of giving the ICC review or appellant powers.[174] In the result, the Rome Conference created a Court that can check and can be checked using complementarity as a yardstick.[175] Complementarity is based on the acknowledgment that the ICC and state parties to the Rome Statute are empowered to exercise

[167] Holmes (n 94 above) 49.
[168] Holmes (n 94 above) 49.
[169] Holmes (n 94 above) 50.
[170] El Zeidy (n 1 above) 900.
[171] LN Sadat & SR Carden 'The new International Criminal Court: an uneasy revolution' (2008) 88 *Georgia Journal of International and Comparative Law* 381 & 418.
[172] Brown (n 41 above) 387.
[173] Holmes (n 94 above) 73 - 74.
[174] MJ Struett *The politics of construing the International Criminal Court: NGOs, discourse, agency* (2008) 124.
[175] Struett (n 174 above).

jurisdiction over international crimes.[176] If the Rome Statute had given the ICC automatic jurisdiction, concurrent jurisdiction could have been granted to both the ICC and state parties.[177]

The Rome Statute motivates both the states and the Court to exercise jurisdiction.[178] States are generally comfortable to maintain and preserve their jurisdiction over crimes. At the Rome Conference, most states pushed for a court subordinate and subsidiary to national criminal courts.[179]

However, the challenge for the states-Court relationship arises from the fact that the term 'complementarity' is not defined in the Rome Statute. Generally, the term is understood to refer to the complementary role of the ICC.[180] The ICC stays within the confines of complementarity when it supports rather than supplant the jurisdiction of states.[181]

The American English Dictionary views complementarity as a balancing tool to ensure that jurisdiction is exercised within the confines of law, administration and prosecution demarcations. Co-operation must exist at two levels to avoid confusion and provide a working framework for the mutual benefit of states and the Court.[182] In the first level, the ICC is expected to assist and encourage national jurisdictions to prosecute perpetrators of international crimes.[183] Support of national authorities may include political and diplomatic backing,[184] and empowering states to carry out national

[176] WW Burke-White 'Proactive complementarity: the International Criminal Court and national courts in the Rome Statute of international justice' (2008) 49 *Harvard International Law Journal* 79.
[177] Newton (n 12 above) 124 - 215.
[178] JK Kleffner 'Auto-referrals and the complementarity nature of the ICC' in Stahn & Sluiter (n 36 above) 41.
[179] HP Kaul 'The International Criminal Court: its relationship to domestic jurisdictions' in Stahn & Sluiter (n 36 above) 34.
[180] Holmes (n 94 above) 41.
[181] Newton (n 12 above) 121.
[182] OC Imoedemhe *The Complementarity Regime of the International Criminal Court: National Implementation in Africa* (2017) 21.
[183] WW Burke-White 'Complementarity in practice: the International Criminal Court as part of a system of multi-level global governance in the Democratic Republic of Congo' (2005) 18 *Leiden Journal of International Law* 557 - 569.
[184] L Moreno-Ocampo `Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593' (2005) 3 December 2008.

proceedings.[185] In the second level, national authorities should co-operate with the Court once the jurisdiction of the ICC has been activated.[186]

The overlap between national jurisdictions and the ICC is unavoidable. The principle of complementarity exists to solve the problem posed by concurrent jurisdictions.[187] The principle confirms national jurisdictions as priority forums.[188] The doctrine of state sovereignty creates rights for states to exercise jurisdiction over crimes within their jurisdiction.[189] More weight has been attached to state sovereignty than international intervention.[190] The Rome Statute recognises the responsibility of states to prosecute.[191] Under the complementarity regime, national authorities are the first bulwark in the fight against impunity.[192]

A perfectly structured relationship is necessary to prevent unwarranted encroachment into the existing sovereign rights of states.[193] To balance the scale, the shield of unconstrained sovereignty must also be pierced[194] through procedures to administer the practical functioning of the relationship. USA and China ultimately objected to the Rome Statute, as they preferred a consent-based approach before the ICC could exercise jurisdiction in a given case.[195] The ICC is auxiliary to states in this regard.[196] To determine which forum exercises authority at a given time, a clear 'separation of duties' is important. States are the primary custodians of crimes within their jurisdictions.[197] Hence, states must have the first option to prosecute cases.[198]

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[185] Newton (n 12 above) 121.
[186] n 2 above, arts 83 - 99.
[187] Olàsolo (n 10 above) 26.
[188] Olàsolo (n 10 above) 27.
[189] CI Brownlie *Principles of public international law* (1998) 303.
[190] El Zeidy (n 24 above) 412.
[191] n 2 above, Preamble para 6.
[192] Brown (n 41 above) 383.
[193] Struett (n 174 above) 95; Holmes (n 94 above) 45 - 46.
[194] B Broomhall 'The International Criminal Court: a checklist for national implementation' in MC Bassiouni (ed) *ICC ratification and national implementing legislation* (1999) 115.
[195] Struett (n 175 above) 95; MP Scharf 'Getting serious about an ICC' (1994) 6 *Pace International Law Review* 114.
[196] GM Pikis *The Rome Statute for the International Criminal Court: an analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supporting Instrument*s (2010) 54.
[197] Burke-White (n 177 above) 79.
[198] JK Kleffner *Complementarity in the Rome Statute and national criminal jurisdictions* (2008) 95 - 97.

Complementarity also dispels the notion of absolute jurisdiction by national courts.[199] Philippe views complementarity as a working tool which avails supporting institutions to fill a gap, should the institution with primacy fail.[200]

The legacy of the Rome Conference

The Rome Conference saw intense negotiations on the characteristics of the envisaged court.[201] The complementarity system of the ICC is a product of compromise between proponents of state sovereignty and hopes for the need to end impunity.[202] The Rome Statute balances competing state sovereignty and external interference through enabling the ICC to prosecute international crimes under certain circumstances.[203] During the drafting of the Rome Statute, states desired to retain primacy in the prosecution of international crimes.[204]

The project for a permanent international court gained support when some clarity was provided on the application of complementarity. Delegates were cautious on the relationship between the court and national jurisdictions. The delegates used the precedents from Nuremberg and Tokyo, and the ICTY and ICTR as references.[205] The delegates were mindful of jurisdictional conflicts which often arise between national and international institutions.[206]

The nature of complementarity

The jurisdiction of the ICC lies dormant until activated by inactivity, unwillingness or inability of a state or group of states with jurisdiction over a case.[207] The Court is the guardian of the Rome Statute and is empowered to evaluate the performance of

[199] OTP 'Paper on some policy issues before the Office of the Prosecutor' http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf (accessed 9 November 2016).
[200] X Philippe 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh' (2006) 88 *International Review of the Red Cross* 380.
[201] Williams & Schabas (n 8 above) 605 - 615; Holmes (n 33 above) 667.
[202] JK Kleffner 'Complementarity as a catalyst for compliance' in JK Kleffner & G Kor (eds) *Complementary views on complementarity: proceedings of the International Roundtable on the complementary nature of the International Criminal Court* Amsterdam (2006) 23.
[203] Kleffner (n 202 above).
[204] Williams & Schabas (n 8 above) 605 - 615; Holmes (n 33 above) 667.
[205] Kleffner (n 198 above) 60.
[206] KJ Heller 'A sentence-based theory of complementarity' (2012) 53 *Harvard International Law Journal* 201.
[207] Olàsolo (n 10 above) 26; n 2 above, art 17.

states.[208] Consequently, the Court has a general obligation to promote the effectiveness of existing international and national mechanisms which combat impunity.[209] The Court should reinforce, and not substitute, these mechanisms.[210] As observed by a group of experts in 2003, '… states will generally have the best access to evidence and witnesses, and the resources to carry out proceedings. Moreover, there are limits on the number of prosecutions the ICC, a single institution, can feasibly conduct'.[211] This gives domestic prosecutions an edge over the ICC in ensuring speedy trials.

Article 17 of the Rome Statute sets guidelines on the enforcement of complementarity.[212] The procedural aspects of the ICC are vital for the functioning of complementarity, as they protect state sovereignty and strengthen the intervention of the ICC.[213] Lee submits that the principle of complementarity prevented a deadlock at the Rome Conference. He explains how a solution was found with the acceptance of a court designed not to hinder but facilitate national efforts.[214]

The approach of the ICC to complementarity is like the models adopted by international criminal tribunals. However, unlike the statutes of international criminal tribunals, which focus mostly on the nature of charges, the admissibility criteria in the Rome Statute is concerned with the nature of investigations and prosecutions.[215] Even when a state has identified a crime under the Rome Statute for prosecution, the case can be deferred to the Court if the state is unwilling or unable to prosecute.[216] Inactivity, unwillingness and inability are the material prerequisites for the activation of the Court's dormant jurisdiction.[217] However, the Court would only assume jurisdiction when any of the parties (states, the ICC and the UNSC) have referred a situation to it, or at least when the Prosecutor has taken his/her own initiative to conduct

[208] Olàsolo (n 10 above) 26.
[209] Olàsolo (n 10 above) 27.
[210] Olàsolo (n 10 above) 27.
[211] Informal expert paper 'The principle of complementarity' (2003) http://www.icc-cpi.int/nr/rdonlyres/20bb4494-70f9-4698-8e30-907f631453ed/281984/complementarity.pdf (accessed 1 October 2020).
[212] WA Schabas *The International Criminal Court: a commentary on the Rome Statute* (2010) 335 - 352.
[213] El Zeidy (n 1 above) 905 - 906.
[214] RS Lee 'Introduction: the Rome Conference and its contributions to international law' in Lee (n 135 above) 27.
[215] Newton (n 12 above) 154.
[216] Newton (n 12 above) 154; n 2 above, art 17.
[217] Olàsolo (n 10 above) 40 - 41.

investigations. The triggering powers of these parties are discussed in the sections to follow.

3.3.2 Referrals in the Rome Statute

The jurisdiction of the ICC remains dormant until it is activated. Activation occurs in three ways, namely, self or state referral, UNSC referral, or prosecutorial initiative.[218] The Court has dealt with all the three triggers. Comparisons of the three will be frequently made to advance the purpose of this chapter. The activation mechanisms originated in the drafting history of the Rome Statute and were consequently included in the Rome Statute.[219] As will be seen below, the Rome Statute leans heavily on a Prosecutor who is guarantor of the proper interpretation and functioning of complementarity.[220] This thesis advances a proposal in which states take the lead.

State and UNSC referrals were proposed at the initial drafts of the ILC on the creation of a permanent international criminal court.[221] The ILC expressed the view that since the international legal system was under development, the investigation and prosecution of international crimes would progress smoothly when supported by states and the UNSC.[222] The broad discretion of the Prosecutor was detestable at that stage of Court creation.[223] Motivations for the view of the ILC will be revisited in this study to reiterate the importance of state discretion even in *proprio motu* cases.

In contemporary times, the three triggers influence the application of complementarity. One common feature, irrespective of the activating power, is the conduct of preliminary examinations by the Prosecutor to obtain grounds to proceed with an investigation. The position is encapsulated in article 53 of the Rome Statute. While the focus of this section is on *proprio motu* activation, it is expedient to explore the other two activations to demonstrate the unique challenges associated with the activation of focus. All the

[218] n 2 above, arts 13 -15.
[219] WA Schabas *The International Criminal Court: a commentary on the Rome Statute* (2010) 316.
[220] Olàsolo (n 10 above) 85.
[221] ILC 'Commentary to Article 25 of the Draft Statute of the International Criminal Court in the report of the International Law Commission on the work of its forty-sixth session' (1994) para 4.
[222] n 220 above, para 5.
[223] ILC 'Report of the Commission to the General Assembly on the work of its forty-sixth session' (1997) *Yearbook of the International Law* Commission 46.

three activations are based on the rationale of ICC action, admissibility *vis-à-vis* evidentiary requirements, and actors of activation and endorsement.

3.3.3 State referrals

Article 14 of the Rome Statute specifically deals with state referrals. The article states as follows:

> Article 14. Referral of a situation by a State Party
>
> 1. 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.
>
> 2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the [s]tate referring the situation.

From the foregoing, it is explicit that a state refers a 'situation' and not a 'case'. Article 14 also demonstrates that a state referral is an invitation for the Prosecutor to initiate a preliminary examination and ultimately an investigation into a situation. After an investigation has been concluded, specific cases may be identified for trials.[224] Olàsolo argues that the notion of situation is better established than that of case in all three triggers, and that it minimises abuse as the door is closed for targeted and politically motivated referrals.[225] The PTC I also weighed in on situations when it highlighted the constituents of the situation, as follows:

> [S]ituations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation, as well as the investigation as such.[226]

State referrals are received by the ICC from state parties or non-state parties over whom the Court exercises jurisdiction.[227] States are the main actors in the scenario

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[224] See for example F Guariglia 'The Selection of Cases by the Office of the Prosecutor of the International Criminal Court' in C Stahn & G Sluiter (eds) *The emerging practice of the International Criminal Court* (2009) 92.
[225] Olàsolo (n 10 above) 46.
[226] *Prosecutor v Lubanga* (17 January 2006) 01/04-101-tEN-Corr ICC para 65.
[227] n 2 above, arts 14 & 12(3).

and voluntarily surrender their jurisdiction to the ICC when they are unwilling or unable to investigate and prosecute. Since states possess the power to refer, they should similarly enjoy the power to defer or reclaim their jurisdiction over a situation. Such a privilege is already enjoyed by the UNSC under the Rome Statute. If states are denied the same privilege, their supremacy under the Rome Statute would be replaced by that of the UNSC. In this regard, Stigen[228] and Kleffner[229] argue that a state self-referring a situation to the ICC should be allowed at a later stage to challenge the admissibility of a situation. Currently, states can request a deferral under article 18 for state referrals and *proprio motu* proceedings. The granting of the request depends on the determination of the Prosecutor or the PTC. The position of states would be strengthened further if this limitation were removed through an interpretation that gives the states' requests the same weight as the request by the UNSC under article 16. Requests made by the UNSC halts proceedings at the ICC.

To avoid unwarranted intrusion on state sovereignty, the Rome Statute placed restrictions on the Court.[230] State referrals are appreciations by both the states and the ICC that states must be at the forefront of prosecuting crimes.[231] Accordingly, the decision of states on whether to exercise jurisdiction over the ICC crimes is preserved.[232]

There are adequate safeguards to prevent improper intervention by the ICC.[233] Although the Prosecutor is not obliged to seek authorisation from the PTC before investigating based on a state referral,[234] the Prosecutor must convince the Court that the situation or case is admissible.[235] The same applies to UNSC referrals.

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[228] J Stigen *The relationship between the International Criminal Court and national jurisdictions: the Principle of complementarity* (2008) 248.
[229] Kleffner (n 198 above) 219.
[230] BS Brown 'Primacy or complementarity: reconciling the jurisdiction of national courts and international criminal tribunals' (1998) 23 *Yale Journal of International Law* 387.
[231] OTP 'Paper on some policy issues before the Office of the Prosecutor' September 2003 http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25 60aa962ed8b6/143594/030905_policy_paper.pdf. (accessed 16 July 2017).
[232] RS Lee *States responses to issues arising from the ICC Statute: constitutional, sovereignty, judicial cooperation and criminal law* (2005) 12 - 13.
[233] Lee (n 231 above) 13.
[234] DNN Nsereko 'Triggering the jurisdiction of the International Criminal Court' (2004) 4 *African Human Rights Law Journal* 267.
[235] n 2 above, art 53(2).

The Prosecutor is unlikely to face an admissibility challenge from a state which has referred a case to the Court. Also, the Prosecutor has an added advantage of better access to evidence in the state.[236] However, an admissibility challenge from an accused person, as was the case in the *Katanga* case, can still arise, albeit often weakened by lack of state support.[237] This argument is buttressed by the failure of the admissibility challenge in the *Katanga* case due to inability to 'sufficiently substantiate' the challenge with evidence.[238] When the Court has the backing of the state, it becomes difficult for an accused to win an admissibility challenge. Through a referral, a state demonstrates inaction, unwillingness or inability to exercise jurisdiction.

To date, the DRC, Uganda and the CAR have referred cases to the ICC. Arguably, the states have abused the state referral process to advance political gains rather than to support the work of the Court and the pursuit of international criminal justice. A striking similarity in the referrals is that the Prosecutor targeted only members of irregular armed forces and members of opposition political parties. Beyond criticisms of bias and subjectivity of the Prosecutor,[239] it can be said that the Prosecutor worked with a category of persons the states had earmarked for investigation and prosecution.

In state referral cases, the Prosecutor steps in when a state has already defined the parameters of investigation. Most states will endeavour to prevent the Prosecutor from stepping out of the stipulated parameters of investigation through limiting access to information which implicates state officials or adopting other non-co-operation approaches. In the Ugandan situation, the Prosecutor was left convinced that gravity was not met for government officials.[240] This came on the backdrop of Luis Moreno-Ocampo having announced the state referral in the presence of Uganda President, Yoweri Museveni in London.[241]

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[236] VO Ayeni & MA Olong 'Opportunities and referrals to the UN Security Council under the Rome Statute of the International Criminal Court' (2017) 25 *African Journal of International and Comparative Law* 245.
[237] *Prosecutor v Katanga* (16 June 2009) 01/04-01/07 ICC.
[238] CM De Vons 'A catalyst for justice? The International Court in Uganda, Kenya and the Democratic Republic of Congo', PhD Thesis, Leiden University, 2016 68.
[239] WA Schabas 'Prosecutorial discretion v judicial activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice* 731 - 761.
[240] WA Schabas 'Complementarity in practice: some uncomplimentary thoughts' (2008) 19 *Criminal Law Forum* 5 - 33.
[241] T Allen *Trial justice: the International Criminal Court and the Lord's Resistance Army* (2006) 96.

3.3.4 United Nations Security Council referrals

The UNSC is authorised under 13(b) of the Rome Statute to refer cases to the ICC. The article states the following:

> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
>
> … a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations….

The UNSC can only refer a 'situation' and not a 'case' to the ICC. Section 13(b) was specifically drafted to prevent the UNSC from playing a judicial role.[242] It was felt during the drafting of the Rome Statute that, in so doing, the independence of the Court would be preserved.[243] Article 53(1) of the Rome Statute further regulates the scope of the UNSC's contribution to the work of the Court. This article enables the Prosecutor to decide whether to initiate an investigation after receiving information from outside sources. Accordingly, the Prosecutor is not obliged to investigate a situation identified by the UNSC.

The first rejection by the Prosecutor is not the end of the road for the UNSC. Article 53(3)(a) allows for the decision of the Prosecutor not to proceed, to be revised. In addition, UNSC like states and non-party states can challenge the admissibility of a particular case in accordance with article 19. While the UNSC is largely dependent on the determination of the OTP and PTC for its requests to be actioned by the Court, article 16 on deferrals by the UNSC seems to take an exception to this rule. In terms of this article, the UNSC could block the Court's efforts to exercise jurisdiction over a case.[244]

The Rome Statute acknowledges that serious international crimes threaten peace and security.[245] Conversely, as a body that is entitled to deal with issues of international peace and security, the UNSC was included.[246] The desire to involve the UNSC in the

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[242] El Zeidy (n 1 above) 959.
[243] L Yee The International Criminal Court and the Security Council: articles 13(b) and 16, in RS Lee (ed) *The International Criminal Court: the making of the Rome Statute* (1999) 147.
[244] El Zeidy (n 1 above) 967.
[245] n 2 above, Preamble para 3.
[246] Charter of the United Nations (UN Charter) art 39.

affairs of the Court was first advanced by the ILC in 1994.[247] The UNSC may invoke Chapter VII of the UN Charter to refer cases to the ICC. The UNSC referrals aim to safeguard political stability in the world when there are actual or perceived threats.[248] There is a paradox for the ICC in this regard. While the Court was not founded on a UNSC Chapter VII resolution, its operations are susceptible to UNSC resolutions. Upon evidence or prediction on the threat of peace and security, guidance is imputed upon the Prosecutor to consider the existence of a reasonable basis to investigate.

The UNSC may also influence the operations of the Court by requesting deferrals of investigations or prosecutions. When it requests deferrals, the UNSC enjoys power to decide on the interests of peace and justice.[249] The UNSC may theoretically refer all states to the ICC. The referral of non-state parties is not expressly mentioned in the Rome Statute but is implied under the UN Charter. Therefore, the Court is not only in a relationship but is equally dependent on the UN in certain circumstances. For example, the Rome Statute gives the UNSC the first bite in determining whether an act of aggression exists.[250] Also, the resolutions of the UNSC on deferrals are persuasive on the Court.[251]

The UNSC has referred situations in Sudan[252] and Libya[253] to the Court. Both states are non-states parties to the Rome Statute. The referrals show that the Court is not immune to political guidance.[254] Also, the referrals were accompanied by specified areas for investigation and the identities of persons alleged to have committed crimes. In the Libyan situation, crimes against humanity were alleged to have been committed in Jamahiriya.[255] Although three categories of parties, namely, state armed forces, armed groups and North Atlantic Treaty Organization (NATO) officials, were identified, crimes by NATO officials were never mentioned to the Prosecutor.[256] The omission is

[247] International Law Commission Draft Statute for an International Criminal Court art 23(3).
[248] n 2 above, art 13(b).
[249] KA Rodman 'Is peace in the interests of justice? The case for broad prosecutorial discretion at the International Criminal Court' (2009) 22 *Leiden Journal of International Law* 120.
[250] n 2 above art 15 bis (6).
[251] n 2 above, art 16.
[252] UNSC Resolution 1564 (2004).
[253] UNSC Resolution 1970 (2011).
[254] D Chatur 'A synergistic failure between the UN Security Council and the International Criminal Court' http://www.works.bepress.com/dchatur/7, 1 - 9 (accessed 18 July 2018).
[255] UNSC Resolution (n 252 above) para 6.
[256] United Nations Human Rights Council 'Report of the International Commission of Inquiry on Libya' 2 March 2012 http://www.refworld.org paras 119 - 122.

indicative that in the exercise of discretion by the UNSC, a selection and prioritisation of cases may be made.

The UNSC is a representative of global states. The narrative and referral of situations imply an acceptance in the Rome Statute that a state or group of states may define the extent and circumstances in which the Court intervenes. Under the UN Charter, the UNSC uses the option of reaching out to regional and national entities to find solutions to political and humanitarian crises.[257] Hence, the UNSC considered the option of regional efforts to end impunity in Sudan.[258]

The role of the UNSC in the operations of the Court strengthens the assertion that political considerations and priorities influence the Prosecutor.[259] The linkages of justice, peace and democracy are widely discussed by scholars and the UN.[260] The intertwined relationship of the concepts makes justice and politics mutually reinforcing.[261]

In Sudan, the UNSC encouraged the Court to adopt an approach which favours complementary forms of justice. UNSC Resolution 1593 advocated for both criminal and other alternative justice mechanisms such as truth and reconciliation commissions. While the invocation of the UNSC powers does not stop the Prosecutor from exercising discretion, undoubtedly the intervention can control the timing and sustainability of prosecutorial activities.[262]

3.3.5 *Proprio motu* initiatives

The jurisdiction of the ICC is also activated by the Prosecutor at his/her own initiative.[263] Article 15, together with article 53, are the two prominent articles regulating a trigger by the Prosecutor. The triggering powers of the Prosecutor commence by requesting the PTC to authorise an investigation in terms of article 15(3). The PTC

[257] n 246 above, art 33.
[258] UNSC Resolution 1593 (2005).
[259] M Bergsmo & J Pejic 'Article 15: Prosecutor' in Triffterer (n 8 above) 598.
[260] See for example OA Maunganidze 'International Criminal Justice as integral to peacebuilding in Africa: beyond the peace v justice conundrum' in HJ van der Merwe & G Kemp *International Criminal Justice in Africa* (2016) 52.
[261] KA Rodman 'Justice as a dialogue between law and politics: embedding the International Criminal Court within conflict management and peacebuilding' (2014) 12 *Journal of International Criminal Justice* 437.
[262] Bergsmo & Pejic (n 259 above) 363.
[263] n 2 above, arts 13(c) & 15.

makes a decision after having examined the request and supporting material, in accordance with article 15(4). If the authorisation is refused, the Prosecutor has other opportunities to resubmit the request, as stated in article 15(5). Scholars debate whether the word 'case' has been misused or used properly under article 15(4).[264] Whichever way it is regarded, such ambiguities were among areas of contention in the *Kenyatta* case. The ICC needs to clarify them to the satisfaction of states and other stakeholders who will appear before the Court.

The jurisdiction of the ICC is also activated by the Prosecutor at own initiative.[265] Article 15(1) of the Rome Statute states that:

> The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

The relationship between articles 15 (Prosecutor) and 53 (Initiation of an investigation) is not always understood. The misunderstanding emanates from the drafting history of the triggering mechanisms in the Rome Statute.[266] While the current article 53 has its roots in the draft statute of the ILC,[267] the current article 15 was a late introduction. The article has its origins in the fourth session of the preparatory committee, which was held in August 1997.[268] Together with article 18 (Preliminary rulings regarding admissibility), article 15 was then agreed upon hours before the end of the Rome Conference.[269] Therefore, the drafting committee did not have time to reconcile articles 15 and 53, as the discussion on the relationship only arose for the first time in the preparatory commission.[270]

The rationale behind article 18 is to give states more opportunities to oppose the activation of the Court's dormant jurisdiction.[271] Therefore, Olàsolo argues that the opposition-to-activation request should focus solely on a state's existing capacity to

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[264] Olàsolo (n 10 above) 67; Bergsmo & Pejic (n 259 above) 370.
[265] n 2 above, arts 13(c) & 15.
[266] Olàsolo (n 10 above) 71.
[267] JT Holmes 'The principle of complementarity' in RS Lee (ed) T*he International Criminal Court: the making of the Rome Statute, issues, negotiations, results* (1999) 73.
[268] MC Bassiouni 'Establishing an International Criminal Court: historical survey' (1995) 149 *Military Law Review* 38.
[269] Olàsolo (n 10 above) 74.
[270] Bassiouni (n 268 above).
[271] Olàsolo (n 10 above) 74.

conduct investigations or carry prosecutions, and not on assumed future capacity.[272] Nsereko differs with this opinion and states the following:

> What if a [s]tate, prior to receiving the Prosecutor's notification, has not investigated the acts contained therein, but, prompted by the notification, now wishes to institute investigation into those acts? Is it precluded from requesting the Prosecutor to defer to its jurisdiction? It is submitted that it is not. The spirit and general tenor of the Statute is to give due deference to State jurisdiction. So, a State that has not yet started investigations, but is otherwise able and willing to do so, must be given a chance to do so under article 18, para.2.[273]

The ability of the Prosecutor to initiate investigations did not come easy. States spent considerable time during the Diplomatic Conference in Rome on the necessity or otherwise safety of granting the Prosecutor independent powers.[274] Some states and the ILC were concerned about the possibility of prosecutorial abuse of power and submission to political pressure which could lead to unjustifiable exercise of power.[275] On the other hand, some states were of the opinion that the initiation of investigations and prosecutions at the prosecutor's own accord was crucial to ensure the autonomy and independence of the prosecutor.[276] The states drew precedence from the competence of the independent ICTY/ICTR prosecutor and raised concerns that state-compliant mechanisms within the human rights treaty system are generally poor.[277]

The voice of states which supported an independent prosecutor was stronger and enabled a compromise for the prosecutor to operate with certain checks in *proprio motu* cases. The German/Argentinian proposal brokered the debate as states finally endorsed a prosecutor with powers subject to judicial oversight by the PTC.[278] The consequential power conferred upon the Prosecutor counters any failures by states and the UNSC to refer situations to the Court.[279]

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[272] Olàsolo (n 10 above) 79.
[273] DDN Nsereko 'Article 18: preliminary rulings regarding admissibility' in Triffterer (n 8 above) 400.
[274] Bergsmo & Pejic (n 259 above) 582.
[275] A Wameyo 'Transitional justice, a two-prong approach: reconciliation and criminal responsibility for Kenya post 2007 elections violence' (2012) *African Yearbook of International Law* 432.
[276] Schabas (n 219 above).
[277] United Nations 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (1995) 26.
[278] MR Brubacher 'Prosecutorial discretion within the International Criminal Court' (2004) 2 *Journal of International Criminal Justice* 73 - 74.
[279] GM Pikis *The Rome Statute of the International Criminal Court: analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments* (2010) 262.

Before embarking on a full investigation, the Prosecutor is not only dependent on the approval of the PTC but also relies on the receipt of information from states, organs of the UN, intergovernmental and non-governmental organisations, victims, relatives of victims, eyewitnesses and other relevant sources.[280] The information helps the Prosecutor to convince the PTC to authorise an investigation.[281] In addition to the information, the Prosecutor is required to inform states with jurisdiction of the intention to seek the authorisation of the PTC and to wait for confirmation by states on whether the states are able or willing to investigate and prosecute the alleged crimes.[282]

Authorisation and notification procedures exalt both the accountability of the Prosecutor and the respect of state sovereignty.[283] The notification procedure precedes the authorisation procedure, thereby relaying the importance of state discretion to the Prosecutor and the PTC. While the PTC has a supervisory role in *proprio motu* initiatives,[284] states with jurisdiction have a managerial role before the authorisation of such initiatives.

In view of the contentious history of an independent prosecutor, it is not surprising that the first exercise of *proprio motu* powers in the Kenyan situation received considerable scrutiny. Some scholars believe the Prosecutor intervened prematurely in Kenya and mistakenly ignored admissibility requirements in article 17 of the Rome Statute, namely, unwillingness and inability.[285] Arguably, the OTP should consider constructive criticisms to strengthen the application of complementarity in future cases.

3.3.6 The Preamble and its interpretative value

The Preamble of the Rome Statute is an interpretative tool used by the Court to dissect the provisions of the Rome Statute. The main object and purpose of the Rome Statute is to end impunity using domestic courts as preferred mechanisms.[286] However, the

[280] n 2 above, art 15(1) & 15(2).
[281] n 2 above, art 53(1).
[282] n 2 above, art 18.
[283] Nsereko (n 273 above) 273.
[284] *Situation in the Republic of Kenya* (31 March 2010) 01/09 ICC para 81.
[285] See for example J Spilman 'Complementarity or competition' (2013) *Richmond Journal of Global and Business Online* 18 - 19.
[286] n 2 above, Preamble paras 5 & 6.

Preamble to the Rome Statute does not define the complementary role the Court has in relation to national criminal jurisdictions.

The Rome Statute should be broadly understood in the context of the notion of complementarity. The Preamble is foundational to the interpretation of the Rome Statute.[287] Admissibility provisions in the Rome Statute are built on the preambular foundation.

The Preamble of the Rome Statute alludes to the duty of states to exercise criminal jurisdiction over perpetrators of international crimes.[288] The international community has attached certain obligations and expectations on states to prosecute these crimes on its behalf.[289] Complementarity gives states a great magnitude of discretion in the prosecution of crimes under the Rome Statute.[290]

The duty of the Court to encourage national jurisdictions to undertake prosecutions can be drawn from the Preamble.[291] The Rome Statute does not expressly impute the duty.[292] However, the overall purpose to end impunity, pursuant to the Vienna Law of Treaties, obliges the Court to assist states.[293] The Preamble of the Rome Statute advocates for international co-operation to ensure that international crimes are punished.[294]

The Preamble provides these four essential features that anchor the complementary system of the ICC: state-centric prosecutions; enhanced scope for national prosecutions; subordination of international criminal jurisdiction to national criminal jurisdictions; and the pledge by states to undertake prosecutions.[295] The features are discussed below.

[287] Benzing (n 31 above) 593.
[288] n 2 above, Preamble para 6.
[289] n 2 above, Preamble para 4.
[290] LE Carter 'The future of the International Criminal Court: complementarity as a strength or a weakness' (2013) 12 *Washington University Global Studies Law Review* 452.
[291] Burke-White (n 176 above).
[292] Burke-White (n 176 above).
[293] Burke-White (n 176 above).
[294] n 2 above, Preamble para 4.
[295] n 2 above, Preamble paras 4, 6, 10 & 11.

State-centric prosecutions

The Rome Statute puts states at the forefront in the prosecution of international crimes. The effectiveness and efficiency of international criminal law enforcement is enhanced when states take initiatives and utilise international assistance to undertake proceedings.[296]

At the Rome Conference, many delegations outlined the advantages of national judicial systems[297] and saw states better positioned to adjudicate crimes under their jurisdiction. Compared to states, the ICC lacks arresting powers and cannot be reasonably expected to have full access to all evidence and witnesses.[298]

Scope of national prosecutions

The Rome Statute gives states an enhanced scope of prosecution. While the Rome Statute is limited to 'core crimes' listed in its article 5, the jurisdiction of states encompasses a wide range of international crimes. The broad discretion enjoyed by states is reflected in the preambular paragraphs of the Rome Statute.[299] Delegates at the Rome Conference preferred the term 'international crimes' over 'most serious or grave crimes' in the explanation of the duty of states to prosecute perpetrators.[300] The terminology permits flexibility to prosecute international crimes beyond the ones which were eventually placed under the Court.[301] As seen in Chapter 6, Africa's proposed regional instrument recognises crimes beyond the core ones, making the AU an important player in the complementarity project of the ICC.

Arguably, states have a comparative advantage in addressing international crimes and other related crimes. The relationship between the ICC and states should be built on the appreciation that states will not always define crimes to encompass the definitions provided in the Rome Statute.[302]

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[296] Benzing (n 31 above) 596.
[297] El Zeidy (n 1 above); Lattanzi (n 86 above) 1 - 3.
[298] OTP 'Draft Paper on some policy issues before the Office of the Prosecutor, for discussion at the public hearing in The Hague' 17 -18 June 2003.
[299] Triffterer (n 58 above) 11.
[300] Triffterer (n 58 above) 11.
[301] Triffterer (n 58 above) 11.
[302] Williams & Schabas (n 8 above) 616; Heller (n 206 above).

Supremacy of national jurisdictions

The foregoing discussions show that under the Rome Statute, national criminal jurisdictions are preferred over international jurisdictions. The Rome Statute represents a modified and reversed system of primacy.[303] Arguably, an authority with primacy is given first preference to decide on the appropriate forum for the adjudication of an offence. Primary jurisdictions prior to the ICC (the ICTY and the ICTR) permitted the use of prosecutorial power to defer cases to national courts.[304] Similarly, states use state referrals to defer cases to the ICC. Likewise, the UNSC, which represents states, may influence deferrals. The Prosecutor may also defer investigations conducted using *proprio motu* powers at the request of a state.[305] In view of state primacy, prosecutorial deferral should be the rule and not the exception.

States' undertaking to prosecute

The Preamble to the Rome Statute alludes to the commitment of states to undertake prosecutions.[306] States are guarantors of the enforcement of international criminal law enforcement by both national and international jurisdictions.[307] The principle of complementarity places confidence in states presumed willing and able to prosecute international crimes.[308] However, the presumption of state prosecutions is rebuttable. The ICC exercises secondary jurisdiction.[309]

States tend to shield cases away from the ICC for as long as possible. The ICC is guided by the unavailability and ineffectiveness of national authorities for the Court to intervene.[310] The efficacy of the ICC would be adequately appraised when states and the Court continue to engage in influencing the practical application of complementarity.[311] Arguably, the OTP through its Jurisdiction, Complementarity and Co-operation Division should invest considerable time engaging states at a political and diplomatic level before considering the initiation of preliminary examinations. An

[303] Bergsmo & Pejić (n 259 above) 585.
[304] M Bergsmo *Rome Statute of the International Criminal Court* (1998) 11.
[305] n 2 above, art 15.
[306] n 2 above, Preamble para 4.
[307] Bergsmo (n 304 above).
[308] Du Plessis *et al* (n 5 above); Lattanzi (n 86 above) 1 - 3.
[309] Du Plessis *et al* (n 5 above).
[310] Lattanzi (n 86 above); MM El Zeidy (n 1 above) 892.
[311] Cassese (n 36 above) 22 - 23.

engagement will enable the Prosecutor to appreciate and respect the political, peace and justice priorities of states. When preliminary examinations start, the Prosecutor often moves to the next level of investigation and eventually takes over cases.

3.3.7 Complementarity and co-operation

The ICC expects states to act first.[312] The ICC also expects states to co-operate with the Court when states have waived their primary obligation to investigate and prosecute international crimes.[313]

The Rome Statute intertwines complementarity and co-operation, since the latter needs to be respected for the former to be accomplished.[314] Some scholars believe that the Rome Statute should have grouped co-operation and complementarity together.[315] The enforcement of international humanitarian norms largely depends on co-operation between the Court and states. The Rome Statute reflects a restricted complementary relationship between the Court and states. Hence, the Court is enabled by the co-operation of states to exercise its part.[316]

The enforcement of international criminal law is characterised by challenges in securing state co-operation and the political will in executing arrest warrants from international jurisdictions such as the ICC. When a state is unwilling to prosecute, it is likely to be unwilling to co-operate with the ICC.[317] A strong framework of co-operation that is mutually beneficial is therefore necessary.

3.3.8 Admissibility requirements

The Rome Statute envisages a distribution of tasks between national and international jurisdictions.[318] The ICC concentrates on persons most responsible and leaves the rest to domestic authorities.[319] The question of complementarity is explored in the

[312] Du Plessis *et al* (n 5 above).
[313] n 2 above, arts 86 - 99.
[314] H Duffy & J Huston 'Implementation of the ICC Statute: international obligations and constitutional considerations' in C Kreß & F Lattanzi (eds) *The Rome Statute and domestic legal orders: general aspects and constitutional affairs* (2000) 29.
[315] See for example Duffy & Huston (n 314 above).
[316] Duffy & Huston (n 314 above).
[317] K Miskowiak *The International Criminal Court: consent, complementarity and cooperation* (2000) 51.
[318] El Zeidy (n 24 above) 405.
[319] n 2 above.

framework of admissibility as opposed to the jurisdiction of the Court.[320] The crux of admissibility is to preserve the primacy of domestic jurisdictions and use the ICC when the role of the Court is most beneficial.[321]

The ICC only exercises jurisdiction in exceptional circumstances when admissibility is established. Article 17 of the Rome Statute suspends the exercise of jurisdiction by the Court until a determination has been made on the admissibility of a matter.[322] The article majors on the consequences for admissibility when a state fails in its obligations.[323] On the other hand, the article is read together with the Preamble paragraph 10 and article 1 of the Rome Statute to emphasise the need for due diligence in ensuring that cases remain within the jurisdiction of states.

The tests of 'unwillingness' and 'inability' are used to determine the admissibility of cases in the ICC.[324] A purposive interpretation of article 17 obligates the Prosecutor to ascertain the ability or willingness of a national jurisdiction to investigate and prosecute.[325] This formulation is supported by the assertion that a state cannot automatically start or stop a case that is before the ICC.[326] Moreover, the use of the word 'unless' in article 17(1)(a) and (b) of the Rome Statute denotes that the burden of proof rests with the Prosecutor.[327] In short, the Prosecutor has to determine the genuineness of a national prosecution.[328]

A state which challenges the admissibility of a case in the ICC must provide regular feedback[329] and other information concerning investigation.[330] Therefore, a plain reading of article 17 shifts the burden of proof to a state. The state must show that it is acting or acted in the case considered by the Court.[331]

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[320] Benzing (n 31 above) 594.
[321] Newton (n 20 above) 133 - 134.
[322] Holmes (n 33 above) 672.
[323] Williams & Schabas (n 8 above) 606.
[324] n 2 above, art 17(a) & (b).
[325] Burke-White (n 176 above) 77.
[326] Struett (n 174 above) 124.
[327] Holmes (n 33 above) 677.
[328] Struett (n 174 above) 124.
[329] Holmes (n 33 above) 682.
[330] Benzing (n 31 above) 628; n 2 above, art 18(7).
[331] Benzing (n 31 above) 628 - 629.

The tests of 'unwillingness' and 'inability' also preserve the state-centric nature of complementarity by limiting the intervention of the ICC to exceptional cases.[332] The tests are designed to promote effective prosecution of international crimes.[333] The ICC is a supporting mechanism for states and the Court should operate in full cognisance of sovereignty rights.[334]

The ICC can support prosecutions both directly and indirectly. The Court intervenes directly when a state is incapacitated or is neglecting the obligation to initiate national processes.[335] However, complications arise when the Court challenges the 'genuineness' of the intention of a state to investigate or prosecute when a state alleges willingness and ability. For instance, in the *Situation in Uganda*, President Museveni committed the national jurisdiction to prosecute the crimes if brought to Uganda's attention.[336] Nevertheless, the OTP decided to investigate the situation.[337] Indirectly, the Court can incentivise states to exercise their jurisdiction on the basis that if they fail, the Prosecutor will take over a case.[338] In both scenarios, the pivotal task of complementarity is to encourage the primacy and centrality of states in the suppression and punishment of core crimes.[339]

When the ICC determines the admissibility of cases, the activities of a state are weighed against the desire by a state to ensure the accountability of the accused, speedy trials, and credibility of courts and the judiciary.[340] The factors reveal the subjective nature of the 'unwilling or unable genuinely' criteria.[341]

The criteria for genuineness leaves the debate open on the best way to restrain unwarranted intervention by the Prosecutor and manipulation of the admissibility standard by the Court.[342] A state may not be privy to the standard of genuineness

[332] Du Plessis *et al* (n 5 above).
[333] Benzing (n 31 above) 597.
[334] UN 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess. Supp. No. 22, 29 - 51' (1995) paras 29 - 51.
[335] n 2 above, art 17.
[336] L Moreno-Ocampo 'Remarks at the 27th meeting of the Council of Europe' 18 March 2004 http://www.coe.int/en/web/cahdi/special-guests# {"6456112":[2]} (accessed 12 May 2017).
[337] n 326 above.
[338] Kleffner (n 202 above) 79 - 104.
[339] Kleffner (n 198 above) 44 - 45.
[340] n 2 above, art 17.
[341] Newton (n 12 above) 135.
[342] Newton (n 12 above) 135 - 136.

expected by the Court, as states and the Court possess inequality of arms and different procedures, among other factors.

3.3.9 Drawbacks of complementarity

Schabas views the complementarity regime in the ICC system as a misnomer or utopia.[343] Presently, national and international justice systems co-exist without key features of complementarity. Instead, the two systems fight for jurisdictional space and consistently conflict.[344] By requiring states to exhaust national efforts for the activation of the jurisdiction of the ICC, the present system resembles the one adopted by international human rights bodies and reflected in customary international law.[345]

Customary international law and several treaties require the exhaustion of remedies provided by states before an aggrieved party can turn to an international forum for recourse.[346] The purpose is to give a state first opportunity to address a wrong within its jurisdiction and to avoid overburdening international tribunals with claims. Also, it must not be assumed that international criminal tribunals are operational and effective.[347]

For an international court to intervene, remedies at the national level should be deemed 'insufficient or inadequate'.[348] Hence, international human rights bodies require petitioners to prove the exhaustion of domestic remedies.

However, international human rights bodies do not clearly define the partnership and co-operation of national courts with international bodies.[349] The ICC system establishes and defines the relationship between the two jurisdictions.[350] Nevertheless, the relationship is interpreted differently by interested parties such as the Court, states and accused persons.

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[343] Schabas (n 21 above) 190 - 191.
[344] Schabas (n 21 above) 190 - 191.
[345] Schabas (n 21 above) 190 - 191.
[346] *Ex parte Ferhut Butt* (1999) ILR 614-615 (High Court) & Court of Appeal 619; European Convention on Human Rights art 35; Inter-American Convention on Human Rights art 5; International Covenant on Civil and Political Rights, Optional Protocol I; Law of the Sea Convention art 295.
[347] MN Shaw *International Law* (2003) 730.
[348] *Akdivar & others v Turkey* (30 August 1996) ECHR paras 67 - 68; *Van Oosterwijck v Belgium* (6 November 1980) ECHR paras 36-40; *Rodriguez* IACHR (22 June 1987) Ser C 1.
[349] Schabas (n 21 above) 190 - 191.
[350] Schabas (n 21 above) 190 - 191.

Another drawback of complementarity is the risk to turn the ICC into a review court that appraises the performance of national courts. Instead, the ICC is a court which should ideally respect the discretion of states in tackling crimes under their jurisdiction.[351] Good judgment and higher degrees of independence are also vital in the determination of the criteria and timing of triggering the jurisdiction of the ICC in given situations and cases.[352] The section that follows considers the application of complementarity in the light of the prosecutorial practice of the ICC and case law.

3.4 Complementarity in the International Criminal Court practice

3.4.1 Complementarity and the International Criminal Court prosecutorial policy

As previously discussed, when he assumed office in 2003, the Prosecutor, highlighted that the ability of states to exercise primacy would be a yardstick for the Court's success.

The early prosecutorial approach demonstrated that complementarity is not a clear-cut concept. The OTP had to adopt prosecutorial policies to craft the best approach to complementarity. The drafting of the policies began in 2003 when the Prosecutor welcomed the input of experts into the 'Draft Policy Paper'.[353] In 2004, the Prosecutor launched the idea of a positive approach to complementarity.[354] Positive complementarity is discussed further later in this chapter.

The 2003 prosecutorial policy considered practical realities in the selection of cases.[355] The approach encouraged states to initiate proceedings on their own.[356] The policy set a high standard for the intervention of the OTP. The OTP needed a 'clear case of failure' by national authorities to undertake investigations.[357] Complementarity recognised the right and obligation of states to exercise criminal jurisdiction.[358] The

[351] Holmes (n 33 above) 672.
[352] Brown (n 41 above) 389.
[353] The Office of the Prosecutor 'Draft paper on some policy issues before the Office of the Prosecutor, for discussion at the public hearing in The Hague' 17-18 June 2003.
[354] L Moreno-Ocampo 'Statement of the Prosecutor to the Diplomatic Corps' 12 February 2004 http://www.icc-cpi.int/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM_20040212_En.pdf (accessed 12 May 2017).
[355] n 354 above, 2.
[356] Schabas (n 21 above).
[357] n 354 above, 2.
[358] n 354 above, 5.

Court was supposed to be cautious in its application of complementarity so as not to trample upon the rights of states.

The prosecutorial policy outlined the expectations of states in the ICC and the proximity of states to evidence and witnesses.[359] A constructive relationship between the Court and states was seen as one that would facilitate partnership, dialogue and burden-sharing.[360] The experts theorised that states are within their rights to decline prosecution and allow the Court to intervene.[361] An analysis of the state's intention, rather than actions, would be determinant on whether a state is in compliance with its duty to prosecute.[362] The OTP endorsed the view and embraced inaction as a test of admissibility in instances in which the division of labour is preferred or when prosecution by the Court would be in the interests of states and their nationals.[363] The inaction of national authorities was subsequently endorsed in various cases before the Court, as will be seen below.

Notwithstanding the efforts of the OTP to craft and apply a policy on complementarity, the OTP was criticised for its departure from prioritising states in the prosecution of crimes.[364] A shift in prosecutorial approach began in 2007 when the Prosecutor explained rigidness in the execution of a judicial mandate independent from other considerations.[365] The Prosecutor believed that the ICC's impartiality and independence hinged on the freedom of the OTP to decide on investigations and prosecutions.[366] The approach disregarded the realities in states and closed the door for prosecutorial adjustments to these realities.[367]

The 2013 Policy Paper on Preliminary Examinations[368] did little to strengthen the discretion of states under complementarity. The policy gave the Prosecutor wide

[359] n 354 above, 2.
[360] OTP 'Informal expert paper: the principle of complementarity in practice' 2003 http://www.icc-cpi.int/RelatedRecords/CR2009_02250.PDF (accessed 2 May 2019).
[361] n 354 above, 5.
[362] n 354 above, 5.
[363] n 354 above, 5.
[364] Burke-White (n 176 above) 55.
[365] L Moreno-Ocampo 'Building a Future on Peace and Justice, Address at the International Conference in Nuremberg' 24 - 25 June 2007 http://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf (accessed 12 May 2017).
[366] L Moreno-Ocampo 'The International Criminal Court in motion' in Stahn & Sluiter (n 36 above) 15.
[367] Ocampo (n 366 above).
[368] OTP 'Policy paper on preliminary examinations' November 2013 http://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf (accessed 2 May 2019).

powers to make demands on states and thus made it difficult for states to retain cases. The mere existence of state investigations and prosecutions was deemed insufficient. The Prosecutor needed to ascertain the genuineness of national processes before allowing a state to exercise its primary responsibility to act against perpetrators of heinous crimes. Thus, the Prosecutor exercised more supervisory than complementary powers.

In principle, the policy of the OTP has reverted to the original approach to support national jurisdictions to undertake proceedings. Hence, the 2016 OTP Policy Paper[369] implies that the Prosecutor is prepared to share the burden with states and assist states to conduct investigations and prosecutions. However, it is unclear how the OTP would render support to states in practice, particularly when the OTP and states differ on the admissibility of cases.

3.4.2 Complementarity in the ICC: a case law approach

The practice of the ICC continues to stir debates on the application of complementarity. Arguably, the current practice of the Court deviates from the original purpose of complementarity.[370] While it is desirable for the Court and states to cement co-operative synergies, there is a spirit of competition between the two.[371] The ICC risks losing legitimacy and viability if it continues to override the discretion of states.[372]

Despite the exhaustive admissibility criteria, the Court has expanded the admissibility requirements in article 17 of the Rome Statute through the insertion of an additional component of 'inaction' by national criminal jurisdictions. The statutory criteria excludes the 'inaction' of the national justice system.[373] Also, the concept of 'inaction' is controversial when measured against article 17(1)(b), which allows a state to decide against prosecution following an investigation.

The ICC has often neglected article 17 criteria in interpreting admissibility.[374] Instead, the Court has explored new means in an attempt to enhance a better understanding

[369] OTP 'Policy paper on case selection and prioritisation' 15 September 2016 http://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf (accessed 2 May 2019).
[370] Newton (n 12 above) 115 - 116.
[371] Newton (n 12 above) 115 - 116.
[372] Newton (n 12 above) 116.
[373] Williams & Schabas (n 8 above) 615.
[374] Newton (n 12 above) 142.

of the Rome Statute's technical terms.[375] Accordingly, there is tension between the static position purported in the Rome Statute and the evolving Court position that is aimed at a contextual interpretation of the Rome Statute.[376] There is a middle path for the Court to utilise both notions in developing its complementarity model.

A state's decision not to prosecute after an investigation constitutes an action by a state.[377] The Court's additional requirement of 'inaction' to the criteria contradicts what the drafters of complementarity intended.[378]

The results of the investigation should be considered before a determination on the unwillingness or inability of a state to act. A question on the scope of an 'investigation' arises. Should the term be given a broader meaning to evaluate thoroughness or is it enough to accept the results and recommendations of the state concerned?[379] If the latter position is accepted, there will be no need to question the state's findings after an investigation.

To guide its approach to situations or cases, the OTP frequently develops a prosecutorial strategy and priorities. In practice, there has often been a diversion from the set strategy and priorities. The Prosecutor took the cases from Uganda and the DRC contrary to the prosecutorial priorities set out in the initial policy paper.[380] The two national jurisdictions were not encouraged to undertake prosecutions.[381]

The interpretation of technical terms such as 'genuinely' can be problematic. The Court needs to exercise extreme caution when using tests under article 17.[382] During the negotiations at the Rome Conference, the term 'genuinely' emerged from obscurity, as no precedent was quoted.[383] Genuineness is about serious intent on the part of the national authorities to attain justice.[384] Notwithstanding the closed and exhaustive list

[375] P Kirsch 'John Tait lecture in law and policy' 7 October 2003, cited in G McNeal *ICC Inability Determinations in Light of the Dujail Case* (2006) 330 - 334.
[376] Newton (n 12 above) 135.
[377] Benzing (n 31 above) 601.
[378] WA Schabas 'The rise and fall of complementarity' in C Stahn & MM El Zeidy (eds) *The International Criminal Court and complementarity: from theory to practice* (2011) 164.
[379] D Robinson 'Serving the interests of justice: amnesties, truth commissions and the International Criminal Court' (2003) 14 *European Journal of International Law* 500.
[380] Olàsolo (n 10 above) 38 - 39.
[381] Olàsolo (n 10 above) 39.
[382] Benzing (n 31 above) 603.
[383] Holmes (n 33 above) 674.
[384] A Zimmermann 'The creation of a permanent international criminal court' (1998) 2 *Max Planck United Nations Yearbook of Law* 220.

under article 17, some scholars argue that the reading of article 17 allows the Court to consider other factors beyond article 17 when determining admissibility of cases.[385]

The ICC demands a higher standard of national proceedings for the inadmissibility of situations and cases.[386] The component of inactivity creates a theory that renders an analysis of the requirements of article 17 unnecessary.[387] The view of the Court is that considerations of the state's right to proceed are muted by inactivity.[388]

The OTP developed a theory of 'uncontested admissibility' based on the inactivity of states and the interests of justice.[389] The concept has been recognised by the PTC I.[390] The AC also embraced this theory in the *Katanga* case.[391]

Article 17 of the Rome Statute is a yardstick for admissibility. All situations and cases before the Court should pass the requirements outlined in the article.[392] Arguably, the theory of 'uncontested admissibility' is misleading because a state referral does not preclude an accused person from contesting the intervention of the Court. Not only states and the interests of the international community are paramount in the Rome system of justice. Other possible actors must not be ignored.[393] For example, the complementarity provisions in articles 17 to 19 of the Rome Statute require the Court to safeguard the accused's rights. Although there is no legal obligation for an accused to appear before a domestic court,[394] the Court must scrutinise state referral cases considering the interests of the accused and victims before activating the jurisdiction of the ICC.

In a description of admissibility, the ICC has consistently used the '*same person* and *same conduct* test*'*.[395] At times, the Court modifies the test to elaborate on the nature of the expected same conduct. The Court has referred to 'substantially' the same

[385] Holmes (n 33 above).
[386] M Politi 'The Rome Statute of the International Criminal Court: rays of light and some shadows' in M Politi & G Nesi (eds) *The Rome Statute of the International Criminal Court: a challenge to impunity* (2001) 15.
[387] Schabas (n 21 above) 193; Williams & Schabas (n 8 above) 616; Broomhall (n 194 above) 91.
[388] Williams & Schabas (n 8 above) 615.
[389] n 360 above.
[390] *Prosecutor v Lubanga* (10 February 2006) 01/04-01/06-8 ICC para 29.
[391] *Prosecutor v Katanga et al* (25 September 2009) 01/04-01/07 OA 8 ICC para 78.
[392] Benzing (n 31 above) 601.
[393] DDN Nsereko 'The International Criminal Court: the jurisdictional and related issues' (1999) 10 *Criminal Law Forum* 303.
[394] Benzing (n 31 above) 598.
[395] *Prosecutor v Muthaura et al* (30 May 2011) 01/09-02/11 ICC para 51.

conduct.[396] 'Substantially' is defined as 'essentially; without material qualification; in the main; in substance; materially; in a substantial manner'.[397] The term 'essential' is defined as 'indispensably necessary; importance in the highest degree; requisite',[398] while 'main' is defined as 'principal, chief, most important in size, extent or utility'.[399]

The conclusion one draws from the immediate definitions is that the charge does not necessarily have to read the same before a national jurisdiction and the ICC. What is important is the weight of the charge brought by either a national jurisdiction or the ICC. The OTP and Court should adjust the interpretation of 'ordinary crimes' to guard against weakening the complementarity practice.[400] Concentration should be more on the penal consequences and contribution to end impunity than on the elements of the crime.

The *same conduct* requirement was also a talking point in the *ad hoc* tribunals. The requirement was adequately discussed by the ICTR in *Bagaragaza*.[401] In *casu*, the ICTR emphasised criminalising crimes of similar nature. The utilisation of rule 11*bis* was held to be on condition that the accused was to be tried for a crime listed in the ICTR Statute and a state was to regard the penalty structure under the ICTR.[402]

The ICTR rejected a request by Norway[403] to try the *Bagaragaza* case as murder but allowed the Netherlands to try the case, since the Dutch Genocide Convention Implementation Act of 1964 domesticated the crime of genocide.[404] The ICTR was concerned about substantial differences between the crimes of murder and genocide in Norwegian law. The crime of murder is committed against individuals as opposed to the crime of genocide which is committed when specifically defined groups are exterminated. The ICTR expanded the definition of 'state' in the ICTR Statute to include the ICTR.[405] Hence, Bagaragaza was transferred to the Netherlands in terms of strict

[396] *Prosecutor v Gadaffi & Al-Senussi* (12 February 2013) 01/11-01/11 ICC para 26.
[397] Black's Law Dictionary 1597.
[398] n 397 above, 642.
[399] n 397 above, 1105.
[400] Newton (n 31 above) 150.
[401] *Prosecutor v Bagaragaza* (Bagaragaza Netherlands) ICTR-2005-66-11 bis WL 2417255 (13 April 2007) (citing *Prosecutor v Bagaragaza*) (Bagaragaza Norway) ICTR-05-86-AR11 bis, Decision on Rule 11*bis* (30 August 2006).
[402] *Bagaragaza* (n 401 above).
[403] *Prosecutor v Bagaragaza* (Norway) ICTR-05-86-AR11 *bis* 30 August 2006.
[404] Newton (n 12 above) 152 - 153.
[405] *Bagaragaza* (n 403 above).

conditions of fair trial, non-application of the death penalty and review of proceedings by the ICTR.

The ICC presumes admissibility of cases before the ICC in the absence of article 17 requirements.[406] The reading seems to conflict with the plain reading of article 17 that identifies national courts as a platform of priority, with the Court coming in as a last resort.[407] On the question of unwillingness, the Trial Chamber II of the ICC identified different forms of unwillingness.[408] According to the Chamber, state referrals constitute a form of unwillingness on the part of a state.[409] The Chamber acknowledged that article 17 is silent on the form of unwillingness, leaving the Chamber to substantiate its intervention based on the aim of the Rome Statute to combat international crimes.[410] It remains to be seen whether this interpretation will pass the test of time.[411]

At this juncture, this chapter proceeds to evaluate the application of the principle of complementarity by the ICC in several cases.

Uganda

In 2003, the intervention of the ICC was triggered for the first time through Uganda referral.[412] The Prosecutor found a rationale to open investigations against five leaders of the Lord's Resistance Army (LRA) accused of war crimes and crimes against humanity.[413]

The warrants of arrest concerning the *Situation in Uganda* were authorised by the PTC after the Chamber considered a letter dated 28 May 2004 from the government of Uganda[414] in which the government stated that it had no intention and ability to arrest the most responsible perpetrators. Also, the government averred that it had no means and capacity to internally deal with those crimes.[415] Therefore, the PTC applied the

[406] Schabas (n 21 above) 193.
[407] Schabas (n 21 above) 193.
[408] Schabas (n 21 above) 194.
[409] *Prosecutor v Katanga et al* (16 June 2009) 01/04-01/07 ICC para 79.
[410] *Katanga et al* (n 391 above).
[411] Schabas (n 21 above) 194.
[412] Struett (n 174 above) 2.
[413] Struett (n 174 above) 2.
[414] *Situation in Uganda* (27 September 2005) 02/04-53 ICC para 37.
[415] n 414 above.

theory of inactivity in the *Situation in Uganda*. However, President Museveni later undertook to prosecute the crimes if transferred to Uganda.

The Prosecutor rejected the intention of the government of Uganda to confine the investigations to crimes allegedly committed by the LRA.[416] When a state refers a situation to the ICC, it is for the Prosecutor – not states – to determine which specific individuals to charge for the commission of crimes in a given situation.[417] The same is true for UNSC referrals or *proprio motu* investigations. The rule is intended to prevent states from shielding certain individuals from investigation or prosecution or conducting biased investigations or prosecutions only against opposition military forces.[418]

The Democratic Republic of Congo

At the initial stage, the Prosecutor wanted to initiate proceedings in the DRC on his own initiative but reconsidered his decision and invited the government of the DRC to make a referral.[419] The PTC I authorised the Thomas Lubanga warrant of arrest in February 2006 based on DRC referral to the Court.[420]

The PTC I highlighted encouraging developments in the DRC. The Chamber noted that the situation in the DRC had improved since the referral of the case and that the justice system in Ituri had been revived since 2005.[421] However, it did not rule that the *Lubanga* case was inadmissible and warranted deferral to the DRC.[422]

The concentration on different conducts hindered the inadmissibility of the *Lubanga* case. The stance of the OTP and the Court is for states to prosecute crimes identified in the Rome Statute and pursued by the Prosecutor for the situation or case in contention.[423] For a case to be inadmissible in the ICC, national proceedings must identify the person and conduct under consideration by the ICC.[424] The PTC and the

[416] n 414 above.
[417] Struett (n 174 above) 2.
[418] Struett (n 174 above) 2.
[419] Moreno-Ocampo (n 366 above) 14.
[420] *Prosecutor v Lubanga* (10 February 2006) 01/04-01/06-8) ICC para 36.
[421] *Lubanga* (n 420 above).
[422] *Lubanga* (n 420 above).
[423] Schabas (n 21 above) 195.
[424] *Lubanga* (n 420) para 37.

AC have rejected the prosecution of murder and rape in some instances as 'ordinary crimes'.

When the Court limits itself to crimes identified by the Prosecutor, it ignores the fact that at times the so-called ordinary crimes carry a greater penalty than the crimes pursued by the Prosecutor.[425] The Court should read the Rome Statute in view of the object specified in the Preamble. Where ordinary crimes consist of serious crimes, and when states stand ready to execute their primary duty to prosecute, the Court must ideally encourage states to prosecute.[426]

In Lubanga, the Court preferred the enlistment of child soldiers, while the national authorities identified more serious offences. The Court missed an opportunity not only to encourage national proceedings but also to interpret the *same person* and *same conduct* test more broadly. The likelihood that an accused person will get a more severe penalty for the offences identified by a national jurisdiction satisfies the requirements of international law.[427] Further, the prosecutorial policy should allow national jurisdictions to prefer cases which place them in a better position to obtain a conviction.[428] One best practice from international criminal tribunals is that they prefer crimes that are easy to prosecute rather than complex ones such as genocide.[429]

The ICC also shielded Lubanga from greater accountability. The Rome Statute considers a case admissible when the action is designed to exonerate the accused from liability.[430] The practice of the Court should therefore support any state action that offers greater punitive action for the accused. Such an approach would no doubt be accepted to the victims as well. When the Court settles for less serious offences, its conduct is tantamount to shielding an accused from 'some' responsibility. The intervention of the Court should not lower the standard of accountability set by a state. Whereas the Court was clear that admissibility consists of two components of

[425] Schabas (n 21 above) 195.
[426] Williams & Schabas (n 8 above); Heller (n 206 above) 201.
[427] Schabas (n 21 above) 198.
[428] Schabas (n 21 above) 198.
[429] R Marquand 'Why genocide is difficult to prosecute' http://www.csmonitor.com/2007/0430/p01s04-wogi.html 30 April 2007 (accessed 16 September 2019).
[430] n 2 above, art 17(2)(a).

complementarity and gravity,[431] the Court did not appreciate that the crimes brought by the OTP were of less gravity compared to those pursued by the DRC.

The Central African Republic

The *CAR Situation* raised some complications for the Prosecutor. For a considerable time, the Prosecutor was not sure whether to initiate an investigation because of uncertainty on the ability of the CAR to investigate.[432] A national investigation had occurred previously.[433] The turning point was in May 2007, when the Prosecutor explained that the CAR's highest judicial body, the *Cour de Cessation*, expressed inability to investigate and prosecute.[434] The Prosecutor accepted that CAR was unable to undertake the proceedings due to the complexity of the situation.[435]

Sudan

In Darfur, the Prosecutor decided to proceed with an investigation of the situation despite the establishment of local courts to try perpetrators. The Prosecutor was aware of decrees that established a 'special court' for Darfur, as well as for Geneina and Nyala.[436] Notwithstanding, the Prosecutor considered the Sudanese authorities unable to deal with the situation due to 'relatively inaccessible' courts, limited resources, lack of expertise and security issues.[437] The Specialised Courts in Sudan were criticised for unfair trials, lack of legal representation for accused persons and summary executions.[438] The Prosecutor convinced the UNSC on the inadequacy of national efforts and the appropriateness of the OTP to investigate.[439] The OTP used its findings from a two-month analysis to explain that the national proceedings in Sudan neglected serious crimes and most responsible persons.[440]

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[431] *Lubanga* (n 420 above) para 29.
[432] Schabas (n 21 above) 195.
[433] Moreno-Ocampo (n 366 above) 14 - 15.
[434] *Situation in the Central African Republic* (15 December 2006) 01/05 ICC paras 12 - 20.
[435] n 434 above.
[436] CD Totten & N Tyler 'Arguing for an integrated approach to resolving the crisis in Darfur: the challenges of complementarity, enforcement, and related issues in the International Criminal Court' (2008) 98 *The Journal of Criminal Law and Criminology* 1069.
[437] Totten & Tyler (n 436 above).
[438] US Department of State 'Country Reports on Human Rights Practices in Sudan' (2005) http://www.state.gov/g/drl/rls/hrrpt/2005/61594.htm (accessed 12 May 2017).
[439] Schabas (n 21 above) 190.
[440] Moreno-Ocampo (n 366 above) 15.

Libya

Libya brought two admissibility challenges before the ICC. The PTC I allowed Libya to retain jurisdiction in the case of *Al-Senussi.*[441] The Court retained jurisdiction in the case of *Saif Al-Islam Gaddafi*.[442]

In the *Al-Senussi* case, the PTC I found that Libyan authorities were willing, able and genuine to investigate and prosecute.[443] Libya had mechanisms to obtain witness statements and evidence.[444] In the case of *Gaddafi*, Libya submitted that the national judiacial authorities were in the process of bringing the accused to justice.[445] Based on the national response against Gaddafi, Libya challenged the admissibility of the case.[446] The PTC I requested the Libyan authorities to prove they were taking concrete steps against Gaddafi.[447] The Court addressed the 'same conduct' requirement and the 'inability' test. The PTC I viewed a domestic investigation and prosecution of ordinary crimes to be sufficient under certain circumstances.[448] However, Libya failed in its admissibility challenge, as it could not prove that it was investigating the same conduct that was before the Court.[449]

The PTC I left the question of determining unwillingness unaddressed.[450] On the test of 'inability', the Court found that Libya was unable to prosecute Gaddafi, making the case admissible.[451] The national system of Libya was considered 'unavailable', as it was limited in geographical scope.[452] The accused was also found to lack legal representation.[453] Like in the *Katanga* case, the AC stated that the determination of unwillingness and inability is preceded by the 'same conduct' requirement.[454]

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[441] *Prosecutor v Gadaffi & Al-Senussi* (11 October 2013) 01/11-01/11 ICC.
[442] Gadaffi & Al-Senussi (n 441 above).
[443] *Gadaffi & Al-Senussi* (n 441 above) para 66.
[444] *Gadaffi & Al-Senussi* (n 441 above) paras 83 - 157.
[445] PTC I 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute' 1 May 2012.
[446] n 445 above.
[447] PTC I 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi' 31 May 2013 paras 52 - 54.
[448] (n 447 above) paras 85 - 88.
[449] (n 445 above) paras 132 - 137.
[450] (n 447 above) para 138.
[451] (n 447 above) para 138.
[452] (n 447 above) para 205.
[453] (n 447 above) paras 212 - 214.
[454] *Prosecutor v Katanga* (25 September 2009) 01/04-01/07-1497 ICC para 78.

Cote d'Ivoire

Côte d'Ivoire opposed admissibility in the *Simone Gbagbo* case on the basis that the state was pursuing charges similar to the ones before the ICC.[455] Côte d'Ivoire argued that it was willing and able to try the crimes. The PTC I said that the evidence provided by Côte d'Ivoire was insufficient to show that it was taking steps and that the state failed to satisfy the *same conduct* requirement.[456] The AC upheld the findings of the PTC I on the lack of relevant action at the national level.[457]

Kenya

In the *Situation in Kenya*, the Prosecutor justified the initiation of a *proprio motu* investigation of the post-election violence because Kenya was inactive. The next chapter discusses complementarity in Kenya in general, and in the case of *Kenyatta* in particular.

3.5 Complementarity and African regional initiatives

3.5.1 Lessons from Africa

The inclusion of complementarity in the Rome Statute and the application of the principle by the ICC are issues of intense debate in international criminal justice. Earlier discussions in this chapter show that the Court can draw lessons from international tribunals that preceded it. The Court can also benefit from current African perspectives on complementarity. This section looks at some of the African perspectives as a precursor to detailed discussions in subsequent chapters.

The prosecution of Habré and the desire by the AU to prosecute international crimes in Africa are initiatives that have borrowed and refined the complementarity principle of the ICC. Like the backlash against the ICC, debates on the supremacy of states and their unhindered exercise of discretion are likely to continue as states attempt to keep cases within national jurisdictions. For this reason, it is desirable to explore, in Chapter

[455] *Prosecutor v Simone Gbagbo* (30 September 2013) 02/11-01/12 ICC.
[456] *Simone Gbagbo* (n 455 above).
[457] *Simone Gbagbo* (n 455 above).

6, how Africa shapes the application of complementarity in view of challenges faced by the ICC.

3.5.2 Beyond Habré

African states have voiced much concern about what they perceived as unfair treatment by the ICC, leading to decreased enthusiasm for the ICC in Africa and calls to extend the work of the ICC to other parts of the world. Schabas states that 'right now international justice needs more Augusto Pinochets and fewer Hisséne Habrés'.[458] Arguably, Schabas' statement augments the debate that the ICC is anti-African. Africa has revealed its anticipation of regional mechanisms in the complementarity project of the ICC. Other continents and the ICC have not followed suit.

Pinochet, the former Chilean head of state, was extradited by the United Kingdom to Spain on 6 October 1998 to stand trial for torture, terrorism and crimes against humanity.[459] Similar to the *Pinochet* case, the ICC can claim jurisdiction over the crimes in the *Habré* case.[460] Hence, the Committee of Eminent African Jurists that was set up by the AU to advise on the ideal forum to prosecute Habré cautioned that the ICC already exercised powers over crimes faced by Habré.[461]

For Spain, the extradition was an opportunity to exercise not only universal jurisdiction but other jurisdictional links such as passive personality (jurisdiction based on the nationality of the victim(s) to a prosecuting state), since some of the torture victims were Spanish. Africa believes Europe abuses the application of universal jurisdiction.

The government of Chad wanted to be guided by the outcomes of a Truth Commission in the *Habré* case.[462] The Truth Commission recommended a domestic prosecution for violations of human rights. The prosecution in Senegal was initiated after Habré had

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[458] WA Schabas 'The banality of international justice' (2013) 11 *Journal of International Criminal Justice* 551.
[459] A Cowell 'Spain widens charges for Pinochet: he signals he will fight extradition' New York Times 20 October 1998 14.
[460] R Brody 'The prosecution of Hissène Habré: An African Pinochet' (2001) 35 *New England Law Review* 321.
[461] G Abraham 'Africa's evolving continental structures: at the crossroads? (2015) *South African Institute of International Affairs Occasional Paper* 209 http://www.saiia.org.za/occasional-papers/669-africa-s-evolving-continental-court-structures-at-the-crossroads/file (accessed 15 March 2019).
[462] National Commission of Inquiry 'Chad: Report of the Commission of Inquiry into the crimes and misappropriations committed by ex-President Habré, his accomplices and/or accessories' (1992) http://www.usip.org 52.

fled to Senegal for refuge.[463] The determinations on the appropriate forum to try Habré were dependent on factors such as the likelihood of a fair trial, access by victims to the trial, political will, the extent to which universal jurisdiction could be exercised and African wishes.[464]

Following deliberations, the Extraordinary Chambers were preferred to try Habré. It was also enough for the ICJ to accept the assurances given by Senegal and allay the fears of Belgium on his possible abscondment.[465] Therefore, Habré was prosecuted by the AU in collaboration with Senegal.[466] The AU did not allow the weak systems of Senegal to hinder the state from participating in the prosecution. The AU gave Senegal time and assistance to strengthen its legislation in preparation for Senegal's contribution in prosecution.

3.5.3 Complementarity in the Malabo Protocol

The Malabo Protocol incorporates provisions from the statutes of other international instruments. The Malabo Protocol also seeks to close the gaps from the instruments through the insertion of new crimes that it envisages bringing under the jurisdiction of the African Court. The emerging African approach raises discussions on horizontal and vertical hierarchical models of complementarity.[467] Complementarity, as understood by the ICC, is vertically applied. Vertical application of complementarity gives the ICC a supervisory role over the investigations and prosecutorial decisions of states. The application permits the Court to intervene when national action fails to meet expected standards.[468] On the other hand, horizontal application of complementarity allows states that do not ordinarily have jurisdiction or connection to a crime to intervene on behalf of the international community.[469]

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[463] DN Sharp 'Prosecutions, development, and justice: the trial of Hissène Habré' (2003) 16 *Harvard Human Rights Journal* 166.
[464] Human Rights Watch 'Submission to the Committee of Eminent African Jurists: options for Hissène Habré to face justice' (2006) http://www.hrw.org 17 - 18.
[465] J Rikhof 'Fewer places to hide? The impact of domestic war crimes prosecutions on international impunity' in M Bergsmo *et al* (eds) *Complementarity and the exercise of universal jurisdiction for core international crimes* (2010) 63.
[466] FK Taffo 'The Hissène Habré case' 23 December 2015 http://www.accord.org.za/conflict-trends/the-hissene-habre-case (accessed 22 August 2019).
[467] HG van Wilt 'Complementary jurisdiction: article 46(h) ' in G Werle & M Vormbaum (eds) *The African Criminal Court: a commentary on the Malabo Protocol* (2017) 187 - 202.
[468] C Ryngaert 'Horizontal complementarity: the complementary jurisdiction of bystander states in the prosecution of international crimes under the universality principle' in Bergsmo *et al* (n 399 above) 165.
[469] Ryngaert (n 468 above).

States without connection to a crime are bystander states and only intervene in the affairs of other states based on universal jurisdiction.[470] In essence, horizontal complementarity is concerned with the relationship between states in international affairs. The African Court may opt for vertical complementarity to supervise the operations of national jurisdictions based on the Malabo Protocol. Horizontal complementarity may best suit the African cause because the AU strives to avoid encroaching on the legitimate and sovereign interests of member states. The AU will be guided by its intervention policy under the Constitutive Act to determine the proper application of complementarity. The AU plays a passive role and leaves greater responsibility to states to address their internal affairs.

The ICC needs to modify its co-operative model in view of the imminent entrance of the African Court into the complementarity arena.[471] Currently, the ICC restricts co-operation and assistance. The growing resistance of the AU to partner with the Court may be overcome when the ICC embraces co-operation as a two-way model. The Court should not only expect assistance from the AU but must also find means to assist the AU to fulfil its own ideals. The AU and its member states anticipate co-operation between the ICC and AU institutions in future. Existing draft documents indicate the anticipated co-operation.

African states advanced proposals for the recognition of African regional mechanisms through the amendment of the Rome Statute.[472] The proposed amendment should be made in accordance with article 121 of the Rome Statute. Because of its appearance and keen interest in the application of complementarity, Kenya swiftly proposed an amendment to preambular paragraph 10 of the Rome Statute. Kenya preferred the ICC to complement both national and regional criminal jurisdictions'.[473] Arguably, the ICC needs to develop a policy to enable the utilisation of regional mechanisms by states under the complementarity system.

[470] Ryngaert (n 468 above).
[471] WA Schabas 'Victor's justice: selecting situations cases at the International Criminal Court' (2010) 43 *The John Marshall Law Review* (2010) 535.
[472] AU 'Draft Decision on Africa's relationship with the International Criminal Court' 12 October 2013 para 9.
[473] ASP 'Report of the Working Group on Amendments' ICC-ASP/13/31 7 December 2014 17.

3.6 Positive and negative complementarity

3.6.1 Approaches to complementarity

Complementarity operates within the confines of a relationship between the ICC and states. The relationship requires well-defined parameters within which complementarity can operate.[474] The extent of the interface between the two institutions has not gone unnoticed by the OTP and scholars.[475]

Two dominant schools of thought emerged to influence the prosecutorial policy and to regulate the relationship between the Court and states. The approaches are classified as positive or proactive, and passive or negative complementarity. Presently, there is strong advocacy to discourage passive complementarity and to widely promote positive complementarity in the work of the ICC.[476]

3.6.2 Positive complementarity

Although positive complementarity is not expressly mentioned in the Rome Statute, provisions on co-operation between the Court and states, mutual assistance and interaction, as well as prosecutorial powers and duties, are indicative of positive complementarity.

The OTP defines positive complementarity in the context of co-operation and capacity building of national authorities.[477] The notion of positive complementarity is a departure from the approach envisioned before the creation of the ICC.[478] The concept also differs from the current Court practice.[479] Through this approach, the ICC acknowledges, embraces and respects the potential of domestic proceedings.[480] Thus, the ICC facilitates domestic prosecutions.[481]

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[474] M Nkata 'Implementation of the Rome Statute in Malawi and Zambia: progress, challenges and prospects' in C Murungu & J Biegon *Prosecuting International Crimes in Africa* (2011) 278.
[475] C Stahn 'Complementarity: A tale of two options' (2008) 19 *Criminal Law Forum* 87 - 113.
[476] OC Imoedemhe *The complementarity regime of the International Criminal Court: national implementation in Africa* (2017) 45.
[477] OTP 'Prosecutorial Strategy 2009-2012' 1 February 2010 https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-strategy-2010 (accessed 13 May 2017).
[478] Burke-White (n 176 above) 56.
[479] Burke-White (n 176 above) 56.
[480] Novak (n 93 above) 54.
[481] CM De Vons 'A catalyst for justice? The International Court in Uganda, Kenya and the Democratic Republic of Congo', PhD Thesis, Leiden University, 2016 68.

Positive complementarity is an action and strategy-oriented approach. The Court overcomes its limitations of expeditiously dealing with impunity by empowering domestic mechanisms to oversee the prosecutions.[482] The Prosecutor avails opportunities and assistance to states that are willing but unable to carry out domestic proceedings.[483] Consequently, the Prosecutor and states are interdependent and strive to jointly strengthen the international system of justice.[484]

Viewed under the positive complementarity notion, complementarity is understood broadly by encouraging and adopting mechanisms that capacitate states to comply with their duty to undertake proceedings.[485] The mechanisms include provision of technical assistance to states which intend to or undertake prosecution.[486] The notion views national proceedings as effective and efficient means to end impunity when supported by the Court.[487] The notion emanates from the understanding that states are custodians of jurisdiction over crimes and that the ICC only retains potential jurisdiction over crimes.[488]

However, the potential jurisdiction of the ICC should be activated first for the complementarity principle to operate in favour of prosecution by the ICC.[489] Proponents of positive complementarity assert that the Court has a duty to contribute to the efficiency of national jurisdictions.[490] Positive complementarity is outlined in prosecutorial policies that encourage and assist prosecution by states[491] and in the domestication of the Rome Statute by states.[492]

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[482] Novak (n 93 above) 54.
[483] (n 360 above) 3.
[484] R Cole 'Africa's relationship with the International Criminal Court: more political than legal' (2014) 14 *Melbourne Journal of International Law* 28.
[485] M du Plessis 'The Zimbabwe torture docket decision and proactive complementarity' (November 2015) *Institute of Security Studies Policy Brief* 1 - 2.
[486] Schabas (n 21 above) 191; n 2 above, art 93(10).
[487] Burke-White (n 176 above) 19.
[488] Du Plessis (n 485 above) 2.
[489] Du Plessis (n 485 above) 2.
[490] Burke-White (n 176 above) 57.
[491] Burke-White (n 176 above) 57.
[492] M du Plessis *et al* 'African efforts to close the impunity gap. Lessons for complementarity from national and regional actions' (2012) 241 *Institute of Security Studies Paper* 1.

The prosecutorial role

The activation of national proceedings overcomes limitations of inactivity, unwillingness or inability.[493] The entrenchment of positive complementarity is clearer in the policies of the OTP. The OTP crafted policies since 2003 to enhance prosecutions by national authorities. In 2003, the Prosecutor stated that the regular functioning of national jurisdictions as opposed to prosecutions by the Court underlies complementarity.[494] The statement was buttressed in 2004 when the Prosecutor mentioned the use of positive complementarity to encourage national systems.[495]

A Prosecutorial Strategy was adopted from 2006 to 2009 to support the use of positive complementarity.[496] However, the concept suffered a setback in 2007, despite a strategy that advocated for its activation. The Prosecutor faced challenges to balance the law and political considerations and chose to separate the law from politics.[497]

The interest in positive complementarity was revived with the new Prosecutorial Strategy of 2009 to 2012.[498] One of the four fundamental principles in the strategy was positive complementarity.[499]

The latest OTP interventions in co-operation with states include the 2010 Kampala ICC Review Conference.[500] The Review Conference emphasised on positive complementarity.[501] The concept was identified as encompassing actions which strengthen national jurisdictions to exercise primacy. The capacity building may be

[493] Burke-White (n 176 above) 57.
[494] L Nichols *The International Criminal Court and the end of impunity in Kenya* (2015) 31.
[495] L Moreno-Ocampo 'Statement to diplomatic corps' 12 February 2012 http://www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf) (accessed 26 August 2018).
[496] OTP 'Report on Prosecutorial Strategy ' 14 September 2006 http://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-strategy-2006 (accessed 27 August 2018).
[497] L Moreno-Ocampo 'I follow evidence, not politics' 20 January 2012 http://www.ipinst.org/2012/01/moreno-ocampo-i-follow-evidence-not-politics (accessed 28 August 2018).
[498] AD Tuhoye *et al* 'Positive complementarity in Africa, a dream or reality? An analytic study of the consequences of the ICC process in Kenya' (2017) 5 *International Journal of Social Science and Humanities Research* 113.
[499] Tuhoye *et al* (n 498 above).
[500] Du Plessis (n 5 above) 2.
[501] http://asp.icc-cpi.int/en_menus/asp/reviewconference/pages/review%20conference.aspx (accessed 1 August 2018).

through states assisting each other, and provision of financial and technical assistance.[502]

The above definition implies that positive complementarity allows the participation of the Court while allowing states to have ownership of their processes. The intervention of the Court is confined to defined limits. The process also allows states to seek assistance from one another as they see fit. In this regard, the concept of positive complementarity is not a diversion from the position that states have the primary right and duty to investigate and prosecute international crimes. The concept advocates for the capacitation of states to enable a national response to international crimes.

The Review Conference's decision for the ICC to support the work of national jurisdictions received overwhelming support.[503] The Court and the Assembly of State Parties (ASP) supported the building of national capacity.[504] The future work of the ICC is poised to be influenced by the positive complementarity approach. The Court needs to overcome tensions with states to remain relevant in its supporting role to states.

The policy of positive complementarity creates a conducive platform for national courts to act but does not direct the operations of national courts.[505] When the OTP assists states, the OTP is expected to respect their sovereign rights to choose the forms of accountability that best suit their diverse contexts.[506] The best the Court can do is to contribute to the debate on the most appropriate accountability mechanism within a particular context. Through the 'margin of appreciation' doctrine, the Court is expected to respect the approach preferred by states. Arguably, the doctrine regulates complementarity through encouraging international and regional institutions to assist national institutions to exercise primacy in issues under their jurisdiction.[507]

When states need help, international and regional institutions can enhance the capacity of states. States are given space to implement human rights obligations as a

[502] n 501 above.
[503] Du Plessis (n 5 above) 2.
[504] ASP 'Resolutions and declarations adopted by the Assembly of State Parties' 21 November 2012 Res. ICC-ASP/11/Res.6.
[505] Burke-White (n 176 above) 74.
[506] F Mégret 'Too much of a good thing? Implementation and the uses of complementarity' in Stahn & El Zeidy (n 378 above) 361.
[507] RSJ Macdonald 'The margin of appreciation' in RSJ Macdonald *et al* (eds) *The European system for the protection of human rights* (1993) 83 – 124.

rule. The right is waived only in exceptional cases.[508] The doctrine of margin of appreciation has roots in the European Court of Human Rights and will be explained further later in this study to demonstrate how states may also use their discretion to exclude the ICC from internal affairs and/or to opt for regional mechanisms instead of the ICC.

Furthermore, not only are states protected from the improper encroaching of the Court but the Court itself is protected from unjustified shifting of state duty to its jurisdiction.[509] The shifting of responsibility can be a common phenomenon in state referral cases. By encouraging engagement and dialogue, options are jointly explored by the Court and states before proceeding with an investigation or prosecution approach that is acceptable to both institutions.

Initiatives by states

Positive complementarity requires the ICC and states to take certain steps to strengthen responses to international crimes. The two institutions reinforce each other and act complementarily for the advancement of the rule of law and justice.[510] Civil society organisations may also contribute to domestic initiatives that complement the ICC.[511] States should translate the provisions of the Rome Statute into domestic law to increase their capacity to fulfil the objectives of the Rome Statute. The domestication of the Rome Statute creates a framework for national prosecutions.[512]

The intention of the Rome Statute is to ensure that serious crimes are punished.[513] In this vein, states should be utilised to counter any limits on the intervention of the ICC.[514] States act in a positive form of 'gap-filling' by invoking unilateral or universal jurisdiction to address the limitations of the UNSC and ICC to address international crimes.[515]

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[508] *Handyside v United Kingdom* ECHR (7 December 1976) Ser A 24.
[509] DA Mundis 'The judicial effects of the completion strategies on the ad hoc international criminal tribunals' (2005) 99 *American Journal of International Law* 146.
[510] Burke-White (n 176 above) 53.
[511] Du Plessis *et al* (n 5 above) 11.
[512] M du Plessis 'South Africa's International Criminal Court Act: Countering genocide, war crimes and crimes against humanity' (2008) *Institute of Security Studies Paper* 8.
[513] n 2 above, Preamble para 4.
[514] Du Plessis *et al* (n 5 above) 2.
[515] Du Plessis *et al* (n 5 above) 6.

The domestic implementation of complementarity strengthens national laws to realise norms set by the Rome Statute.[516] Implementation is a catalytic effect on national systems to prosecute crimes.[517] For example, South Africa can exercise extraterritorial jurisdiction after it domesticated the Rome Statute.[518]

This means national initiatives have an added advantage of potential universal jurisdiction over ICC crimes[519] through an expanded scope which is not bound by territoriality and nationality limitations.[520] South African courts used the concept of universal jurisdiction to remind the state of its complementarity, co-operation and international law obligations.[521] On the negative, the legal framework and decisions have so far lacked the backing of the political authorities, making enforcement difficult.

3.6.3 Passive complementarity

The initial model of complementarity was more reactive (ʻnegative or passive complementarity') than proactive (ʻpositive or proactive complementarity').[522] The jurisdiction and participation of the ICC remain dormant until triggered by a state or UNSC referrals or prosecutorial initiative.[523] The Court intervenes as a last resort when states are unwilling or unable to prosecute perpetrators of heinous crimes.[524] As a spectator, the Court relies on national jurisdictions to take steps to administer justice.[525]

Passive complementarity was a highlight throughout the drafting of the Rome Statute as considerations on the parameters of state sovereignty took centre stage.[526] One

[516] Mégret (n 506 above).
[517] H Fische at *el International and national prosecution of crimes under international law* (2001) 769 - 797.
[518] Implementation of the Rome Statute of the International Criminal Court Act (ICC Act) Preamble & sec 3.
[519] The Princeton Principles on Universal Jurisdiction principle 1(1).
[520] R O'Keefe 'Universal jurisdiction: clarifying the basic concept' (2004) 2 *Journal of International Criminal Law* 735 - 760.
[521] Du Plessis (n 485 above) 30 - 32.
[522] 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 413.
[523] Imoedemhe (n 476 above).
[524] C Hall 'Positive complementarity in action' in Stahn & El Zeidy (n 378 above) 1017.
[525] AM Slaughter 'A global community of courts' (2003) 44 *Harvard International Law Journal* 34.
[526] Imoedemhe (n 476 above) 44.

commentator argued that state sovereignty must not hinder international peace and order.[527]

Passive complementarity means the OTP mainly constrains its contribution to international justice by waiting for political authorities in states and the UNSC to give guidance on the initiation of investigations.[528] The OTP withholds assistance from states and only intervenes when the states fail.[529] A passive court is therefore bent on fault finding and weaknesses of national systems.[530] Arguably, this explains why it took the Prosecutor nearly a decade to use *proprio motu* powers granted by the Rome Statute. The Prosecutor has little room to manoeuvre under the passive complementarity model.[531]

Many delegates at the Rome Conference desired an ICC with three main features: a court independent from UNSC control; led by an independent prosecutor; and with inherent jurisdiction over core international crimes.[532] The Court used a two-fold approach in its early years. The Court waited in vain for states to exercise and probably fail on their primary jurisdiction, and for states to make referrals to the Court. The Court was eager to try some cases with the belief that a well-resourced and empowered ICC was better positioned to investigate and prosecute international crimes.[533]

Current arguments foresee the invocation of passive complementarity when states deliberately reject the jurisdiction of the ICC in favour of weaker or developing alternative mechanisms, such as regional courts.[534]

3.6.4 Rationale for positive complementarity in the Kenyatta case

The Prosecutor has previously encouraged states such as Colombia to carry out national proceedings. The situation in Colombia has been under preliminary

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[527] B Ferencz 'Address to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court 16 June 1998 http://un.org/icc/speeches/616ppc.htm (accessed 14 May 2017).
[528] JT Holmes 'The principle of complementarity' in Lee (n 94 above) 41; Hall (n 458 above) 1017.
[529] JT Holmes 'Complementarity: national courts versus the ICC' in A Cassese *et al* (eds) *The Rome Statute of the International Criminal Court: a commentary* (2002) 677.
[530] R Teitel *Transitional justice* (2002).
[531] Imoedemhe (n 476 above) 45.
[532] P Mochochoko 'Africa and the International Criminal Court' in E Ankumah & E Kwakwa (eds) *African Perspectives on International Criminal Justice* (2005) 250.
[533] Imoedemhe (n 476 above) 45.
[534] Du Plessis *et al* (n 5 above) 1.

examination since 2004. The Prosecutor is yet to request the PTC to authorise an investigation.[535] The Prosecutor consistently encouraged Colombian authorities to conduct genuine national proceedings on the most responsible persons.[536] The Court and the national jurisdiction shared information that was ultimately used by Colombia to successfully preside over cases.[537]

The hand of the ICC in Colombia led to the enactment of legislative reforms and peace talks between warring parties. In 2015, Colombia enacted the Justice and Peace Law (JPL) to resolve the conflict through negotiation and consultation.[538] The JPL was modified after the Constitutional Court struck down the legislation. The amendment to the JPL removed certain amnesty provisions and addressed human rights concerns raised by the ICC.[539] The peace talks commenced in 2012. Some scholars attribute the achievements to the awareness of ICC's watchful eye.[540]

The dialogue between Colombian authorities and the ICC reflected the potential impact of the ICC in reminding states of their primary obligation to investigate and prosecute. Also, it gives hope for the advancement of positive complementarity when the ICC engage patiently with states. The assertions augur well for Kenya, which was preoccupied with continuous engagement with the ICC on the application of complementarity.

Kenya implored the Court to be patient to enable it to complete domestic reforms. Kenya submitted that the reforms were the first step towards effective investigations and prosecutions.[541] The Court paid little attention to the possibility of invoking positive complementarity as a means of ensuring a credible judiciary and police system in Kenya. Instead, the Court preferred to expedite the prosecution ahead of requests by Kenya for information in the custody of the Prosecutor. Admittedly, the *Kenyatta* case

[535] http://www.icc-cpi.int/colombia (accessed 27 August 2018).
[536] YM Dutton and T Alleblas 'Unpacking the deterrent effect of the International Criminal Court: lessons from Kenya' (2017) 91 *St John's Law Review* 125 - 126.
[537] R Urueña 'Prosecutorial politics: the ICC's influence in Colombian peace processes, 2003 - 2017' (2017) 111 *American Journal International Law* 104 -125.
[538] Dutton & Alleblas (n 536 above).
[539] F Capone 'From the Justice and Peace Law to the revised Peace Agreement between the Colombian Government and the FARC: will victims' rights be satisfied at last?' (2017) 77 *Virginia Law Review* 127 - 130.
[540] See for example Dutton & Alleblas (n 536 above).
[541] *Situation in the Republic of Kenya* (31 March 2011) 01/09-01/11 ICC paras 2 - 6.

presented the first opportunity for the Court to apply positive complementarity at a case stage.

3.7 Conclusion

In the context of international criminal law, both the ICC and national courts have a common obligation to ensure accountability.[542] Complementarity outlines the legal and functional relationship between the two.[543]

Complementarity gives priority to national jurisdictions. The ICC is expected to complement, and not supersede, national jurisdictions.[544] Complementarity makes the ICC a support mechanism that succours national jurisdictions when the latter are incapacitated to bring perpetrators of heinous crimes to justice.[545]

Complementarity is an evolving concept. Both the OTP and the ICC are inventing various ways to interpret the concept and enhance its effective application. Presently, the ICC has resigned itself to the application of the '*same person* and *same conduct*' test. The test ignores the so-called 'ordinary crimes'. Controversially, the ICC maintains the 'inaction' test, despite the lack of a statutory basis for the test. The OTP is increasingly appreciative of the need to empower national jurisdictions through positive complementarity. The approach is expected to dominate the relationship between the ICC and national jurisdictions in future.

The next chapter provides an overview of the *Kenyatta* case and a discussion of the application of complementarity in the case.

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[542] Struett (n 174 above) 3 - 6.
[543] L Yan 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court' (2005) 4 *Chinese Journal of International Law* 121 &132.
[544] Kleffner (n 198 above).
[545] Kleffner (n 198 above).
[545] OTP 'Paper on some policy issues before the Office of the Prosecutor' September 2003 http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf 4 (accessed 24 May 2017).

CHAPTER 4

AN OVERVIEW OF THE KENYATTA CASE AND ARISING COMPLEMENTARITY ISSUES

4.1 Introduction

The ICC was embroiled in unresolved ethnopolitical tensions and entrenched election-related violence when it intervened in Kenya. The divide-and-rule tactics, the use of violence as an election campaign tool and the inspiration to reclaim 'stolen' land or suppress opposition parties, escalated from the reign of Daniel Arap Moi.[1] When Moi left office in 2002 and with new constitutional reforms in place, such as those limiting presidential terms to two and those favouring a multiparty system, there was renewed hope for transformation in the political landscape.

The hope was further ignited in 2002 when the Kenya African National Union (KANU) suffered an electoral defeat for the first time since independence in 1963.[2] The defeat was engineered by the Rainbow Coalition led by Mwai Kibaki. However, soon afterwards, it emerged that the struggle to transform the political and election landscapes was far from over. The next election in 2007 saw violence of great magnitude and crimes being committed against humanity.

With the Kenyan political authorities seemingly unprepared to provide guarantees of violence-free elections in the future and to end impunity, the ICC intervention was considered. Uhuru Kenyatta and five others were on the Prosecutor's priority list. As will be seen in this chapter, the *Kenyatta* case exposed deficiencies in the application of complementarity. The case revealed difficulties which arise on admissibility and preliminary examination of issues in *proprio motu* cases. Arguably, the case caught the ICC unprepared to invent an interpretation of complementarity that reflects the

[1] SF Materu *The post-election violence in Kenya: domestic and international legal responses* (2015) 24 - 30. See also M Mutua 'Justice under siege: the rule of law and judicial subservience in Kenya' (2001) 23 *Human Rights Quarterly* 96 -118; D Branch & N Cheeseman *Democratization, sequencing, and state failure in Africa: lessons from Kenya* (2008) 15.

[2] Materu (n 1 above) 31.

evolving theory to practice reality.[3] The consequence of the unpreparedness and the resultant lack of precision weakened the principle of complementarity and degraded state discretion.

Since the Court mostly relies on the co-operation of 'interlocutors' for its effectiveness, one views the *Kenyatta* case as a test of the relationship between the Court and states which oppose admissibility.[4] Some scholars criticised the Court for solely concentrating on individual accountability and neglecting other forms of justice.[5] Chapter 5 discusses alternative forms of justice in the context of state discretion.

The *Kenyatta* case presented the ICC with the first admissibility challenge by a state. The Court had to reconfirm and redefine concepts related to complementarity. The Court differentiated admissibility at situation and case stages and laid a threshold on acceptable investigations. Also, the Court stuck with the often-criticised use of inaction as a determinant to admissibility, shifted the burden to the accused and disregarded the activation of positive complementarity.

The plethora of legal issues created by the *Kenyatta* case significantly contribute to the understanding of complementarity.[6] Most of the issues require further address by the Court in future cases, lest the *lacuna* created by the *Kenyatta* case may hinder the Court from maintaining the confidence of states. While both Kenya and the Court were agreeable on the possibility of the latter assuming jurisdiction at some point, the two had unreconcilable positions on the threshold for admissibility. Resultantly, this chapter analyses the *Kenyatta* case with a view of dissecting the contested and controversial issues related to the case. The case is a perfect foundation for the Court to build a strong and clear complementarity regime. Prior to the case, the Court did not receive so many submissions from national, sub-regional, regional and international actors on the scope of complementarity. Some of the submissions were proposals for the ICC to

[3] J Spilman 'Complementarity or competition' (2013) *Richmond Journal of Global and Business Online* 13.
[4] MC Nnaju 'Violence in Kenya: any role for the ICC in the quest for accountability?' (2009) 3 *African Journal of Legal Studies* 91.
[5] See for example S Kendall 'UhuRuto and other leviathans: the International Criminal Court and the Kenyan political order' (2014) 7 *African Journal of Legal Studies* 425.
[6] TO Hansen 'A critical review of the ICC's recent practice concerning admissibility challenges and complementarity' (2012) 13(1) *Melbourne Journal of International Law* 217.

expand the doctrine of complementarity to allow investigations and prosecutions at a regional level.[7]

This chapter lays a foundation for a detailed discussion on the need to protect state discretion to the greatest extent possible. Only when there is no possible action in the foreseeable future can the Court abrogate state discretion. State discretion and prosecutorial discretion are discussed in detail in the next chapter.

The Rome Statute provides for two limbs of admissibility, which are gravity and complementarity.[8] This chapter does not focus on gravity but only on the complementarity limb of admissibility. The chapter presupposes that the gravity element was met in the case as per the views of majority judges, notwithstanding the persuasive minority decision on gravity. However, where relevant to reinforce the arguments on complementarity, gravity will be referred to.

4.2 The search for an elusive solution to electoral violence in Kenya

4.2.1 The electoral environment pre-2002 and pre-2007

To unseat KANU in the 2002 elections, the opposition parties adopted a 'winning strategy' in the elections in Kenya, in other words, participating in elections as coalitions. The political parties in Kenya are now accustomed to forging unity prior to elections to enhance their chances of winning. As most of these coalitions are opportunistic or formed out of convenience, they fail the test of time and fragment with time.[9] It, therefore, came as no surprise when the winning coalition was destabilised before the next general election in 2007. However, when these coalitions are strong and when they play the tribal card well, either to divide or unify people for political ends, they emerge as a threefold cord that cannot be broken easily. The Kenyan scenario appraised the Prosecutor on the difficulties of operating in a highly politicised environment and prosecuting a sitting head of state.

[7] ASP 'Report of the Working Group on Amendments' 7 December 2014 http//www.asp.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-31-ENG.pdf. (accessed 19 July 2018).
[8] Rome Statute of the International Criminal Court (Rome Statute) art 17.
[9] Materu (n 1 above) 28 – 34.

The cracks in the Rainbow Coalition became visible when a new constitution-making process was initiated in 2005. A draft constitution was put to a referendum and partners of the Rainbow Coalition differed greatly on the content with the Kibaki-aligned camp advocating for its adoption, while the Raila Odinga camp opposed the draft.[10] The Odinga camp's voice appealed to the Kenyans who had rejected the draft constitution.[11] Encouraged by the referendum victory, Odinga contested against Kibaki for the presidential office in the 2007 general election. Considering this factionalism and animosity, the stage was set for a violence-infested election, hence violence erupted. The formation of a government of national unity ended the fight between the parties.

4.2.2 The post-2007 election environment

A pattern of politically and ethnically sponsored violence followed the post-2007 election.[12] Following a disputed election outcome, political leaders manipulated their own ethnic grouping to view others as 'enemies', which exacerbated the magnitude of the violence.[13] The tragic occurrence left more than 1 300 dead, more than 600 000 displaced, with many others being tortured, sexually harassed and having their property destroyed.[14] The cycle of complex politics was upon Kenya again. The intuition on the part of Kenyan political authorities was to reinvent the wheel and rely on old approaches such as commissions of enquiry, which previously proved ineffective[15] and absolved perpetrators from accountability.[16] It was in this regard that the Waki Commission did not escape scrutiny, which was seen by some as a waste of

[10] S Elischer 'Ethnic coalitions of convenience and commitment: political parties and party systems in Kenya' (2008) *German Institute for Global and Area Studies Working Paper* 190.
[11] See 'Elections in Kenya' http://www.africanelections.tripod.com/ke.html (accessed 28 September 2020).
[12] Report of the Kenyan National Commission on Human Rights 'On the brink of the precipice: a human rights account of Kenya's post-election violence' (2008).
[13] n 12 above, para 43.
[14] CIPEV 'Report of the Commission of Inquiry into Post-Election Violence' (2008). See also Human Rights Watch *Turning pebbles: Evading accountability for post-election violence in Kenya* (2011) 3. See also Internal Displacement Monitoring Centre 'Speedy reforms needed to deal with past injustices and prevent future displacement' 10 June 2010 http://www.internal-displacement.org/countries/kenya (accessed 4 October 2020).
[15] Materu (n 1 above) 38 - 40.
[16] L Misol *et al Playing with fire: weapons proliferation, political violence, and human rights in Kenya* (2002) 34.

time and resources.[17] One member of Parliament, namely Esther Muringi Mathenge, lamented as follows:

> We have had the same incidents, although not of the same magnitude. One was in 1992, another in 1997, a minor one in 2002 and [a] major one in 2007. In the past, after such incidents occurred, we formed commissions. We formed the Akiwumi Commission. However, what did we do with it? We put it under the carpet. We also formed the Ndung'u Commission… What did we do with the Ndung'u Commission Report? We also put it under the carpet.[18]

In the foregoing state of confusion, a room was created for the AU to mediate on the crisis and for the ICC to look closely at the developments in Kenya. On the other hand, the Waki Commission was entrusted with giving direction on how to proceed after completing its investigations. One of the commission's outstanding recommendations was the need for criminal and political accountability.[19] The commission was keen to see the implementation of its recommendations and for action to be taken against the perpetrators who had borne the greatest criminal responsibility for the alleged crimes. The failure to establish a domestic criminal mechanism activated the commission's recommendation for the ICC to intervene.[20] Furthermore, Kenyatta and Ruto encouraged the intervention of the ICC before learning that their names were among those that had been handed over to the Court.[21]

4.2.3 The desire of the ICC for criminal accountability

Similar to other parts of the African continent where the ICC has operations, the Court was met with the twin considerations of political and legal responses to violations on international crimes. Generally, national and regional actors in Africa focus more on political solutions to resolving the malfeasance associated with elections.[22] This has led to the formation of governments of national unity in countries such as Kenya and Zimbabwe, following inconclusive presidential elections. The ICC did not fully

[17] Republic of Kenya (2008) 18.
[18] Parliament of Kenya (2008).
[19] http://www.kas.de/c/document_library/get_file?uuid=d8aa1729-8a9e-7226-acee8193fd67a21a&groupId=252038 (accessed 29 September 2020).
[20] Materu (n 1 above) 65.
[21] International Crisis Group (2012) 6.
[22] See P Chigora & T Guzura 'The politics of the Government of National Unity (GNU) and power sharing in Zimbabwe: challenges and prospects for democracy' (2011) 3(2) *African Journal of History and Culture* 20 - 26.

appreciate the impact of the political environment and the influence of national/regional actors when it intervened in Kenya.

Prior to the election of Uhuru Kenyatta and William Ruto as President and Deputy President of Kenya respectively, the appropriateness of the intervention of the ICC was checked from at least four fronts. First, the mediation process brokered by the AU was aimed at establishing a long-term programme for Kenya, such as constitutional reforms. The objective was to secure a peaceful and stable country underpinned by justice and reconciliation.[23] The AU believed in dialogue and reconciliation. Justice or criminal accountability was seen through a lense of lasting peace and stability. Secondly, the Prosecutor appeared to have overlooked the role of Odinga in the violence leading up to the election. For instance, he and Ruto are alleged to have incited violence by asking the Kalenjin community to remove all 'stains' from the Rift Valley.[24] Odinga also called for protests after the election results were announced.[25] The Prosecutor indirectly sent either or both of these messages, namely that those in high echo power were untouchable or that he did not care about the ethnic sensitivity in Kenya.

Third, regarding the long-awaited truth commission, perhaps the Prosecutor could have given the prosecutorial and non-prosecutorial approaches adequate time before adopting a hard stance on the need for a legal response. Lastly, the perennial coalition factor sprouted again with Kenyatta and Ruto joining forces for the 2013 elections. As discussed earlier, these coalitions can be formidable and render an institution such as the ICC ineffective as they pursue their political agenda. Arguably, the Prosecutor was inexperienced to deal with the complications arising from a united front.

4.2.4 The election of Kenyatta and Ruto

The first four to five years of post-election violence saw the ICC enjoying considerable support among Kenyans. They perceived the Court as a genuine option to address

[23] http://www.dialoguekenya.org/index.php/negotiating-team.html (accessed 29 September 2020).
[24] Republic of Kenya (2008a) 92.
[25] n 24 above.
[26] Kenya National Dialogue and Reconciliation (2011) vi.
[27] n 24 above, 8.
[28] Kenya National Dialogue and Reconciliation Monitoring Project (2012a) 57.
[29] Kendall (n 5 above) 408.

impunity[30] and to prosecute the powerful people who had participated in the post-election violence.[31] However, this support dwindled when the Ocampo six were revealed and tribal targeting by the ICC was alleged.[32] Crucially, the ICC lost support in some of the regions from victims it aimed to protect and whose interests it aimed to advance. Once Kenyatta and Ruto had been accused by the ICC of having orchestrated crimes against humanity, the two engaged their communities for solidarity. Surprisingly, the Kikuyus (Kenyatta's ethnic group) and the Kalenjins (Ruto's ethnic group), who had fought against each other in 2007, were united when Kenyatta and Ruto formed a coalition named the Jubilee Alliance.[33] This posed a dilemma for the ICC who could not adequately serve the alleged victims who now preferred reconciliation. The closure of the rift between the victims also augmented the need to continue with the restoration process.

For their part, Kenyatta and Ruto successfully pushed the anti-ICC narrative during the 2013 election campaign. They continued to oppose the ICC at domestic and regional levels after assuming office. The ICC intervention was framed as community or tribal persecution.[34] The Luos (Odinga's ethnic group) were regarded as betrayers as they supported the ICC process.[35] At the domestic level, the prominent theme of the new government was the protection of Kenya's sovereignty. One leader, namely Aden Duale, remarked: "Let us protect our citizens. Let us defend the sovereignty of the nation of Kenya."[36] At the regional level, African leaders were inspired by the outspoken Kenyatta to argue robustly before the ICC and the UNSC for the respect of the immunity of the sitting heads of state.

In addition to the above, the ascendancy of Kenyatta to the office of President, reiterated that the ICC could not function as a referee or coach where its targets were those with the levers of power. The Court is unlikely to overcome the prevailing politics in such scenarios. The Court would do well to contribute to international criminal justice as a player, without directing states or penalising them for merely differing with the

[30] Kenya National Dialogue and Reconciliation (2011) vi.
[31] n 24 above, 8.
[32] Kenya National Dialogue and Reconciliation Monitoring Project (2012a) 57.
[33] Kendall (n 5 above) 408.
[34] Kendall (n 5 above) 410.
[35] Kendall (n 5 above) 411.
[36] 'Kenya MPs vote to withdraw from ICC' BBC News (5 September 2013) http://www.bbc.co.uk/news/world-africa-23969316 (accessed 29 September 2020).

Court on the preferred approach to complementarity. The change in the political landscape in Kenya also exposed the difficulties of using *proprio motu* interventions in a country that was unwilling to fully cooperate with the ICC. Arguably, the ICC has not indicted state actors in self-referrals to avoid jeopardising cooperation relations with states. The ICC still needs to find a way to indict state actors without weakening cooperation. The Court may make compromises and concessions, such as deferring trials and using alternative forms of justice where these are made in good faith.

4.3 Complementarity in Kenya: the ICC perspective

The recommendation of the CIPEV inspired the ICC to intervene in Kenya. The CIPEV gave the ICC a watchdog status in domestic processes which Kenya was expected to undertake. The Prosecutor proposed a three-pronged approach in which persons most responsible for the violence were to be prosecuted by the ICC; Kenya would deal with middle and lower perpetrators through an STK; and a Justice, Truth and Reconciliation Commission would oversee cases which required national reconciliation.[37] Therefore, the ICC assumed jurisdiction and primacy over persons most responsible from the onset of the discussions with Kenya following the post-election violence.

One of the CIPEV's major recommendations was the intervention of the ICC if Kenya failed to establish an STK.[38] Prosecutions by either the STK or the ICC was indicative that the CIPEV was not in favour of purely national prosecutions for persons bearing the greatest responsibility.[39] The CIPEV did not envisage prosecutions by the existing national courts despite Kenya's ratification of the Rome Statute and initiation of processes for the domestication of the Rome Statute. The ICC moved quickly and formally commenced a preliminary investigation after the failure to establish the STK.

The rejection of the STK Bill following democratic parliamentary processes was not evidence of inaction on the part of Kenya. Instead, the drafting of the Bill and the debates which ensued thereafter were actions credited to Kenya. What lacked among most parliamentarians was the willingness for the STK to preside over cases of post-

[37] C Totten *et al* 'The ICC Kenya case: implications and impact for proprio motu and complementarity' (2014) 13 *Washington University Global Studies Law Review* 711.
[38] http://www.icc-cpi.int/CourtRecords/CR2009_08645.PDF (accessed 28 July 2018).
[39] A Wameyo 'Transitional justice, a two-prong approach: reconciliation and criminal responsibility for Kenya post 2007 elections violence' (2012) *African Yearbook of International Law* 424.

election violence.[40] The ICC adopted a threat-based approach to complementarity in its early phases of involvement in Kenya. Kleffner notes that the Court may use a coercive or co-operative model to address impunity.[41] With the foundation of a threat-based complementarity, the Prosecutor proved reluctant to concede to crucial demands by Kenya from the beginning to the withdrawal of the *Kenyatta* case.

4.4 Complementarity in Kenya: Kenya's perspective

At first, Kenya appreciated the intervention of the ICC following Kenya's failure to use national mechanisms to deal with post-election violence. The desire to demonstrate national ability led to discussions with the Prosecutor. One of the discussions was held on 3 July 2009 and attended by a high-powered Kenyan delegation which met the Prosecutor in The Hague and agreed on the course of action. Following the meeting, Kenya appraised the OTP on national steps but did not refer the cases to the ICC when the STK Bill was rejected by parliament.[42]

Arguably, Kenya preferred the intervention of the ICC through a state referral rather than the Prosecutor's own initiative over the situation, hence Kenya's arguments on the inadmissibility of Kenyan cases before the ICC. Kenya expected its guidance to influence the timing of the Court's intervention. Kenya's view was that complementarity is operational when a state with jurisdiction is satisfied that it lacks willingness or ability to control its own affairs. When the Court allows states to exercise their discretion to the greatest extent possible, the duty of states is enhanced.

4.5 Situations and cases

Philippe Kirsch, who chaired the Bureau at the Rome Conference, said that in principle, states should refer 'situations' rather 'cases' to the Court.[43] The negotiators wanted to prevent states from making politically motivated referrals against opponents.[44] Hence,

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[40] C Meloni 'The ICC and Kenya: a boomerang effect?' (2014) *Institute for International Political Studies paper* 6.
[41] J Kleffner 'Complementarity as a catalyst for compliance' in J Kleffner & G Kor (eds) *Complementary views on complementarity* (2006) 80.
[42] OTP 'Kenya's post-election violence: ICC Prosecutor presents cases against six individuals for crimes against humanity' 15 December 2010 http://www.icc-cpi.int/Pages/item.aspx?name=pr615 (accessed 28 July 2018).
[43] P Kirsch & D Robinson 'Reaching agreement at the Rome Conference' in A Cassese *et al The Rome Statute of the International Criminal Court: a commentary* (2002) 623.
[44] Kirsch & Robinson (n 43 above) 74.

the drafting history of the Rome Statute shows a deliberate use of the term 'situations' to exclude scenarios where specific persons have been identified.[45] The Rome Statute does not clearly differentiate between situations and cases. The Court has given a descriptive definition of the two terms. Kenya highlighted the alleged inconclusiveness of the meaning of the terms in its appeal on the admissibility of the Kenyan cases before the ICC.[46] The Court acknowledged the ambiguity and emphasised contextual interpretation of the terms.[47]

Broadly, the view of the Court is that a situation stage begins from a preliminary examination and ends with the completion of the examination. At this stage, a general assessment or investigation is done to identify specific persons for prosecution.[48] The Prosecutor has 'potential' rather than 'concrete' cases. On the other hand, the case stage begins when specific persons have been identified and the Prosecutor is ready to summon the persons to appear or issue warrants of arrests.[49]

The *Kenyatta* case revealed that although a determination has been made, the controversy of separating the two stages is far from resolved. The question arises as to whether it is necessary to treat situations and cases differently. Prosecutorial powers, evidentiary standards and expected outcomes are different in the two stages as argued by the Court.

4.5.1 Key provisions relating to situations and cases

The Court identified articles 15, 53(1) and 18 of the Rome Statute as situation provisions, and articles 19, 58 and 61 of the Rome Statute and regulation 52 of the Regulations of the Court as case provisions.[50]

An analysis of situation provisions

The Prosecutor has powers in terms of article 15 to initiate an investigation and preliminary examination on own initiative, to analyse the information received from numerous sources and to proceed with an investigation if a reasonable basis exists

[45] International Law Commission Draft Statute art 23(1).
[46] *The Prosecutor v Muthaura et al* (30 August 2011) 01/09-02/11 OA ICC para 27.
[47] *Muthaura* (n 46 above) para 38.
[48] *Muthaura* (n 46 above) para 38.
[49] *Muthaura* (n 46 above) para 39.
[50] *Muthaura* (n 46 above) paras 38 & 39.

following the authorisation by the PTC. The prosecutorial powers are checked under this and other articles of the Rome Statute.[51] Article 53(1) outlines the factors the Prosecutor should consider in determining the rationale of proceeding, such as jurisdiction of the Court over the alleged crime, admissibility of the case, and interests of victims and justice.[52] Article 18 focuses on preliminary rulings regarding admissibility. The article provides that a state may challenge both the authorisation of an investigation and the admissibility of a case upon submission of additional significant facts or a significant change of circumstances.[53]

The link between articles 15 and 53(1) is mentioned in rule 48. Article 15 covers preliminary examinations and investigations at the situation stage. While the Prosecutor requires a reasonable basis to proceed with an investigation (situation stage), a sufficient basis to proceed is required for a prosecution (case stage).[54] The Court has differentiated between a reasonable and sufficient basis to demonstrate the quality of required evidence. The differentiation was made in the later stages of the drafting of the Rome Statute.[55]

The reasoning of the Court on the rationale of abandoning a 'sufficient basis to proceed' is understandable when the two standards are read together or used interchangeably from the stage of preliminary examinations, where appropriate. Undoubtedly, article 53(2) on prosecution is a transition from article 53(1) on investigation, yet the two are treated separately by the Court. The two articles share

[51] N Jurdi *The International Criminal Court and National Courts: A Contentious Relationship* (2011) 97 - 99.
[52] See M Scharf 'The amnesty exception to the jurisdiction of the International Criminal Court' (1999) 32 *Cornell International Law Journal* 507 - 527 arguing that article 53 of the Rome Statute, reflects creative ambiguity 'which could potentially allow the prosecutor and judges of the ICC to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the court', see also K Henrard 'The viability of national amnesties in view of the increasing recognition of individual criminal responsibility at international law' (1999) 8 *Michigan State Universi ty-DCL Journal of International Law* 595 - 650.
[53] For a discussion on the change of circumstances see M Bergsmo & J Pejic 'Prosecutor' in O Triffterer (ed) *Commentary on the Rome Statute: observers' notes, article by article* (1999) 359 - 368; J Lindenmann 'The Rules of Procedure and Evidence on jurisdiction and admissibility' in H Fischer *et al* (eds) *International and national prosecution of crimes under international law: current developments* (2001) 173 - 184.
[54] n 8 above, art 53(2).
[55] *Situation in the Republic of Kenya* (31 March 2010) 01/09 ICC, paras 23 - 24.

the common requirements of admissibility, interests of justice and victims, and adequate information to proceed.[56]

The fact that the outcome of a preliminary examination may not identify specific suspects as opposed to the outcome of an investigation should not disregard the fact that the Prosecutor has unlimited time to do a preliminary examination before approaching the PTC for authorisation of an investigation. The OTP previously confirmed the unlimited time.[57] Therefore, the Prosecutor should not seek authorisation for an investigation without a sufficient basis, as acting otherwise may be an affront to the proper administration of international justice.[58]

Complementarity will be better protected if the Prosecutor only intervenes in investigations or prosecutions when reasonable and sufficient bases to proceed are read together. Until then, states should exercise discretion on a situation. However, it is justifiable for a reasonable basis to be used for the preliminary examination when facts are still obscure from the Prosecutor and no danger exists for a Prosecutor to improperly interfere with the right and duty of a state to investigate or prosecute crimes under its jurisdiction.

Another motivation for using a sufficient basis to proceed from the onset is to provide the Prosecutor with a strong justification if a state challenges authorisation of an investigation. A state is expected to base its challenge on the basis that it has the ability

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[56] Article 53(1) states: 'The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
(b) The case is or would be admissible under article 17; and
(c) Taking 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.
If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.'
Article 53(2) states: 'If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
(b) The case is inadmissible under article 17; or
(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.'

[57] *Situation in the Central African Republic* (30 November 2006) 01/05 ICC.

[58] A Cassese 'The Statute of the International Criminal Court: some preliminary reflections' (1999) 10 *European Journal of International Law* 162.

and willingness to investigate or prosecute the alleged offences. Cassese highlights the challenges of states which are 'bent on shunning international jurisdiction and therefore unwilling to cooperate in the search for and collection of evidence, or even willing to destroy such evidence to evade justice.' [59] A reasonable basis to proceed, when used in isolation, may create doubt that a state has failed to exercise its primacy in investigation and prosecution.

Article 18 of the Rome Statute requires a state to provide significant facts or significant change of circumstances when challenging the admissibility of a case following the PTC's authorisation of an investigation. Such a challenge is made under article 19 (case stage). This disregards the fact that a transition from article 18 to article 19 does not necessarily encompass specific suspects. The challenge by a state may be confined to the authorisation of an investigation and not the result of an investigation. Article 87(7) refers to a case that may also be viewed as a situation if the current demarcation by the Court is maintained. In this regard, a situation challenge can be dealt with under article 19 (case stage), an observation that strengthens the undesirability to treat situations and cases differently.

If the Prosecutor can rely on a reasonable basis to proceed at the situation level, fairness demands that the same standard available to the Prosecutor also be available to the challenging state. Article 53(1) allows the Prosecutor to decide on the absence of a reasonable basis to proceed. Likewise, a challenging state must be allowed to challenge the authorisation of an investigation on the grounds of the absence of a reasonable basis for the Prosecutor to proceed. The solution is to resort to a sufficient basis to proceed to meet the high requirements of article 18(7). The low standard of the reasonable basis to proceed will make it difficult for a Court to sustain the decision on investigation.

An analysis of case provisions

Article 19 of the Rome Statute regulates challenges to the jurisdiction of the Court and admissibility of cases. The article requires the Court to deal with challenges before or at the commencement of a trial. In exceptional cases, and with its permission, the Court may deal with subsequent challenges. Article 58 and regulation 52 provide for

[59] See Cassese (n 58 above) 159.

summons to appear and warrants of arrest, and the accompanying details, after the completion of an investigation by the Prosecutor. Article 61 covers procedures for the confirmation of charges before trial.

In terms of article 19, most admissibility challenges must be made before a trial begins. The Rome Statute encourages states to launch challenges at the earlier stages of proceedings to avoid interruptions once trials begin. Unnecessary delays undermine the rights of accused persons to a fair trial.[60] The right to a fair trial includes being tried expeditiously.[61] Fair trials can be enhanced if the Prosecutor uses the reasonable basis to proceed thoroughly at the preliminary examination stage and when the Prosecutor invokes the sufficient basis test to proceed at the investigation stage. Logically, a sufficient basis at an earlier stage may ensure the exhaustion of debates on admissibility before a transition to the case stage.

The Prosecutor must lay down all necessary reasons for intervention at an earlier stage.[62] At the same time, a state must be given an opportunity to prevent the intervention of the Court.[63] To wait until suspects have been identified and a trial is nigh before a higher standard is required from the Prosecutor opens room for vigorous challenges by a state which claims jurisdiction. A state or Prosecutor may introduce more arguments that could have been dealt with at earlier stages. Consequently, accused persons face prejudice, as they will endure lengthy processes before their trial commences or is completed. Hall argues that:

> It would be consistent with judicial economy and with due process to limit "exceptional circumstances" in a challenge to admissibility to adopt a standard similar to that in article 84(1)(a) for revision of convictions or sentences, which would require that the challenge based on newly discovered information be sufficiently important so that the decision on the ruling on admissibility would have been different. Given that both the State and the Court have concurrent jurisdiction over the crimes, if the Court has determined that a case was admissible,

[60] JK Cogan 'International criminal courts and fair trials: difficulties and prospects' (2002) 27 *Yale Journal of International Law* 136 -137.
[61] n 8 above, art 64(2).
[62] MM El Zeidy 'The principle of complementarity: a new machinery to implement international criminal law' (2002) 23 *Michigan Journal of International Law* 906 - 910.
[63] RB Philips 'The International Criminal Court Statute: jurisdiction and admissibility' (1999) 10 *Criminal Law Forum* 80.

> the right of the accused to a prompt trial would appear to outweigh the State's interest in trying the case, as a transfer of the case to the State's court could lead to delay.[64]

Admissibility challenges can be made at situation and case stages. The Court endorses this statutory position.[65] However, the Court seems to pay little attention to article 19, which is not solely limited to the case stage.[66] Should the Court overcome the restrictive view, it will put admissibility requirements in the same basket as situations and cases. An admissibility challenge may be made prior to the commencement of a trial.[67] The Rome Statute is silent on the specific stages before a trial starts for the purposes of article 19(4). Arguably, article 19 applies to challenges which include challenges on the authorisation of an investigation.

As earlier stated, admissibility challenges should ideally be made at the earliest possible moment. A state or person may not be able to include all the necessary documents at the time of filing. The Court should consider such limitations and not insist on 'sufficiently substantiated' admissibility challenges at the time of filing.[68] At any stage, the Court should comply with the guidelines in article 17 to determine the admissibility of cases.[69] The Rome Statute leans in favour of keeping the same standard to ensure consistency in the application of complementarity in both situation and case stages.

Admissibility challenges in terms of article 19 may be made by an accused person who has been issued with a warrant of arrest or summons to appear. Also, a state party and a non-state party with jurisdiction may make an admissibility challenge in terms of article 19.[70] A challenge by an accused strongly affirms that article 19 challenges are done at the case stage, considering that an accused will have been issued with a warrant of arrest or summons to appear. There is no provision for a challenge by an accused under article 18. The non-participation of an accused at the situation stage of

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[64] CK Hall 'Challenges to the jurisdiction of the Court or the admissibility of as a case' in O Triffterer (ed) *Commentary on the Rome Statute: observers' notes, article by article* 412 - 413.
[65] *Muthaura* (n 46 above) para 37.
[66] *Muthaura* (n 46 above) para 39.
[67] n 8 above, art 19(4).
[68] CM De Vons 'A catalyst for justice? The International Court in Uganda, Kenya and the Democratic Republic of Congo', PhD Thesis, Leiden University, 2016 68.
[69] 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(1) *Cornell International Law* 1.
[69] n 8 above, art 19(2).
[70] n 8 above, art 19(2).

proceedings is understandable because it is naturally impossible to consult an accused who is yet to be identified.

On the flip side, a state enjoys participation from the situation stage, since states have the right of first preference or refusal in the Rome Statute complementarity system.[71] Article 19 admissibility challenges may encompass investigations (situation stage).[72] Article 19(11) empowers the Prosecutor to defer an investigation and to request a state to avail information on the status of the proceedings. In short, a case may not always be a concrete case as interpreted by the Court. A group of persons may be narrowed to individual persons beyond the situation stage, particularly during the confirmation of charges.

4.5.2 The pros and cons of the differentiation of situations and cases

Advantages

The different treatment of situations and cases has several advantages. First, the situation stage gives the Prosecutor time and flexibility before preparation for trial. Second, the situation stage enhances the chances of a credible conclusion by the Prosecutor flowing from the unlimited time available to examine a situation intensely. Third, the situation stage broadens the scope of examination for the Prosecutor. The Prosecutor is not required to identify specific suspects until the case stage. Fourth, the 'limited interference' nature of preliminary examinations reduces chances of potential political interference. Even the UNSC is precluded from requesting deferral of preliminary examinations.[73] Last, the low standard required for the Prosecutor to initiate an investigation makes authorisation by the PTC easier.

Disadvantages

The differentiation has several disadvantages. First, the duplication of preliminary examinations and investigations wastes considerable resources. An option is to conduct preliminary examinations and investigations concurrently and leave the Court

[71] L Yang 'Some critical remarks of the Rome Statute of the International Criminal Court' in Lee (ed) *States' responses to issues arising from the ICC Statute: constitutional, sovereignty, judicial cooperation and criminal law* (2005) 290.
[72] n 8 above, art 19(11).
[73] n 8 above, art 16.

to decide whether, based on the submission of investigation results, there is a sufficient basis to prosecute.

Second, different approaches in national jurisdictions and the ICC cause different interpretations.[74] Whereas the Court precedes investigations with preliminary examinations, most national jurisdictions do not conduct preliminary examinations. Because of preliminary examinations, the Prosecutor is given considerable time to weigh options from the situation stage. Undoubtedly, Kenya asked for additional information from the Court.

Third, information received by the Prosecutor before the start of a preliminary examination may contain the names of persons who will become subject of investigation and prosecution, thereby defeating the demarcation between a situation and a case when a case is situation-dependent. For instance, the Prosecutor received an envelope from Kofi Annan with the names of Kenyan suspects before an investigation was authorised by the PTC.[75] The same names were not shared with Kenya until at a late stage to facilitate the application of complementary through Kenyan national courts.[76]

Fourth, the Prosecutor may fail to identify the most responsible persons, yet the state may be able to do so. Owing to the *same person* and *same conduct* test, the Court may miss an opportunity to prosecute persons most responsible for atrocities. The state may assist in identifying the most responsible persons.

Last, the test for reasonable basis to proceed impugns the thoroughness of a preliminary examination and demonstrates a deficiency which can be cured by concurrent conduct of preliminary examinations and investigations. The outcome will not be limited to a reasonable basis to proceed with an investigation which is contentious, subjective and controversial. The unnecessary contention may be

[74] Yang (n 71 above) 289.
[75] OTP 'ICC Prosecutor receives sealed envelope from Kofi Annan on post-election violence in Kenya' 9 July 2009 http://www.icc-cpi.int/Pages/item.aspx?name=pr436 (accessed 16 August 2018).
[76] n 75 above.

avoided, as the Prosecutor's early engagements with a state and request for the authorisation of the PTC will be based on a weightier basis to proceed.[77]

4.5.3 Kenya's view on situations and cases

Kenya contested the approach of the Court in the application of different standards for situations and cases. It advocated for the application of the same standard in all stages of proceedings before the Court.[78] Kenya contended that the Court should have accepted that a state is not under obligation to investigate the same suspects as the Court.[79] As long as the state concentrates on persons of the same hierarchy, the Court lacks justification to intervene.[80] The interpretation of Kenya allows the Prosecutor to apply flexibility in the choice of cases and choices of forms of justice.[81] Since the OTP concedes in its prosecutorial policy that the Court cannot prosecute every person in a situation, the desire of the Prosecutor to prosecute the most responsible persons can still be fulfilled if persons who are equally responsible are prosecuted by the Prosecutor instead of the persons initially identified for prosecution.

In the Kenyan scenario, the Prosecutor was supposed to evaluate the extent to which the implicated persons were at the same level of responsibility. The goal to end impunity and violence in future elections could have been achieved while respecting Kenya's discretion to investigate and prosecute identified perpetrators.[82] In former ICC prosecutor, Luis Moreno Ocampo's own words, Kenya was to serve as an example to the whole world on the intolerance of violence and impunity.[83] By prosecuting equally responsible persons, Kenya could have demonstrated the advancement of the interests of victims. According to Tallgren:

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[77] RS Lee 'States' responses: issues and solutions' in Lee (ed) *States' responses to issues arising from the ICC Statute: constitutional, sovereignty, judicial cooperation and criminal law* (2005) 23.
[78] *Muthaura* (n 46 above) para 29.
[79] *Muthaura* (n 46 above) para 29; K Vaid 'What counts as state action under article 17 of the Rome Statute? Applying the ICC's complementarity test to non-criminal investigations by the United States into war crimes in Afghanistan' (2002) 44 I*nternational Law and Politics* 604 - 605.
[80] *The Prosecutor v Ruto et al* (30 May 2011) 01/09-01/11 ICC para 65.
[81] K Vaid 'What counts as state action under article 17 of the Rome Statute? Applying the ICC's complementarity test to non-criminal investigations by the United States into war crimes in Afghanistan' (2002) 44 I*nternational Law and Politics* 609 - 610.
[82] See WA Schabas *Unimaginable atrocities: justice, politics and rights at the war crimes tribunals* (2012) 91, proposing the need for the Prosecutor to seek political guidance in certain circumstances.
[83] J Makori 'Ocampo presses Kenya for justice' 5 November 2009 http://www.news.bbc.co.uk/2/hi/africa/8343843.stm (accessed 27 August 2018).

> A [n]ational decision not to proceed because of insufficient evidence or because prosecution would not serve the interest of justice would suffice. A national decision, not amounting to a conviction or acquittal, must be subject to the same criteria, the negligence of which lead to the application of the exception.[84]

4.5.4 International Criminal Court's view on situations and cases

The Prosecutor and the Court consistently argue that situations and cases should be treated differently.[85] As discussed above, a situation differs from a case in that the former consists of a general assessment of a cluster of persons, while the latter consists of specific persons whom the Court intends to prosecute. The separation of situations and cases encroaches on state discretion and ignores state priorities. The separation also makes the interpretation of the Rome Statute somehow uncertain because one must know the contextual environment to determine whether a stage falls under a situation or a case.

Considering that the Rome Statute applies to several states, clarity and certainty are important. Uncertainty breeds arguments on the proper application of complementarity. The Court practice needs to evolve to address the confusion created by the Court's formulation of the contextual interpretation of situations and cases. Ideally, the Court should avoid the application of the law using a situation or a case as the underlying basis for its reasoning.

Provisions for situations and cases can borrow strengths from each other. For instance, a sufficient basis to proceed at the situation level will lead to a more convincing argument on the admissibility of a case at a later stage. On the other hand, there is a need to narrow the 'hierarchy of persons' standard, and the gap between the findings of the Court and of a state. The gap was apparent when the ICC intervened in Kenya. It would have been interesting to see whether the ICC was to intervene based on complementarity, had the STK been established.

The STK was the recommended first option and may have excluded suspects who were later revealed by the ICC investigations. The dilemma for the Court could have been to gain national and international support to pursue the excluded suspects and

[84] I Tallgren 'Article 20: Ne bis in idem' in Triffterer (n 53 above) 431.
[85] *Muthaura* (n 46 above) paras 38 - 46.

override the discretion of the STK. The report of CIPEV only recommended the intervention of the ICC if the STK was not formed.[86] The STK was to possess an international appearance through the mixture of national and international staff,[87] further supporting the proposition that ICC intervention would have been unthinkable if the STK started and completed its work.

4.6 Dichotomy of investigations

Investigations are covered in parts 2 and 5 of the Rome Statute. The investigation stage follows a preliminary examination into a situation. The stage can either begin with the authorisation by the PTC in the case of *proprio motu* initiatives or independently, as in the case of state and UNSC referrals. Regardless of the trigger, an investigation is foundational to the issuance of summons to appear or warrants of arrests. Similarly, to the prosecution stage, the investigation stage determines the applicability of complementarity. The Court first considers whether a state is or has investigated or prosecuted a case before granting the Prosecutor permission to intervene.[88] The status of an investigation on the part of a state can catalyse the intervention of the ICC in a state's sovereign affairs or restrain the ICC. It is on this basis that this section intends to dissect the meaning of an investigation in the context of the Rome Statute.

4.6.1 Key provisions on investigations

Before delving into the controversy of the definition of the substance and scope of the investigation in the *Kenyatta* case, it is necessary to briefly examine the main provisions of the Rome Statute, which cover investigations. The analysis will enable a better understanding of the discussion that follows in subsequent paragraphs of this section.

Article 17 is protective of the national jurisdiction and is crafted skilfully to assume inadmissibility of cases before the ICC.[89] Article 17(a) highlights the general rule of

[86] Wameyo (n 39 above) 423.
[87] Wameyo (n 39 above) 428.
[88] n 8 above, art 17(1)(a).
[89] Art 17(1) states in part that a Court shall determine that a case is inadmissible where 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. Further, a case is inadmissible where the case has been investigated by a State which has jurisdiction over it and the State has decided not to

excluding the ICC when state action genuinely exists.[90] Article 17(b) covers the genuine decision of a state not to prosecute.

Article 19(2)(b) allows a state with jurisdiction to challenge the admissibility of a case based on national proceedings, either concluded or ongoing.

The PTC cannot authorise an investigation if a case is 'being' or 'has been' or 'is' investigated by a state. At face value, the use of the terms 'is' or 'being', juxtaposed with 'has been', suggests that an investigation must be ongoing (current) or concluded (past). However, the Rome Statute falls short in that it does not provide guidance on when an investigation is deemed to have begun. Does an investigation begin at the preparatory phase or when investigation results are tangible? Black's Law Dictionary defines an investigation as follows: To follow up step by step by patient inquiry or observation; to trace or track mentally; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry.[91]

The foregoing definition demonstrates that an investigation is a patient and structured process which happens when an investigator takes steps on the ground or mere observation (assessment); it involves tracing, searching, examination, inquiry, and collection of evidence or tracking. Therefore, an investigation is not limited to deployment on the ground but includes preparatory measures which contribute to results. Preparatory measures are key to genuine investigations envisaged by the Rome Statute. The measures may lead to credible investigation results. It may have been unhelpful and a panacea for sham investigations had Kenya investigated the suspects without legal or police reforms. The drafting history of the Rome Statute indicates that 'the Court was intended to operate in cases where there was no *prospect* of trial in national courts.'[92]

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prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

[90] PF Seils 'Making complementarity work: maximizing the limited role of the Prosecutor' in C Stahn & El Zeidy (eds) *The International Criminal Court and complementarity: from theory to practice* (2011) 1012.

[91] Black's Law Dictionary 956.

[92] SA Williams & WA Schabas 'Article 17: Issues of admissibility' in Triffterer (n 53 above) 607 (emphasis added).

In addition, article 15 presents two phases of an investigation, namely, initiation and commencement. The terms 'initiation' and 'commencement' arguably refer to one and the same concept. However, the context in which they are used shows that the terms refer to two different stages. The Prosecutor may 'initiate', not start investigations on his or her own initiative.[93] It is for purposes of a preliminary examination (preliminary investigation) that a Prosecutor receives and evaluates information before approaching the PTC. Before starting a full investigation, the Prosecutor presents the received and evaluated information for the PTC's consideration. In other words, *proprio motu* investigations are initiated when information is assessed by the Prosecutor at the preliminary examination stage and commence (start) when investigation authorisation is given by the PTC.

An investigation within the context of article 15(1) of the Rome Statute is factually a preliminary examination. The commencement and continuation of an investigation may be prohibited once the UNSC requests for a deferral of a situation,[94] an illustration that an investigation consists of many phases. The Court should consider all the different phases of an investigation, whether in situation or case stages, to adopt a broader definition of an investigation. A preliminary examination is equivalent to a preliminary investigation; hence, the definition and scope of investigations can be traced back to preparatory stages before the launching of a full investigation.

Since Kenya had an impression that investigating suspects in accordance with the same level of hierarchy sufficed,[95] a preferred option for the Court and Kenya was to first reconcile their differences. In the spirit of complementarity, the Court would have allowed Kenya to exercise its discretional powers to include or exclude the suspects identified by the Court. The risk of the exercise of primacy by the Court in the identification of suspects would be avoided.

A state that is undergoing legislative and other reforms must be considered at worst to have initiated investigations and at best to have commenced investigations.

[93] M Bergsmo & J Pejic 'Article 15: Prosecutor' in Triffterer (n 53 above) 730.
[94] n 8 above, art 16.
[95] *Muthaura* (n 46 above) para 27.

4.6.2 International Criminal Court interpretation of an 'investigation'

The view of the Court is that an investigation must be accompanied by detailed information on the concrete and ongoing steps taken by a state.[96] At the case stage, the identities of persons who are investigated must be availed by a state challenging the admissibility of a case.[97] An intention to investigate falls outside the scope of an investigation and accordingly fails the test in an admissibility challenge.[98] The Court's interpretation is a rubber stamp of the prosecutorial regulations that stipulate that existing facts should be used in assessing complementarity.[99] The standard is so high at the case stage such that a sufficient degree of specificity needs to accompany the admissibility challenge.[100]

Although according to the Court, the genuineness of an investigation is not an issue, a state must reveal the investigative steps taken at national level.[101] The approach requires results or outcomes of an investigation rather than preparatory or incomplete investigations. State procedures and strategies towards a full investigation are not considered in this approach, despite the challenge states may face in tackling politically sensitive issues.[102] This fundamentally affects peacebuilding before launching full-scale investigations.

The state approach may not always be expected to be the same as the one for the Court which already has legislative and institutional mechanisms in place.[103] An approach such as the one adopted in the later cases of *Simone Gbagbo* and *Saif Al-*

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[96] H Olàsolo 'The Prosecutor of the ICC before the initiation of investigations: a quasi-judicial or a political body? (2003) 3 *International Criminal Law Review* 87; *Muthaura* (n 46 above) para 49.
[97] R Rastan 'What is a case for the purpose of the Rome Statute' (2008) 19 *Criminal Law Forum* 441; H Olàsolo & EC Rojo 'The application of the principle of complementarity to the cecision of where to open an Investigation: the admissibility of situations' in Stahn & El Zeidy (eds) *The International Criminal Court and complementary: from theory to practice* (2011) 393 - 420; *Muthaura* (n 46 above) para 67.
[98] K Vaid 'What counts as state action under article 17 of the Rome Statute? Applying the ICC's complementarity test to non-criminal investigations by the United States into war crimes in Afghanistan' (2002) 44 I*nternational Law and Politics* 603 - 604; *Muthaura* (n 46 above) para 49.
[99] Regulations of the Office of the Prosecutor 29(4).
[100] *Muthaura* (n 46 above) para 61.
[101] *Muthaura* (n 46 above) para 40.
[102] LA Young 'Political complementarity and ICC's engagement in Darfur, Sudan' in *International criminal justice: the ICC and complementarity* (2014) 132; M Du Plessis 'Complimentarity: a working relationship between African states and the International Criminal Court' in Du Plessis (ed) *African Guide to International Criminal Justice* (2008) 137.
[103] P Jakob 'The principle of complementarity in the cases of the Sudanese nationals Ahmad Harun and Ali Kushayb before the International Criminal Court' (2008) 8 *International Criminal Law Review* 185–228.

Islam Gaddafi, if consistently applied by the Court, may help to clarify the scope of an investigation. In the *Gbagbo* case, the PTC clarified that the required evidence may extend to all material which proves the existence of investigation or prosecution.[104] The *Gaddafi* case added that this includes documents, guidance, reports and decisions of national authorities pertaining to domestic proceedings[105]

4.6.3 Kenya's interpretation of an 'investigation'

Kenya submitted that national investigations were underway and pleaded for more time to execute the national strategy.[106] States should be given more discretion in line with the principle of complementarity that favours domestic jurisdictions.[107] The pillar of Kenya's arguments was on the judicial and police reforms that had been taken or were being undertaken.[108] Limitations or shortcomings could be cured by sharing information in the possession of the Prosecutor.[109] Kenya also argued that an admissibility challenge is a process; hence, information can be submitted at any time.[110] The argument finds support in rule 84 of the Rules of Court which allows an investigation by the Prosecutor after the confirmation stage and any disclosure proceeding.[111]

4.7 Inaction and admissibility

4.7.1 Dissecting the element of inaction

The Rome Statute presumes that states are able and willing to genuinely invoke national proceedings.[112] The Rome Statute also accepts that a state may decide, in good faith, not to investigate or prosecute.[113] More focus should be placed on the

[104] *Prosecutor v Gbagbo* (11 December 2014) 02/11-01/12-47-Red ICC para 29.
[105] *Prosecutor v Gaddafi & Al-Senussi* (11 December 2014) 01/11-01/11-239 ICC para 29.
[106] *Muthaura* (n 46 above) *para* 71.
[107] *Muthaura* (n 46 above) *para* 43.
[108] C Alai 'Measured hope: positive complementarity and accountability for sexual crimes in Kenya' in *International criminal justice: the ICC and complementarity* (2014) 62 - 63; *Muthaura* (n 64 above) *para* 64.
[109] MM El Zeidy 'The principle of complementarity: a new machinery to implement international criminal law' (2002) 23 *Michigan Journal of International Law* 908 - 909.
[110] *Muthaura* (n 46 above) *para* 75.
[111] *Situation in the Democratic of Congo* (13 October 2006) 01/04-01/06-568 ICC paras 49 - 57.
[112] n 8 above, art 17(1)(a).
[113] n 8 above, art 17(1)(b).

motives rather than actions of a state that decides not to prosecute.[114] The 2003 OTP Policy Paper endorsed the assertion that inaction may be the most appropriate decision in certain circumstances.[115] As a general rule, cases are inadmissible before the Court unless a state has triggered admissibility through failure to investigate and prosecute.[116]

The limitation of the Court's intervention makes it mandatory for the Court to adopt a cautious approach before making admissibility determinations. The Court should exhaust all efforts to define inaction before it snatches jurisdiction from a state.

Reliance on 'inaction' at the expense of 'unwillingness' and 'inability' impacted on the application of complementarity in the *Kenyatta* case. In a bold decision, the Court found it unnecessary to consider the core terms of article 17, such as unwillingness, inability and genuineness. While the Court may be correct that inaction leads to automatic admissibility or uncontested admissibility,[117] it is important to refer to unwillingness or inability in discussing inaction because inaction does not exist in isolation. According to Schabas, 'even in a case of "uncontested admissibility", it remains legitimate to consider whether the state is itself willing and able to prosecute'.[118]

Whereas the unwillingness of national courts to effectively prosecute was predicted when the ICTY was created, the inability of national courts to effectively prosecute was predicted when the ICTR was created.[119] Inaction is a direct result of either unwillingness or inability to prosecute. The essence of a challenge to the admissibility of a case is that a state is willing and able to investigate or prosecute.[120]

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[114] WA Schabas & MM El Zeidy 'Article 17: issues of admissibility' in O Triffterer & K Ambos *Rome Statute of the International Criminal Court: a commentary* (2016) 796.
[115] OTP 'Paper on some policy issues before the Office of the Prosecutor' September 2003 http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25 60aa962ed8b6/143594/030905_policy_paper.pdf. (accessed 16 July 2017).
[116] n 8 above, art 17(5).
[117] 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* 601; B Broomhall *International justice and the International Criminal Court: between sovereignty and the rule of law* (2003) 91.
[118] WA Schabas *An introduction to the International Criminal Court* (2007) 181.
[119] J Trahan 'Is complementarity the right approach to the International Criminal Court's crime of aggression? Considering the problem of overzealous national prosecutions' (2012) 45 *Cornell International Law Journal* 582.
[120] n 8 above, art 19(2).

The Court held that the *Kenyatta* case was admissible based on a lack of judicial activity in Kenya,[121] despite the information provided by Kenya on the ongoing investigations. Judge Ušacka noted in a dissent that Kenya demonstrated the existence of national proceedings, including the investigations and allegations against one of the persons targeted by the ICC, Mr Ruto.[122] The reliance on inaction by the Court was somehow misplaced in view of the activity of Kenya.

The OTP's 2013 Policy Paper on Preliminary Examinations clearly provides guidelines on what constitutes inactivity in a case.[123] Factors to be considered include deficiencies in the legislative framework; laws which promote non-judicial approaches; bias toward persons with political clout; political will; and judicial capacity.[124] The Court mentioned the alleged focus on low-level perpetrators to justify the inactivity of Kenya. On the other hand, the Court denied Kenya's evidence in the possession of the Prosecutor, making it difficult to determine the intention of Kenya to ignore the investigation of persons identified by the Court.

The Court invented the consideration of inaction as a means of authorising automatic admissibility and to avoid at times the cumbersome process of determining unwillingness or inability.[125] Prior to Kenya, the Court often relied on the standard of inaction to alter state jurisdiction. The understanding of the Court is that when investigative or prosecutorial steps are invisible, states with jurisdiction are inactive. The additional element of inactivity has received both support and criticism from scholars. Conservatives maintain that the admissibility interpretation should be limited to unwillingness or inability to investigate or prosecute.[126] The conservative view advocates for non-intervention of the ICC on other grounds except the grounds expressly mentioned in the Rome Statute. On the other hand, liberals contend that the consideration of inaction is at the forefront of determining admissibility. The liberal view regards the consideration of unwillingness or inability as secondary, since it is

[121] *Muthaura* (n 46 above) *para* 40; *Prosecutor v Ruto* (30 August 2011) 01/09-01/11-307 ICC para 41.
[122] *The Prosecutor v Ruto & Sang* (20 September 2011) 01/09-01/11-336 ICC para 8.
[123] OTP 'Policy paper on preliminary examinations' November 2013 http://www.legal-tools.org/doc/acb906/ (accessed 28 July 2018).
[124] n 123 above.
[125] *Prosecutor v Chui* (6 July 2007) 01/04-01/07-262 ICC 21; *Prosecutor v Katanga* (5 November 2007) 01/04-01/07-55 ICC 20.
[126] HA Moy 'The International Criminal Court's arrest warrants and Uganda's Lord's Resistance Army: renewing the debate over amnesty and complementarity' (2006) 19 *Harvard Human Rights Journal* 273.

unnecessary once inaction is detected.[127] The Court has overwhelmingly and consistently endorsed the liberal view.

4.7.2 What if ability was considered?

Inability is assessed based on the effectiveness or availability of the national judicial system to conduct proceedings, the ability to obtain the accused or evidence, and a demonstrated ability to carry out proceedings.[128] Inability becomes mute when the readiness, resources and structural capabilities in the national legal system are unquestionable or progressively developing.[129] The national judicial system needs to be non-existent, or in a total or substantial collapse, among other requirements for the test to apply.

Had the PTC considered the inability of Kenya, it could have found it hard to authorise the investigation. None of the above assessments easily qualify as inability in the *Kenyatta* case. Possibly, the Court dodged the analysis to avoid the controversy that could have emerged had it authorised the investigation when it was inconclusive that Kenya lacked the ability to investigate or prosecute. Genuineness or intention to undertake national proceedings in future could also have given Kenya an edge by invoking positive complementarity to appeal for assistance in strengthening its national systems.

In the aftermath of the post-election violence, Kenya admitted that its criminal justice system needed reforms to effectively investigate and prosecute perpetrators.[130] At that point, Kenya could be said to have lacked the ability to undertake national proceedings. The position changed when Kenya started legislative reforms to infuse reforms into the national process. Riding on CIPEV recommendations, Kenya began by enacting the International Crimes Act (ICA) in 2008 to domesticate the Rome Statute.[131] The ICA authorised the prosecution of international crimes by the High Court of Kenya,[132] and

[127] M Benzing (n 117 above).
[128] n 8 above, art 17(3).
[129] KJ Heller 'A sentence-based theory of complementarity' (2011) 53 *Harvard International Law Journal* 208 - 209; n 8 above, art 17(3).
[130] Kenya National Assembly 'Official report on Constitution of Kenya (Amendment) Bill during the second reading' (2 December 2009).
[131] International Crimes Act (ICA).
[132] n 131 above, sec 8.

protection of victims and witnesses.[133] Kenya announced an intention to establish an International Crimes Division within the High Court.[134]

South Africa is one example regarding the potential of national courts to remind states of the impact of domestication. The ICC Act gives domestic courts powers to adjudicate the prosecution of war crimes, crimes against humanity and genocide.[135] The High Court of South Africa ordered the government to exercise jurisdiction over crimes committed in Zimbabwe, since South Africa is obliged under the Constitution and the ICC Act to investigate and prosecute international crimes 'as far as possible'.[136] Just like in this South African scenario, a strong international crimes legislation and competent judiciary may not be backed by the necessary political will.

Following the enactment of the ICA, another chapter to the ongoing reforms was added with the drafting of a new Constitution that commenced before the PTC authorised the investigation. The new Constitution was adopted in 2010, soon after the authorisation of an investigation. The Constitution empowered Kenya with competence to carry out national proceedings. The Constitution provides for strong mechanisms in the judiciary[137] and the police,[138] and enshrines a justiciable Bill of Rights.[139]

The strengthening of the Kenya National Human Rights and Equality Commission (KNHREC) enhanced the ability of Kenya to promote the attainment of justice and realisation of human rights. The KNHREC is a constitutional body, with powers to conduct investigations on human rights violations.[140] In light of the constitutional developments, Kenya has made strides in pursuit of democracy, human rights and accountability. The Constitution of Kenya has been described as 'revolutionary' and 'progressive'.[141]

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[133] n 131 above, sec 105.
[134] International Centre for Transitional Justice 'Prosecuting international and other serious crimes in Kenya' April 2013 http://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf (accessed 30 July 2018).
[135] Implementation of the Rome Statute of the International Criminal Court Act (ICC Act).
[136] *Southern Africa Litigation Centre and Another v National Director of Public Prosecutions and Others* 2012 (3) All SA 21 (HC).
[137] Constitution of Kenya (Constitution) section 160(1).
[138] n 135 above, sec 244.
[139] n 135 above, sec 23.
[140] n 135 above, sec 252.
[141] GM Musila 'Testing two standards of compliance: a modest proposal on the adjudication of positive socio-economic rights under the new constitution' in J Biegon & GM Musila (eds) *Judicial enforcement of socio-economic rights under the new constitution: challenges and opportunities for Kenya* (2011) 59.

The KNHREC is an independent institution which exerts checks and balances on the government. The promulgation of the new Constitution in Kenya can be likened to the stance adopted by South Africa when the country made a transition from apartheid to democracy. South Africa adopted the 1996 Constitution in response to the oppressive social, economic, legal and political history occasioned by an apartheid system.[142] The transformative nature of the South African Constitution enhances fundamental human rights.[143]

In the *Kenyatta* case, the Court should have considered that Kenya was making significant progress through the enactment of constitutional reforms which acknowledged past injustices and the historical context in the country. However, the Court could have been justified in overlooking the steps taken by Kenya if Kenya was moving towards 'abusive' or 'sham' constitutionalism. Abusive constitutionalism depicts a state which makes constitutional changes aimed at closing the democratic space for citizens.[144] Sham constitutions give governments excessive powers which are often exercised to quash human rights.[145]

The Kenya National Commission on Human Rights (KNCHR), predecessor to the KNHREC, supported the intervention of the ICC in Kenya in 2008.[146] The KNCHR did not utilise its first Strategic Plan of 2003 to 2008 to encourage the strengthening of institutional capacity to effectively and efficiently deliver on human rights.[147] Also, the KNHREC did not utilise the Strategic Plan of 2009 to 2013 developed by its predecessor and lost the opportunity to activate a strong administration of justice mechanism.[148] As a result, the ability of Kenya to investigate and prosecute post-election violent crimes was not fully explored. Potential accountability mechanisms at

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[142] P De Vos 'Between promise and practice: constitutionalism in South Africa more than twenty years after the advent of democracy' in M Adams *et al* (eds) *Constitutionalism and the rule of law: bridging idealism and realism* (2017) 229.
[143] K Klare 'Legal culture and transformative constitutionalism' *South African Journal on Human Rights* 14 (1998) 146; M Pieterse 'What do we mean when we talk about transformative constitutionalism?' *South African Public Law* 20 (2005) 155*;* D Moseneke 'Transformative constitutionalism: its implications for the law of contract' *Stellenbosch Law Review* 20 (2009) 3*.*
[144] D Landau 'Abusive constitutionalism' in M Tushnet (ed) *Comparative constitutional law: basic issues* (2017) 580.
[145] Q Zhang 'A constitution without constitutionalism? The paths of constitutional development in China' (2010) 8 *International Journal of Constitutional Law* 952.
[146] Kenya National Commission on Human Rights 'Annual report for the 2008 - 2009 Financial year' 9.
[147] BR Dinokopila & RI Murangiri 'The Kenya National Commission on Human Rights under the 2010 constitutional dispensation' (2018) 26 *African Journal of International and Comparative Law* 209 - 210.
[148] Dinokopila & Murangiri (n 144 above) 210.

the domestic level were overlooked to pave the way for the ICC. As an important institution and a check on state human rights obligations, the KNHREC could also have pressured the government to conduct transparent domestic proceedings.[149]

4.7.3 What if willingness was considered?

Unwillingness is assessed based on sham or biased national proceedings, unjustifiable delays in the proceedings and interference with decisions of courts.[150] Following controversial debates at the Rome Statute negotiations, the above three alternative criteria were adopted as an exhaustive list for the definition of unwillingness.[151] The notion of unwillingness mostly refers to the political will to investigate or prosecute, and the authenticity of national proceedings. The existence of willingness is dependent on politics.[152]

Proceedings at the national level should be diligently conducted if a state wants to pass the willingness test.[153] The Court is empowered to evaluate the credibility of national proceedings to end impunity which may result from procedural and legislative defects.[154] The Court should holistically evaluate article 17 to evaluate admissibility without transforming itself into an appellate court.[155]

Arguably, the Court missed a great opportunity to justify the admissibility of the *Kenyatta* case by neglecting the analysis of unwillingness. Kenya was active and evidently demonstrated an ability to investigate persons identified by the ICC through the legislative and police reforms that were progressively enacted. Nevertheless, serious doubt remained on whether the country was willing to effectively investigate the alleged perpetrators. The mere existence of national proceedings is not enough. A

[149] Kenya National Commission on Human Rights Act section 8(f).
[150] n 8 above, art 17(2).
[151] H Olásolo *The triggering procedure of the International Criminal Court* (2005) 150.
[152] Y Lijun 'On the principle of complementarity in the ICC Statute of the International Criminal Court' (2005) 4 *Chinese Journal of International Law* 121 - 123.
[153] *Prosecutor v Tadić* (2 October 1995) 94-1-AR72 IT; KJ Heller 'A sentence-based theory of complementarity' (2011) 53 *Harvard International Law Journal* 208.
[154] AKA Greenawalt 'Justice without politics? Prosecutorial discretion and the International Criminal Court' (2007) 39 *New York University Journal of International Law and Politics* 585 - 605.
[155] JT Holmes 'Jurisdiction and admissibility' in RS Lee (ed) *International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 330.

state should show that the quality and fairness of the proceedings comply with due process and international law standards.[156]

Kenya displayed reluctance to try perpetrators identified by the ICC and refused to sufficiently co-operate with the Court. Kenya also threatened to withdraw its ICC membership.[157] The strength of the political will to implement the ICA was put to the test when Kenya was presented with an opportunity to enforce a High Court decision to arrest Omar Al Bashir on Kenyan territory on 27 August 2010.[158] Kenya refused to arrest Bashir, an indication that it lacked the political will to prosecute or facilitate the prosecution of certain categories of persons accused of atrocities. The failure to prosecute because of the desire to protect an alleged perpetrator is inconsistent with the fight against impunity.

A case of unjustified delay may have been imputed on Kenya which had over a year from early 2008 to late 2009 to deal with the case involving the identified persons. Kenya made little progress.[159] The reluctance was shown during the ICC proceedings and through the criticism of the ICC by prominent politicians in Kenya. Reliance on unwillingness could have given legitimacy to the Prosecutor's case, particularly in the face of widespread criticism in Africa. The Prosecutor could also have attained justification to dismiss the alternative regional mechanisms proposed by Kenya based on their largely unsatisfactory record to address human rights violations on the continent.

The Prosecutor had the space to make sustainable and convincing submissions based on express provisions in the Rome Statute. Kenya would have been left with an insurmountable task to rebut convincing prosecutorial arguments. Positive complementarity could not have helped Kenya's admissibility challenge when unwillingness was proven.[160] In future cases, it is advisable for the Prosecutor to rely

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[156] Olásolo (n 151 above) 151.
[157] EO Asaala 'Prosecuting crimes related to the 2007 post-election violence in Kenyan courts: issues and challenges' in HJ Van der Merwe & G Kemp *International Criminal Justice in Africa* (2016) 42.
[158] *The Kenya Section of the International Commission of Jurists v Attorney General & Other* (2011) eKLR.
[159] ICC 'The situation of the Republic of Kenya assigned to Pre-Trial Chamber II' 6 November 2009 http://www.icc-cpi.int/Pages/item.aspx?name=pr473 (accessed 30 July 2018).
[160] C Alai 'Measured hope: positive complementarity and accountability for sexual violence crimes in Kenya' in Kenyan Section of International Commission of Jurists *International criminal justice: The ICC and complementarity* (2014) 37.

on inaction within the context of both inability and unwillingness of a state to investigate and prosecute perpetrators of international crimes.

4.7.4 What if genuineness was considered?

The adjective 'genuinely' is affixed to the words 'unwilling or unable' in article 17 of the Rome Statute. Neither the Rome Statute nor its preparatory documents provide guidance on the meaning of 'genuine' proceedings.[161] However, the term refers to circumstances in which things are truly what they purport to be, and they are not false, forged, fictitious, simulated, spurious or counterfeit.[162] A state is required to conduct its proceedings in good faith, without pretence or insincerity.[163] In other words, the intention of a state forms the basis of genuineness.

The term 'genuine' was inserted in the Rome Statute after the negotiators dropped the terms 'effectively', 'diligently' and 'efficiently'.[164] The objective was to narrow the leverage of the Court in judging certain aspects of national proceedings.[165] In interpreting genuineness, every attempt should be made to defer cases to a state to conduct the proceedings in good faith.[166] Some scholars prefer a lower standard in interpreting genuineness and argue that national proceedings can be genuine even in the absence of due process.[167] The Prosecutor must demonstrate a lack of genuineness of national proceedings.[168] The Court determines the lack of genuineness after assessment of the Prosecutor's submissions. Had the Court considered genuineness in the *Kenyatta* case, it could have prevented the unprecedented shifting of the burden of proof from the Prosecutor to Kenya.

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[161] JT Holmes 'Complementarity: national courts versus the ICC' in A Cassese *et al* (eds) *The Rome Statute of the International Criminal Court: a commentary* (2002) 674.
[162] n 91 above, 816.
[163] Holmes (n 161 above) 266.
[164] JT Holmes *The International Criminal Court: the making of the Rome Statute - issues, negotiations, results* (1999) 41 - 49.
[165] Holmes (n 161 above).
[166] SA Williams 'Article 17: issues of admissibility' in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: observers' notes: article by article* (1999) 386.
[167] See for example 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*.
[168] NN Jurdi *The International Criminal Court and national courts: a contentious relationship* (2011) 6.

4.8 Burden of proof and evidentiary requirements

In the *Kenyatta* case, the Court appraised four standards of evidence as applicable to different stages of proceedings. The 'reasonable basis to believe' standard is the lowest evidentiary burden.[169] The standard applies to circumstances in which the Prosecutor is yet to get investigative powers. The duty of the Prosecutor is to show the PTC that a reasonable basis exists for the authorisation of an investigation. The Prosecutor does not need concrete, tangible or conclusive evidence at this stage of the proceedings. That which can be reasonably assumed, believed, suspected and predicted will suffice for the Prosecutor's submissions to be accepted.

Closest to the 'reasonable basis to believe' standard is the 'reasonable grounds to believe' standard found in article 58 of the Rome Statute. The 'reasonable grounds to believe' standard applies at the issuance of warrant of arrest or summons to appear stage.[170] Unlike the preliminary examination stage that majors on the commission of crimes within a particular context, the warrant of arrest or summons stage majors on the criminal responsibility of an individual.[171] A reasonable basis to believe gives the Prosecutor flexibility to leave the room open for other possibilities that may exist alongside the preliminary conclusion.[172] Article 61(7) of the Rome Statute requires 'substantial grounds to believe' in the confirmation of charges. Finally, 'proof beyond reasonable doubt' is required to convict an accused person.[173]

4.8.1 Burden of proof

The Rome Statute allows a state or an accused person to make an admissibility challenge.[174] The Court's demand for Kenya to back up its admissibility challenge with concrete evidence sparked fierce debate, particularly because an admissibility challenge should be accompanied by significant facts or evidence.[175] The Prosecutor can request a review for an inadmissibility decision.[176] In the *Kenyatta* case, the Court

[169] n 55 above, paras 27 - 31.
[170] n 55 above, para 29.
[171] n 55 above, para 29.
[172] n 55 above, para 33.
[173] n 55 above, para 28.
[174] n 8 above, art 19(2).
[175] n 8 above, art 18(7).
[176] n 8 above, art 19(10).

held that a party challenging the admissibility of a case bears the burden to prove that the case is inadmissible.[177] The Court maintained the position in the Libyan situation.[178]

A party that challenges admissibility should provide supporting documents or evidence. However, there is no clear guidance on whether merely producing documents suffices as the disclosure of evidence or whether one needs to prove inadmissibility in the process. Prior to the *Kenyatta* case, the understanding was that the Prosecutor bears a burden of proof.[179] The *Kenyatta* case altered the rigidity of the position and established a new standard which imposes a responsibility on a challenger of admissibility to prove that a case is inadmissible.[180]

The Rome Statute and the Court's Rules of Procedure and Evidence provide some guidance on the bearers of the onus to prove (in)admissibility. Article 67(1)(i) of the Rome Statute and rule 63 of the Rules of Procedure and Evidence provide the most relevant guidance. Article 67 is on the submission of evidence and indicates who bears proof or any onus of rebuttal. Article 67 is placed under the trial section of the Rome Statute, thereby raising questions on whether it is only applicable at the later stages of the proceedings when, for instance, the Prosecutor needs to prove guilt beyond any reasonable doubt. Rule 63 fills the *lacuna* by establishing a link between article 67 and rule 63.

Rule 63 promotes an interpretation that acknowledges the Rome Statute as a multilateral treaty governed by the customary rules of interpretation embodied in the Vienna Convention on the Law of Treaties. Articles 31 and 32 of the Vienna Convention allow an interpretation that encompasses the object and purpose of a treaty. Rule 63 applies to proceedings before all Chambers. Arguably, article 67(1)(i) applies to proceedings before all ICC Chambers, although it is placed under the trial section of the Rome Statute.

The Court's decision in the *Kenyatta* case was made pursuant to a deliberate disregard or oversight of the statutory provisions of the Court. The Court may need to revisit its practice to conform it to the Rome Statute because a state does not need to establish

[177] *Ruto et al* (n 122 above) paras 61 & 83.
[178] *Prosecutor v Gaddafi & Al-Senussi* (31 May 2013) 01/11-01/11 ICC para 52.
[179] Spilman (n 3 above) 15.
[180] *Muthaura* (n 46 above) para 61.

inadmissibility. The Rome Statute already presumes inadmissibility. The onus is on the Prosecutor to rebut the presumption of inadmissibility. The Prosecutor conducts preliminary examinations or investigations to determine whether a situation is ripe for intervention and to determine a state's procedures.[181] A thorough process results not only in the Prosecutor considering the existence of a reasonable basis to proceed but also on the conclusion about the genuineness of a state's ability or willingness.[182]

A warrant of arrest can only be granted if it contains evidence which shows reasonable grounds that crimes were committed and the necessity to bring the person before the Court.[183] Thus, the Prosecutor bears the burden of proof. At the confirmation of charges, the Prosecutor shall support alleged charges with sufficient evidence.[184] The accused will only be convicted if the Prosecutor proves guilt beyond reasonable doubt.[185] With all the evidentiary burdens on the Prosecutor, the Court has surprisingly interpreted the submission of information or evidence or observations by a state insufficient if not accompanied with proof of the adequacy of such evidence.

4.8.2 Fair trials and burden of evidence

International criminal tribunals often strive for legitimacy and credibility, as their performance is scrutinised globally.[186] The first Chief Prosecutor for the ICTY and the ICTR, Richard Goldstone, once remarked, 'Whether there are convictions or whether there are acquittals will not be the yardstick of the ICTY. The measure is going to be the fairness of the proceedings….'[187] For the ICC, the aim is to end impunity and at the same time deliver justice in a fair, independent and impartial manner.[188]

The Rome Statute has a high standard to prevent unjustified trumping of an accused's rights. The Court primarily considers the Rome Statute, the Elements of Crimes, the Rules of Evidence and Procedure, and applicable treaties, principles and rules of international law to give effect to the rights.[189] The OTP developed the Strategic Plan

[181] Spilman (n 3 above) 14.
[182] n 8 above, art 53(1).
[183] n 8 above, art 58(2).
[184] n 8 above, art 61(5).
[185] n 8 above, art 66.
[186] JK Stewart *Fair trial rights under the Rome Statute from a prosecution perspective* (2014).
[187] MS Ellis 'Achieving justice before the International War Crimes Tribunal: challenges for the Defense Counsel' (1997) 7 *Duke Journal of Comparative and International Law* 519.
[188] n 8 above, Preamble paras 5 & 7.
[189] n 8 above, art 21.

2012-2015 to cement the preservation of fair trials, among other objectives. Through the Plan, the OTP committed to carry out its activities with due regard to human rights, due processes and fair trial.[190]

Article 67 of the Rome Statute protects the accused from bearing the burden of proof or any onus of rebuttal.[191] Further, the rights of the accused including fair trial should be respected in terms of article 64(2). In the Libyan situation, the Court linked admissibility with fair trials.[192] Libya's ability to guarantee the rights of the accused was scrutinised based on its criminal justice system and assurances for fair trial.[193] The Prosecutor submitted that the accused was in danger of prosecution without due diligence.[194] The Court made various fair trial considerations in the light of Libya's laws and international human rights instruments.[195]

The Court negatively impacts the accused's right to a fair trial when the burden of proof is transferred to a state. The burden of proof should remain with the Prosecutor in all stages of proceedings before the Court. Otherwise the Court will risk creating scenarios that it endeavours to prevent, such as 'sham' proceedings. The Court needs to guard against the assertion that international criminal tribunals pay little attention to the rights of the accused. The Court should assess the evidentiary burden in conjunction with the need to preserve fair trials.[196]

4.9 Substantially the same person

4.9.1 What is in the term 'substantial'?

The term 'substantial' is commonly used by the Court in matters in which particular standards apply on a certain issue. The Court has created its own standards that are subsequently amended and interpreted in different ways. The term substantial is defined as 'of real worth and importance; of considerable value; valuable'.[197] The term

[190] *Prosecutor v Kenyatta* (31 May 2013) 01/09-02/11 ICC paras 11 - 17.
[191] n 8 above, art 67(1)(i).
[192] *Gaddafi & Al-Senussi* (n 178 above).
[193] *Gaddafi & Al-Senussi* (n 178 above) paras 31 & 32.
[194] *Gaddafi & Al-Senussi* (n 178 above) para 93.
[195] *Gaddafi & Al-Senussi* (n 178 above) paras 218 & 271.
[196] JK Cogan 'International criminal courts and fair trials: difficulties and prospects' (2002) 27 *Yale Journal of International Law* 112.
[197] n 91 above, 1597.

denotes that to a greater or significant extent essential parts are covered.[198] The term has been used to define the extent of the state's co-operation with the Court, the weight of evidence presented and elements of crimes preferred by the Court or state.

The Court uses the term when a higher standard is required in a case. A mere action by a state in response to issues is deemed inadequate under the circumstances. The objective is to prevent shallow or half-hearted investigations and prosecutions by a state. The Court evaluates a state's willingness and ability in comparison with the standard set by the Court.

The substantial standard usually comes into play when a state takes some action which does not entirely convince the Court. The subjective nature of the term leads to controversy due to differences in the threshold of expectations between the Court and a state.[199] The anomaly can be cured by reconciling the different thresholds through, for instance, giving a state a broader discretion to define the parameters of its action. The prosecutorial policy can be read together with state policy to find the middle ground on the substantiality of state action.

4.9.2 The two-fold test

The Court has consistently held that for a case to be inadmissible, state action should encompass the same conduct and the same person under the focus of the Court.[200] The *'same person* and *same conduct'* test is often criticised because it disregards the contextual or circumstantial nature of different cases.[201] The test may also place a high standard which a state may not meet due to deficiencies of resources and information. This test was first used in the case of *Lubanga*[202] and robustly argued in the *Kenyatta* case. In the *Kenyatta* case, the Court addressed the same person component for the first time.[203] The bone of contention was the meaning of a 'case' and of a 'person'.

[198] Concise Oxford English Dictionary 1438.
[199] *Situation in Libya* (23 July 2013) 01/11-01/11 ICC para 48.
[200] *Prosecutor v Harun & Kushayb* (27 April 2007) 02/05-01/07-1-Corr ICC paras 21 & 24; *Gbagbo* (n 102 above) paras 34 & 40.
[201] HK John 'A sentence-based theory of complementarity' (2012) 53 *Harvard International Law Journal* 239; C Stahn 'One step forward, two steps back? Second thoughts on a sentence-based theory of complementarity' (2012) 53 *Harvard International Law Journal Online* 189.
[202] *Prosecutor v Lubanga* (9 March 2006) 01/04-01/06-08 ICC para 31.
[203] n 55 above, para 48.

The Court viewed the case as specific and concrete with identified persons, while Kenya argued that the Court is yet to authoritatively define the term.[204] The Court defined a person as an individual identified for prosecution, whereas Kenya viewed a person as belonging to a group of persons.[205] Kenya believed in a hierarchical or representative approach to prosecutions, as opposed to an individual-specific approach to prosecutions. The view is not far-fetched and finds a basis in the jurisprudence of most international criminal tribunals.

The Court developed the interpretation of the same conduct component of the test. In its early practice, the Court adopted a strict approach which required a state to show that it was investigating or prosecuting the same conduct. The Court required proceedings in a state to reflect not only the prosecution of international crime(s) under the Rome Statute but also the definitions as embodied in the Rome Statute.[206]

After some time, the Court realised that it was drifting towards primacy, as it is not always possible for a state to investigate or prosecute the same crimes pursued by the Court. The realisation led to the modification of the same conduct component. Resultantly, the Court accepted the 'substantially same conduct' approach in the *Ruto et al* and *Saif Al-Islam Gaddafi* cases.[207] Despite the modification, the Court is yet to appreciate the inadmissibility of cases when 'different conduct' state proceedings offer a stronger liability or punishment for the accused.[208] Also, the Court is yet to modify the same person component of the test.

The modification of the same conduct component opens room to debate the modification of the same person component of the test, since in the context of the ICC, a 'case' comprises both crimes (conduct) and perpetrators (persons). The modification may lead the Court to appreciate investigations or prosecutions in accordance with the same hierarchy of persons. Such a scenario offers a likely advantage for states to try military and non-military commanders who bear more responsibility than persons

[204] *Ruto et al* (n 122 above) para 54.
[205] *Ruto et al* (n 122 above) para 29.
[206] M Konforta & MM Vajda 'The principle of complementarity in the jurisprudence of the ICC' (2014) 1 *German Journal of Legal Education* 15 - 18.
[207] *Ruto et al* (n 122 above) para 39; *Prosecutor v Gaddafi & Al-Hussein* (31 May 2013) 01/11-01-11-344 ICC paras 73 &77.
[208] AJ Stein 'Reforming the sentencing regime for the most serious crimes of concern: the International Criminal Court through the lens of the Lubanga trial' (2014) 36 *Brooklyn Journal of International Law* 557.

preferred by the Court. In future cases, the Court should consider a comparative assessment of the persons presented by a state and those under the focus of the Court. If the persons under the focus of the state bear a relatively similar or more responsibility than those preferred by the Court, an admissibility challenge by a state should succeed.

4.9.3 Case or person selection

International criminal tribunals often deal with cases involving low-level to high-level perpetrators. Tribunals based on complementarity do not prosecute all or most crimes like domestic courts.[209] Prosecutorial discretion is exercised to limit cases tried by international tribunals.[210] Resource constraints, sharing of burden between the tribunals and states, and the need to expedite trials lead tribunals to prioritise crimes and perpetrators.[211] The prioritisation and selection process is challenging due to several factors which encompass political, ethnic, geographical and hierarchical considerations.[212]

The policy of the OTP changes periodically to outline the priorities of the Prosecutor at a given time. In the early years of the Court, the Prosecutor mostly targeted persons bearing the greatest responsibility for international crimes. The 2012-2015 Strategic Plan refined the Court's approach to include middle-level perpetrators.[213] The OTP policy shows that the Prosecutor can independently and in consultation with states exercise flexibility in crafting a selection strategy. The Prosecutor is guided by the gravity of the offences, the degree of responsibility and potential charges, and crimes that have traditionally been under-prosecuted.[214]

Other international criminal tribunals have also prioritised crimes and perpetrators. The SCSL focused on the most responsible. Cambodia prioritised senior leaders, whereas

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[209] Schabas (n 118 above) 159.
[210] 'Statement by Justice Louise to the Preparatory Committee on the Establishment of an International Criminal Court, 8 December 1997' 7 - 8; Schabas (n 118 above) 159.
[211] See for example the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, as amended on 6 April 2004, rule 28 (A).
[212] M Bergsmo *et al* 'The backlog of core international crimes case files in Bosnia and Herzegovina' (2009) 3 *Forum for International Criminal and Humanitarian Law* 70.
[213] OTP 'Strategic plan June 2012 - 2015' 11 October 2013 http://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf (accessed 21 August 2018).
[214] OTP 'Policy paper on case selection and prioritisation' 15 September 2016 http://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf (accessed 21 August 2018).

the initial policy of the ICTY and ICTR was based on the position of the person, serious violations, policy and practical considerations.[215] The ICTY and ICTR considered the importance of not jeopardising inter-ethnic reconciliation and regional equity in the selection process.[216] The strategy of the ICTY and ICTR was later revised to implement the completion strategy that required more deferrals to Yugoslavia and Rwanda under rule 11*bis*.[217]

With a change in strategy, the ICTR held the contribution of African regional mechanisms to international criminal justice in high esteem. The ICTR turned to Rwanda and the African Commission for the finalisation of cases referred by the tribunal. In the opinion of the ICTR, the African Commission possessed requisite competence to monitor trials prosecuted by Rwanda.[218] In this regard, the ICTR assisted the African Commission in monitoring guidelines, as demonstrated in the *Prosecutor v Uwinkindi* (*Uwinkindi* referral).[219] Therefore, the ICTR created a cooperative model where a state, international criminal tribunal and African regional mechanism were party to, or displayed interest in a case.

Notwithstanding practical advantages associated with the selection of cases, scholars criticised the criteria of selecting crimes and persons based on geographical or ethnic considerations. Scholars argue that a prosecutor steps out of responsibility when he or she is motivated partly by the affiliation of suspects instead of the role of perpetrators.[220]

4.9.4 Hierarchical considerations in the Kenyatta case

The ICTY raised alarm on the selection of senior leaders and individuals based on their positions or functions in a relevant hierarchy.[221] Previously, the ICC identified with the

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[215] C Angermaier 'Case selection and prioritization criteria in the work of the Tribunal of the Former Yugoslavia' in M Bergsmo (ed) *Criteria for prioritizing and selecting core international crimes cases* (2010) 27 - 28.
[216] A Obote-Odora 'Case selection and prioritization criteria at the International Criminal Tribunal for Rwanda' in Bergsmo (n 215 above) 56.
[217] KJ Heller 'Completion strategies' (2009) http://www.ipp.ghum.kuleuven.be/publications/heller.pdf (accessed 21 August 2018).
[218] See for example *Prosecutor v Munyakazi* (18 July 2008) ICTR-97-36-R11 *bis* para 30.
[219] *Prosecutor v Uwinkindi* (28 June 2011) ICTR-2001-75-R11*bis* paras 209 & 212-213.
[220] See for example I Simonovic 'The role of the ICTY in the development of international criminal adjudication' (1999) 23 *Fordham International Law Journal* 445.
[221] S Brammertz 'The Interaction between international and national criminal jurisdictions: developments at the ICTY ' in Bergsmo (n 215 above) (ed) 249.

prioritisation of senior leaders, although the Court has not extensively demarcated persons in view of the scope of same hierarchy.

The *Kenyatta* case called for an assessment of what constitute persons in the same level of hierarchy. Kenyatta was an indirect co-perpetrator with subordinates and possibly those at the same level of hierarchy.[222] At the situation stage, the Court had no problem with hierarchical considerations.[223] It is at the case stage when the Court has raised dissatisfaction with certain categorisations.[224]

In the *Kenyatta* case, two considerations emerged on the view of the Court and Kenya on the application of the same level of hierarchy test. Both considerations are based on Kenyatta's position as a superior or non-military commander. First, the application of superior responsibility has a lower standard under the Rome Statute.[225] While article 28(1) of the Rome Statute requires military commanders to know or to predict the commission of crimes by subordinates, article 28(2) of the Rome Statute applies a lower standard by only expecting that the civilian superior knew or ignored information on the commission of crimes by subordinates.

Complications arise when a state identifies mostly superior actors, *in lieu* of potential military perpetrators, with the aim of giving effect to the doctrine of superior responsibility to the greatest extent possible. Will the Court discourage national proceedings claiming the suspects are different from those identified by the Court, or will the Court embrace the prosecution of superiors who will normally evade justice at the national level? Ideally, the Court should accept the selection of cases by a state and encourage the state to broaden its horizon to include other suspects who bear the most responsibility. By putting the military and non-military commanders at the same level of hierarchy, the superior responsibility standard is raised, thereby auguring well with the objective to end impunity.

Kenyatta was charged with crimes against humanity. Crimes against humanity entail widespread and systematic attacks against civilian populations.[226] The attacks may

[222] *Prosecutor v Kenyatta et al* (29 January 2012) 01/09-02/11 ICC.
[223] *Ruto et al* (n 122 above) para 44.
[224] *Ruto et al* (n 122 above) para 44.
[225] JA Williamson 'Some considerations on command responsibility and criminal liability' (2008) 90 *International Review of the Red Cross* 309.
[226] n 8 above, art 7(1).

also be part of a state or organisational policy.[227] In the *Tadić* case, the term 'policy' was used to explain collective, as opposed to 'isolated, random acts of individuals'.[228] The explanation resonated with the 1996 ILC Draft Code that viewed an attack as 'instigated or directed by a government or by any organisation or group'.[229] Crimes against humanity differ from common crimes, as the former constitute the policy element.[230] Cassese contends that members of joint common enterprise may operate at the same level or form part of a hierarchically constituted organisation or structure.[231] Therefore, in terms of the Rome Statute, Kenyatta either initiated or implemented a state or organisational policy as a senior government official.

When the Prosecutor chose Kenya for investigation and prosecution, the Prosecutor wanted to make Kenya an example of the outcomes of inaction by a state which is expected to address impunity.[232] The Prosecutor also wanted to break the culture of electoral violence in Kenya.[233] The Prosecutor aimed to dismantle a policy that authorised and institutionalised violence and promoted impunity for decades.

The conduct of perpetrators is often co-ordinated to carry out a widespread and systematic attack against the civilian population.[234] Since it is not always possible to gather evidence for every aspect of the attack, including specific persons who carry each attack, individual conduct can be fitted within a criminal scheme of an established hierarchy.[235] Arguably, a number of persons carried or facilitated the accomplishment of the policy, not only in the 2007 to 2008 violence but dating back to 1963. Hence, the investigation of the CIPEV encompassed violent acts from independence.[236]

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[227] n 8 above, art 7(2)(a.
[228] *Prosecutor v Tadić* (7 May 1997) IT-94-1-T paras 653 & 655.
[229] ILC 'Draft code of crimes against the peace and security of mankind' (1996) 2 *Yearbook of International Law Commission* 47.
[230] GJA Knoops *An introduction to the law of international criminal tribunals: a comparative study* (2003) 37.
[231] A Cassese International criminal law (2008) 209.
[232] OTP 'ICC Prosecutor: Kenya can be an example to the world' 18 September 2009 http://www.icc-cpi.int/Pages/item.aspx?name=pr452 (accessed 21 August 2018).
[233] n 232 above.
[234] Knoops (n 230 above) 37.
[235] *Prosecutor v Karadžić & Mladić* (25 July 1995) IT-95-5-1.
[236] Wameyo (n 39 above) 419.

The Prosecutor was spoilt for choice on the number of persons who were part of the policy. Arguably, the Prosecutor should have considered persons in the same level of hierarchy from a list of suspects.

International crimes are predominantly committed through direct or indirect governmental or organisational authority.[237] A number of superiors may exercise effective control and therefore are likely to be implicated for crimes committed by subordinates.[238] In a prosecutorial policy that aims to identify few superiors or commanders for prosecution, the selection process can be done within the ambit of persons at the same level of hierarchy. Just like the Prosecutor is free to exercise discretion on preferred persons, a state should also be allowed to exercise discretion in choosing persons in the hierarchy.

The Court practice must reflect the '*substantially same persons*' test, where appropriate. This is not to exonerate certain persons from responsibility but to show that when the need is to address a policy or when equally responsible persons exist, a sample of individuals will suffice. If the persons are at the same level of hierarchy, preferred persons are of little relevance.

The discussion that follows examines examples from the ICTY and the ICC to substantiate the interpretation of superior command responsibility and ensuing prosecution in the context of a policy.

4.9.5 Joint Criminal Enterprise in the International Criminal Tribunal for the former Yugoslavia jurisprudence

In the *Čelebići* case, the ICTY laid a foundation for the 'effective control' or 'material ability' test which entails the responsibility of commanders or superiors for acts committed by subordinates. Responsibility can be imputed if the person exercised effective control over the subordinates and had the ability to prevent or punish the

[237] OC Imoedemhe 'The complementarity regime of the International Criminal Court: national implementation in Africa' (2017) 10.
[238] *Prosecutor v Aleksovski* (25 June 1999) IT-95-14/I-T para 106; *Prosecutor v Blaškić* (3 March 2000) IT-95-14-T para 303; *Prosecutor v Kunarac et al* (22 February 2001) IT-96-23-T & IT-06-23/I-T para 398.

violations.[239] The Additional Protocols to the Geneva Conventions are also authoritative on the duties and relations of commanders and their subordinates.[240]

The *Čelebići* standard was subsequently endorsed in *Kunarac*,[241] *Krstic*,[242] and *Kvočka et al*.[243] The ICTY practice also developed the joint criminal enterprise theory whereby co-perpetration exists such as in the case of *Kenyatta*. In the *Tadić* case, the ICTY Appeals Chamber fully discussed the 'notion of common purpose'[244] through which co-perpetrators have a common design or enterprise and possess the same criminal intent to commit a crime.[245] The co-perpetrators aim to further a criminal activity or purpose of a group.[246] The common enterprise may result in the conviction of an offender for an act committed by another member of a group.[247] Participants are dependent on one another and none has overall control of the offence.[248]

In the *Brdjanin* case, the ICTY Appeals Chamber held that a crime can be imputed to at least one member of the joint criminal enterprise, provided the member acted in accordance with the common plan.[249] Mundis posits that the doctrine of superior responsibility may be used in conjunction with joint criminal enterprise to close any gaps and to ensure the prosecution of the greatest possible number of perpetrators.[250] A prosecutor must establish superiors who were part of a joint criminal enterprise with either commanders of a similar rank or even with subordinates in the chain of command, and select cases within the given same or different hierarchy.

For purposes of complementarity under the Rome Statute, it is ideal for the Prosecutor and states to jointly establish the persons under a hierarchy to determine the extent to which a national jurisdiction investigates or prosecutes crimes that were allegedly committed. Considering the near impossibility of prosecuting every person in a hierarchy, the Prosecutor should be guided more by a qualitative rather than a

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[239] *Prosecutor v Delalić et al* (16 November 1998) IT-96-21-T para 378.
[240] Additional Protocols to the Geneva Conventions arts 86 & 87.
[241] *Kunarac* (n 238 above) para 396.
[242] *Prosecutor v Krstić* (2 August 2001) IT-98-33-T paras 648 - 649.
[243] *Prosecutor v Kvočka et al* (2 November 2001) IT-98-30/1-T para 315.
[244] *Prosecutor v Tadić (*15 July 1999) IT-94-1-A paras 185 - 229.
[245] *Tadic* (n 244 above) para 220.
[246] *Tadic* (n 244) above para 228.
[247] Schabas (n 118 above) 216.
[248] *Prosecutor v Stakić* (31 July 2003) IT-97-24-T para 440.
[249] *Prosecutor v Brdjanin* (3 April 2007) IT-99-36-A para 428.
[250] DA Mundis 'Crimes of the commander' in G Boas & WA Schabas (eds) *International criminal law developments in the case law of the ICTY* (2003) 275.

quantitative nature of national proceedings. The qualitative nature must include a sample of the most responsible persons as per the discretion of a state. The Court must be satisfied where 'substantially same persons' are prosecuted.

4.9.6 Joint Criminal Enterprise in the International Criminal Court jurisprudence

Article 25 of the Rome Statute imposes criminal liability for individual and joint acts. The ICC first applied the concept of co-perpetration in the *Lubanga* case.[251] The case not only identified the necessity of an agreement or common plan but also the importance of a co-ordinated contribution by each perpetrator.[252] On this basis, if a state or Court institutes criminal proceedings against selected individuals or commanders, the identified persons will be representative of the group and thereby fall within the 'substantially same persons' concept. Ambos observes that an individual may commit a crime as part of a group or in advancement of a group plan, hence the need to consider individual responsibility and collective responsibility together.[253]

The organisational or policy of a constituent of joint criminal enterprise was not articulated in the *Lubanga* case but came to the fore in the *Katanga and Ngudjolo Chui* case.[254] In the latter, the two accused were identified as indirect co-perpetrators who agreed on a common plan as commanders of their respective hierarchical organisations to attack the village of Bogoro.[255] By failing to separate the two organisations so as to establish the criminal acts committed by each organisation respectively, the Court impliedly confirmed that the two groups were substantially the same at the time the acts were committed. Accordingly, individuals can rightly be prosecuted for acts committed through others as if they had individually committed the acts.[256]

The *Al Bashir*[257] and *Blé Goudé*[258] cases further narrow the participation of hierarchical organisations by treating different organisations as one, if the different organisations

[251] *Prosecutor v Lubanga* (29 January 2007) 01/04-01/06-803-tEN ICC para 326.
[252] *Lubanga* (n 251 above) paras 343 - 348.
[253] K Ambos 'Article 25: individual criminal responsibility' in Triffterer & Ambos (n 111 above) 1000.
[254] *Prosecutor v Katanga & Ngudjolo Chui* (30 September 2008) 01/04-01/07-717 ICC para 498.
[255] *Katanga & Ngudjolo Chui* (n 254 above) paras 548 - 560.
[256] Ambos (n 253 above) 999.
[257] *Prosecutor v Al Bashir* (4 March 2009) 02/05-01/09-1 ICC paras 203 - 223.
[258] *Prosecutor v Blé Goudé (*11 December 2014) 02/11-02/11-186 ICC para 136.

acted with a common purpose. Various co-perpetrators combine to act under one hierarchical organisation.

Notwithstanding the above, the Joint Criminal Enterprise theory at the ICC has been subjected to extensive critique. Cassese and Gaeta are of the view that article 25(3)(a) permits the use of the theory owing to the acknowledgement that a crime can be committed jointly.[259] On the other hand, some scholars highlight the complications brought by the *Lubanga* case, which endorsed the 'Control of the Crime' theory.[260] This theory distinguishes between principal liability and accessorial liability. There is also no consensus among the judges of the ICC on an appropriate theory for the Court, for example, Judges Fulford and Van den Wyngaert previously held that the Control of the Crime theory is inconsistent with the Rome Statute.[261]

4.10 Disclosure of evidence

4.10.1 Necessity of disclosure

The disclosure of evidence by the prosecution or the defence is mandatory in many international and domestic jurisdictions.[262] The duty to disclose evidence is suspended only in exceptional circumstances, such as protection of persons or evidence, or prevention of abscondment of persons.[263] Disclosure is at the heart of fair trials as well as the ability of the prosecution and the defence to adequately prepare cases.[264] The interests of justice are better served when opposing parties are symmetrically prepared. The sharing of information redresses structural and resource imbalances.[265]

Article 66 of the ICTY and ICTR Statutes mandated disclosure throughout the proceedings. Just as the parameters of a potential case should be known by the Court and a state for comparison to be made on what both are investigating, the parameters

[259] A Cassese & P Gaeta *International Criminal Law* (2013) 175.
[260] See for example MM Varda 'Distinguishing between principals and accessories at the ICC: another assessment of control theory' (2014) 64 *Zbornik Pravnog fakulteta u Zagrebu* 1041; S Manacorda & C Meloni 'Indirect participation versus joint criminal enterprise: concurring approaches in the practice of international criminal law' (2011) 9 *Journal of International Criminal Justice* 167.
[261] *Prosecutor v Lubanga* (14 March 2012) 01/04-01/06-2842 ICC paras 6 - 8; *Prosecutor v Ngudjolo Chui* (18 December 2012) 01/04-02/12-4 ICC para 6.
[262] D Meyerson 'Why courts should not balance rights against the public interest' (2007) 31 *Melbourne University Law Review* 873; A Choo *Evidence* (2015) 147.
[263] n 8 above, art 54(e).
[264] Rules of Procedure and Evidence (Rules) rule 77.
[265] V Tochilovsky *Jurisprudence of the international criminal courts and the European Court of Human Rights: procedure and evidence* (2008) 274 - 284.

of the outcomes of investigation should be availed by each party to initiate a discussion on the application of complementarity.

A party who has custody, possession or control of evidence should share helpful evidence with the other party.[266] In the *Lubanga* case, the failure to disclose exculpatory evidence led to a temporary stay of proceedings and provisional release of the accused.[267] The Court considered the duty of the Prosecutor to disclose evidence more important than the Prosecutor's privilege to retain confidential information.[268] Exculpatory evidence may assist in proving the innocence of the accused and to help the Court reach an appropriate sentence after conviction.[269]

In the *Kenyatta* case, if the Prosecutor had disclosed evidence requested by Kenya, the credibility of evidence may have been affected through a revelation that Kenya was prepared to investigate the suspects as soon as it was in possession of adequate information. The disclosure of evidence enhances the 'equality of arms'.[270] In Katanga and Ngudjolo Chui, the Court emphasised the importance of exculpatory evidence.[271] The Prosecutor should reveal exculpatory, incriminating and exonerating evidence without the request of the Defence prior to trial.[272] The duty should be performed 'as soon as possible',[273] and 'as soon as practicable'.[274]

4.10.2 Disclosure requests in the Kenyatta case

This section looks at disclosure requests made by either Kenya or the Prosecutor in the *Kenyatta* case. The objective is to emphasise the importance of disclosure for both parties and to demonstrate that the disclosure of evidence is a key consideration in cases before an international criminal tribunal such as the ICC.

One of the notable submissions made by Kenya in the *Kenyatta* appeal case was that 'unlimited and continuous' disclosure of evidence should be done during the

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[266] n 264 above, rule 77.
[267] *Prosecutor v Lubanga* (13 June 2008) 01/04-01/06-1401 ICC para 97.
[268] *Lubanga* (n 267 above) para 70.
[269] *Lubanga* (n 267 above) paras 88 - 89.
[270] *Prosecutor v Brdjanin and Tadić* (23 May 2002) IT-99-36-PT; *Prosecutor v Krajisnik & Plavšić* (1 August 2001) IT-00-39 and 40-PT); *Situation in Uganda* (19 August 2005) 02/04-01/05 para 30; *Prosecutor v Lubanga* (6 November 2006) 01/04-01/06.
[271] *Prosecutor v Katanga & Ngudjolo Chui* (16 July 2010) 01/04-01/07 O A 11 ICC para 75.
[272] R Dixon & KAA Khan *International criminal courts: practice, procedure and evidence* (2013) 472.
[273] *Prosecutor v Ntanganda* (12 April 2013) 01/04-02/06-47 ICC.
[274] n 5 above, art 67(2).

subsistence of an admissibility challenge.[275] Judge Ušacka endorsed the assertion in a dissenting judgment. The Court dismissed this interpretation of admissibility and saw it as Kenya's strategy to extend admissibility proceedings beyond acceptable time.[276]

The AC noted that the PTC retains discretion to allow the filing of additional evidence after an admissibility challenge has been raised.[277] A rejection of the filing by the PTC does not amount to an abuse, the AC held.[278] This means a state should be ready to suffer consequences of a premature filing, since an amendment to an admissibility challenge is not guaranteed.

Three requests arose in the *Kenyatta* case that are pertinent to the approach to the disclosure of evidence either by a state or the Prosecutor. The first two requests pertain to Kenya's requests for an oral hearing and additional evidence in possession of the Prosecutor. The request for an oral hearing was designed to update the Court on the status of domestic proceedings, while the request for additional evidence was designed to enable a deferral to the domestic jurisdiction. Kenya hoped to trigger the Prosecutor's deferral powers when it requested additional evidence.[279] The third request led the Prosecutor to make a counter request, without success, for Kenya to release evidence implicating Kenyatta. The three requests show that the obligation to disclose evidence rests with both the Prosecutor and states.

Regarding the first request, Kenya wanted the conduct of an oral hearing for the Court to be briefed by the Police Commissioner that indeed the country was taking steps to investigate and prosecute the suspects.[280] The Court found the submission unnecessary and accordingly rejected the request.[281]

The second request was unsuccessful because the Court failed to get a linkage between the disclosure of evidence by the Prosecutor and the issue of admissibility.[282] This was despite a low burden placed upon the defence in rule 77 of the Rules of Procedure and Evidence. The rule requires the establishment of a *prima facie*

[275] *Ruto et al* (n 122 above) para 28.
[276] *Ruto et al* (n 122 above) para 63.
[277] *Ruto et al* (n 122 above) para 96.
[278] *Ruto et al* (n 122 above) para 96.
[279] n 8 above, art 18(2).
[280] *Ruto et al* (n 122 above) para 110.
[281] *Ruto et al* (n 122 above) para 110.
[282] *Ruto et al* (n 122 above) para 34.

relevance of the information.[283] The requested information was filed out of time and the Court considered the requested information to be of irrelevance in the current challenge. The Prosecutor advised Kenya to make such a request in a future admissibility challenge.[284] Further, the Court declined that it has an obligation to assist states with evidence.

In relation to the third request, the Prosecutor failed to convince Kenya to produce Kenyatta's financial history.[285] The non-co-operation by Kenya forced the Prosecutor to withdraw the charges, as he could not build a strong case to secure a conviction.[286] Since the evidence was relevant to the Prosecutor's case, the failure to obtain the evidence was viewed by the Court as having an adverse impact on the Court's ability to exercise its powers and functions.[287] Arguably, the Prosecutor's failure to share the evidence requested by Kenya also adversely affected the ability of Kenya to comply with its primary duty to investigate and prosecute Kenyatta.

The above requests stemmed from the Rome Statute, Rules of Procedure and Evidence, and Regulations of the Court. The Court applied a lower disclosure standard and ignored the materiality of prosecution disclosure to the admissibility of cases. Since the aim of complementarity is to preserve the primacy of states, every effort and opportunity should be exhausted to assist states to exercise their primary duty. Concentration on the procedural flaws of a state frustrates the substance upon which complementarity is built. The Court could have used the flexibility in the Court's legal instruments to create opportunities for the transmission of evidence to Kenya as proffered below.

First, the Rules of Procedure and Evidence empower the Court Chambers to decide on procedure when an admissibility challenge has been filed.[288] Through the conduct of an oral hearing, the sticky issues that arose during the admissibility challenge may

[283] *Prosecutor v Banda & Jerbo* (28 August 2013) 02/05-03/09-501 ICC para 42.
[284] *Ruto et al* (n 122 above) para 118.
[285] OTP 'Statement of the Prosecutor of the International Criminal Court on the status of the Government of Kenya's cooperation with the Prosecution's investigations in the Kenyatta case' 4 December 2014 http://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-04-12-2014 (accessed 26 August 2018).
[286] *Prosecutor v Kenyatta* (13 March 2015) 01/09-02/11 ICC.
[287] *Kenyatta* (n 286 above) para 10.
[288] n 264 above, rule 58.

have been narrowed and the assistance to be rendered to Kenya to carry out its own domestic proceedings may have been better appreciated.

Secondly, the Rules of Procedure and Evidence permit an adjournment under certain circumstances to address issues raised by a state or an accused person.[289] An adjournment was also an opportunity for Kenya to inspect material availed by the Prosecutor. The Court and Kenya could have used the adjournment to assess the potential impact of the Prosecutor's evidence on admissibility.

Lastly, the Court could have used its discretion to allow the disclosure of additional evidence by both Kenya and the Prosecutor. The Regulations of the Court allow for the extension of time when the extension is justified.[290] Kenya's willingness and ability to carry out domestic proceedings was to be further tested if no steps were taken after the Court had exhausted its duty towards the state. The failure of the Prosecutor to obtain evidence from Kenya showed that the Court and states exist in an interdependent relationship. The interdependence should inspire the Court to assist a state to retain jurisdiction.

4.10.3 Disclosure prior to confirmation of charges

The PTC II authorised the Prosecutor to intervene in Kenya on 31 March 2010. On 8 March 2011, the Prosecutor issued summons for Kenyatta and two others to appear before the Court. Kenya unsuccessfully challenged the admissibility of the cases on 31 March 2011. On 30 August 2011, the AC upheld the decision of the PTC II. On 23 January 2012, PTC II confirmed charges against Kenyatta. The historical background indicates that the requests by Kenya that are relevant to the discussion on complementarity were done before the Court confirmed charges.

The proceedings in the ICC consists of a two-stage disclosure framework, namely, disclosure prior to the confirmation of charges and disclosure related to trial. Disclosure prior to the confirmation of charges is discussed in this section. Notably, there is no

[289] n 264 above, rule 58.
[290] Regulations of the Court (Regulations) regulation 35.

longer a distinction in the ICC practice between confirmation and trial stages regarding prosecutorial disclosure.[291]

The confirmation of charges stage is specifically covered by article 61 of the Rome Statute as well as rules 121 to 126 of the Rules of Procedure and Evidence. As discussed earlier, 'substantial grounds to believe' standard is used at the confirmation stage. The confirmation stage begins the transition into the trial stage. The Court established the application of this standard in the admissibility challenge by Kenyatta. Considering that the Court required Kenya to present evidence with a high degree of specificity and probative value, the disclosure by the Prosecutor becomes even more important. Kenya needed all the available evidence to meet the evidentiary standard.

Before the confirmation of charges, the Prosecutor is required to hold a hearing to confirm the charges and also share evidence to be presented to the Court with the accused within a reasonable time.[292] The PTC plays a supervisory role and may issue orders to compel the release of evidence to be used at the hearing.[293] Amendments to the list of evidence may be done prior to the hearing.[294] The defence is also expected to present its evidence prior to the hearing.[295] The defence has often urged the prosecution to adopt a flexible interpretation on defence filings for the defence to effectively prepare for trial. The provisions provide guidance on the admissibility of cases which are due for the confirmation stage.

The focus of this section is not on disclosure for purposes of determining charges but on disclosure for purposes of determining complementarity. Comparison is done for these two determinations, in this case, to show how the confirmation standard applies in the determination of complementarity. The keywords for the comparison as derived above are timing, fair trials, ongoing investigation and amendment, postponement, scope of application, and the Prosecutor's burden.

[291] KAA Khan & C Buisman 'Sitting on evidence? Systemic failings in the ICC disclosure regime: time for reform' in C Stahn (ed) *The law and practice of the International Criminal Court* (2015) 1041.
[292] n 264 above, rule 121.
[293] n 264 above, rule 121(2).
[294] n 8 above, art 61(4).
[295] n 264 above, rule 121(2).

Timing

Advance and timely notification is required before the hearing takes place to enable adequate preparation by the defence to challenge the charges. Likewise, the Prosecutor must disclose adequate information if the Court expects a state to present evidence of probative value. A state must analyse the Prosecutor's findings to determine the rationale for preferred suspects. Otherwise, the same case requirement will remain difficult to apply.

Fair trials

Before the confirmation of charges, a status conference must be held to disclose evidence, to preserve the accused's right to a fair trial. Admissibility determinations should not be limited to the gravity of offences, interests of victims or justice but must encompass the interests of the accused as well.

Ongoing investigation and amendment

The Prosecutor may continue with investigation and amend the charges before a hearing. An investigation should be treated as a continuous process and additional evidence should be allowed for the state to strengthen its admissibility challenge.

Postponement

The Prosecutor may request the PTC to postpone a hearing. The PTC can also use its discretion to postpone a hearing. In admissibility challenges, the Prosecutor or the PTC can invoke the same powers to postpone an admissibility determination to such a time as will be clear that a state is genuinely unwilling or unable to carry out national proceedings.

Scope of application

A confirmation hearing serves to identify important aspects and persons for trial. Some charges may be preferred above others based on gravity or the likelihood for the Prosecutor to prove the charges. In determining the admissibility of cases, the emphasis should not be limited to the capacity a state has but should consider the potential of a state to carry out national proceedings.

The Prosecutor's burden

The Prosecutor should support each charge with sufficient evidence. For purposes of determining admissibility, the Prosecutor must prove that the case is admissible.

4.11 Conclusion

The application of complementarity in the *Kenyatta* case presented unprecedented challenges which the Court had to consider for the first time. The case gave the Court the first opportunity to deal with an admissibility challenge from a state. Likewise, it was the first time for the Court to deal with a case of crimes against humanity committed outside an armed conflict.

Faced with the new challenges presented by the *Kenyatta* case, it emerged that the determination of admissibility of cases requires consideration of several factors. The factors include careful demarcation between situations and cases, reconsideration of the definition of investigation, clear parameters on the *chapeau* elements of admissibility, burdens of proof and expectations of disclosure. The failure by the Court to consider the factors makes it difficult to exhaustively address the practical application of complementarity.

Broadly, the *Kenyatta* case was a battle between the standards and perceptions of the Court and those of a state. Chapter 5 proceeds with the argument through a discussion of prosecutorial and state discretions. The aim is to ascertain how state discretion has thus far been limited in the application of complementarity. The chapter will show that by giving states more discretion, the controversies surrounding the practical application of complementarity will be largely addressed.

CHAPTER 5

GIVING EFFECT TO STATES' DISCRETIONARY POWERS

5.1 Introduction

The exercise of prosecutorial discretion in the enforcement of international criminal justice and the safeguards to curtail the unwarranted use of the discretion have received considerable academic attention. The effect of prosecutorial discretion on relations between the ICC and other entities, such as the AU, have also received attention.[1] However, state discretion in the operations of the ICC is relatively ignored. Complementarity in copycat to international criminal law is built on a paradox,[2] competition and yet reinforcement of states and ICC jurisdictions.

When the exercise of discretion is lopsided in favour of the Prosecutor, state primacy is endangered. When prosecutorial discretion is improperly exercised, the integrity and credibility of the Court is also compromised.[3] The Prosecutor was heavily criticised for the manner in which he exercised discretion on the preliminary examination in Kenya.[4] Some argue that the Prosecutor violated the tenets of the Rome Statute in the exercising of powers,[5] and that the Prosecutor was motivated by political rather than legal interests.[6]

A complementary-based system leads to jurisdictional conflicts.[7] Hence, debates on discretion are common in the operations of the ICC. As partners in the prosecution of international crimes, domestic criminal justice systems and the ICC will thrive in a well-developed interactive and co-operative system.[8] The two institutions require an

[1] K Mills 'Bashir is dividing us: Africa and the International Criminal Court' (2012) 34 *Human Rights Quarterly* 404 - 407.
[2] C Stahn & L van den Herik 'Future perspectives on international criminal justice: through the looking glass' in C Stahn & L van den Herik (eds) *Future perspectives on international criminal justice* (2010) 2.
[3] D Dukic 'Transitional justice and the International Criminal Court- in the interests of justice?' (2007) 89 *International Review of the Red Cross* 717.
[4] WA Schabas 'Prosecutorial discretion v judicial activism at the International Criminal Court' (2008) *6 Journal of International Criminal Justice* 731 - 761.
[5] See for example MM de Guzman 'Choosing to prosecute: expressive selection at the International Criminal Court' (2012) 33 *Michigan Journal of International Law* 265 - 320.
[6] S Nouwen & W Werner 'Doing justice to the political: the International Criminal Court in Uganda and Sudan' (2011) 21 *European Journal of International Criminal Law* 941 - 965.
[7] WA Schabas An introduction to international criminal law (2007) 175.
[8] W Burke-White 'Proactive complementarity: the International Criminal Court and national courts in the Rome system of international justice' (2008) 49 *Harvard International Law Journal* 53 - 108; JK Kleffner *Complementarity of the Rome Statute and national criminal jurisdictions* (2009) 309 - 310.

integrated approach to give equal attention to both state and prosecutorial discretion, and to enable the Prosecutor to incorporate different views in decision making. The Prosecutor may escape criticism when exercising power during preliminary examinations because, at that stage, the Prosecutor has considerable leeway to patiently explore possibilities for future action with limited checks from any other actor.[9] The same cannot be said of subsequent stages where different perspectives frequently influence the interpretation of prosecutorial discretion.[10]

The Prosecutor is tasked by the international community to discern, dissect and decide on the scope of prosecutorial intervention. Backed by the statutory provisions on prosecutorial independence as well as discretional powers, the Prosecutor may exercise the discretion in disregard of state discretion. In addition, the weakened Westphalian model of state sovereignty motivates an international prosecutor to select cases when convinced that domestic systems are poorly placed to serve the interests of justice and to thwart impunity for international crimes.

However, convincing concerns emerged during the Rome Statute negotiations on the dangers of an all-powerful prosecutor whose unfettered discretion may lead to uncontrolled abuse of power.[11] Lines are clearly drawn for judicial oversight and the powers of the UNSC to 'veto' prosecutorial discretion.[12] States have the prerogative to act first,[13] and as such, states are the main players in international criminal justice. However, the current practice gives little attention to state discretion. Bassiouni correctly observes that the longevity of international criminal justice depends on internal rather than ICC processes.[14]

The inconsistency and diversity of Court decisions and frequent policy proclamations are examples of many grey areas in the application of complementarity. One controversy is the lack of recognition in the Court practice that states, just like the

[9] Rome Statute of the International Criminal Court (Rome Statute) arts 1, 15, 17 & 53.
[10] D Robinson 'The mysterious mysteriousness of complementarity' (2010) 21 *Criminal Law Forum* 67-102.
[11] SAF de Gurmendi 'The role of the international prosecutor' in RS Lee (ed) *The International Criminal Court: the making of the Rome Statute* (1999).
[12] M Bergsmo & J Pejić 'Article 15, Prosecutor' in O Triffterer (ed) Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article (1999) 363.
[13] K Ambos 'The role of the Prosecutor of an International Criminal Court' (1997) 45 *The Review of International Commission of Jurists* 53.
[14] MC Bassiouni 'Perspectives on international criminal justice' (2010) 50 *Vancouver Journal of International Law* (2010) 269.

UNSC and ICC Chambers, may directly suspend the exercise of prosecutorial power. States should not be confined to an 'observer status' and should not be put in a position in which they rely on the goodwill of the Court or UNSC to tame the Prosecutor as he or she encroaches on state discretion. This chapter unlocks the dominance of state discretion. The chapter explores existing gaps in the Court's approach to state discretion and the detrimental effect on relations between the Court and states. The chapter also revisits the overall objective of complementarity.[15]

This chapter commences with a discussion on the rationale of discretion before delving into the boundaries of prosecutorial discretion. The chapter proceeds to discuss the duties and position of states in the Rome Statute. Thereafter, the chapter examines the elements of discretion, the overlap between UNSC and state powers and the widely debated interests of the justice phenomenon. Finally, the chapter demonstrates that the Court already respects, albeit in an uncomfortable manner, the supremacy of state discretion under certain circumstances.

5.2 The rationale for discretion

5.2.1 The context

As the practice of the Court continues to evolve, the extent to which discretionary dimensions are understood, developed and applied needs scholarly attention. The legal, political and theoretical bases upon which discretion is exercised by different actors in the Rome Statute should be explored. The exercise of discretion and the adequacy of the ICC legislation as well as prosecutorial policies, principles and practices which promote the overall objective of complementarity also need academic attention. The broad understanding of the scope of discretion allays fears of bias, inconsistency and political manipulation.

The proper exercise of discretion is essential for a criminal justice system. The goal of ending impunity is attached to the exercise of discretion and the reconciliation of complex national and international interests. Discretion is the glue that binds the system together and a force that drives the ability of an institution to adapt to

[15] C Stahn 'Admissibility challenges before the ICC: from quasi-primacy to qualified deference?' in C Stahn (ed) *The law and practice of the International Criminal Court* (2014) 253.

circumstances.[16] States, the Prosecutor, the UNSC, ASP, the Court and other supporters of the Court have a role to play in developing the proper exercise of discretionary powers in the Rome Statute.

5.2.2 Defining discretion

The term discretion is associated with a variety of meanings and numerous uses.[17] Linds[18] and Dong[19] convincingly dissect the definition of discretion. Linds refers to discretion as the making of a decision in a galaxy of interconnected factors,[20] while Dong views discretion as the authentication of a preferred option among other options.[21] However, there is debate on which definition mostly captures discretion. The comprehensive and impressive scholarly work on the promotion of the understanding of discretion at both the national and international levels is greatly appreciated in this study.

Discretion finds legitimacy when various options are availed to a person or entity. In the midst of the options, power accrues to the permissible choice of one or more courses of action.[22] Black's Law Dictionary views prosecutorial discretion as the power given to a prosecutor to utilise various options when either prosecuting or refraining from prosecuting a criminal offence.[23] The power of discretion enables the person or entity to discern, dissect and decide on the most appropriate course of action under the circumstances. Discretion is also interpreted in the negative, in that it allows flexibility to refrain from taking an action that the law otherwise permits.[24] International prosecutors and states, in their attempt to address the dynamics of law and politics, face criticisms in both the pursuit of cases and their failure to do so.

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[16] HB Jallow 'Prosecutorial discretion and international criminal justice' (2005) 3 *Journal of International Criminal Law* 145.
[17] CH Koch 'Judicial review of administrative discretion' (1986) 624 *George Washington Law Review* 470.
[18] A Linds 'A deal breaker: prosecutorial discretion to repudiate plea agreements after R v Nixon' (2012) 38 *Queens Law Journal* 301.
[19] J Dong 'Prosecutorial discretion at the International Criminal Court: a comparative study' (2009) 2 *Journal of Politics* 109.
[20] Linds (n 18 above).
[21] Dong (n 19 above).
[22] A Danner 'Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510 - 552.
[23] Black's law dictionary (2009) 534.
[24] K Stith 'The arc of the pendulum: judges, prosecutors, and the exercise of discretion' (2008) 117 *Yale Law Journal* 1420.

Although a control mechanism regulates the discharge of certain responsibilities,[25] and a fixed criterion normally exists,[26] discretion creates room for broad consideration of issues.[27] One is given the ability and freedom to make own decisions.[28] The conferred authority allows considered judgment and conscience to prevail over certain conditions, situations or control by other people.[29] Nsereko views discretion as the autonomy to act as one sees fits in circumstances which are constrained by the need to adapt action to realities.[30] The view augurs well with the *Kenyatta* case in which Kenya was in the process of developing a future plan to address electoral violence in view of its violent electoral history.

Unlike the Prosecutor who is subject to legal constraints, states have boundless options. Kenya had options, both at national and regional level, to deal with the post-election violence for the healing of the nation and punishment of perpetrators. If the options proposed by a state are not manifestly unreasonable and unfounded, the Court has no basis to interfere with state discretion. In future, the prosecutorial policy should outline options available to states to tackle international crimes under their jurisdictions. Consequently, there is a need to (re)define and explain key terms in the Rome Statute to create an impetus for state discretion to be accepted as a broad concept beyond the express provisions of the Rome Statute.

5.2.3 Exercise of discretion at international criminal tribunals

Like complementarity, the concept of discretion evolved with the emergence of international criminal tribunals. However, the extent to which international criminal tribunals make room for prosecutorial discretion is a bone of contention. Notwithstanding the exception of the early tribunals after the Second World War, an independent prosecutor is a pillar of international criminal justice. At the IMT and the IMTFE, the influence of states on prosecutorial discretion could not be

[25] Dong (n 19 above) 109 - 114.
[26] R Kerr *International Criminal Tribunal for the Former Yugoslavia: an exercise in law, politics and diplomac*y (2004) 178.
[27] S Boolell 'Challenges in crime in the 21st century' 20 March 2012 http://dpp.govmu.org/English/Documents/publication/hopac.pdf (accessed 2 November 2018).
[28] The New international Webster's pocket dictionary (2002) 168.
[29] R Pound 'Discretion and mitigation: the problem of the individual special case' (1960) 4 *New York University Law Journal* 926; Black's law dictionary (n 23 above) 466.
[30] DDN Nsereko 'Prosecutorial discretion before national courts and international tribunals' (2005) 3 *Journal of International Criminal Justice* 124 - 144.

underestimated.[31] After the disappointment of the IMT and the IMTFE, many attempts were made for prosecutorial discretion to exist as a critical component in the jurisprudence and practice of international criminal tribunals. This section looks at the development of discretion since Second World War. Also, this section examines the status of both state and prosecutorial discretion at international criminal tribunals.

The IMT thwarted all efforts for an independent prosecutor as the Allied powers sought to expedite trials and punish former foes. A Committee of Prosecutors, rather than a single prosecutor, prosecuted war criminals. At the helm of the Committee were Chief Prosecutors appointed by IMT Charter state parties.[32] The independence of prosecutors was compromised, since the Chief Prosecutors received direct instructions from their respective governments.[33] The compromise of prosecutorial independence promoted bias and the proliferation of victors' justice to the benefit of many who were aligned to the Allied powers.[34] State discretion dominated prosecutions at Nuremberg, as the prosecutors could not discharge their duties independently but under the oversight and instructions of their member states.

The IMTFE slightly departed from the IMT when it granted more discretion to prosecutors. The appointment of prosecutors was not left entirely to the political wing of their respective governments partly, as the Chief of Counsel (Chief Prosecutor) was an appointee of the Supreme Commander.[35] Notwithstanding, the IMTFE could not be detached from state influence. The Supreme Commander served the interests of the Allied powers. Notably, the indictments of the IMTFE were politically negotiated before issuance.[36]

The weakness of the IMT and IMTFE flowed from the use of state discretion to promote politically motivated and biased prosecutions. States intended to avoid these two dangers at the ICC and thus rejected a prosecutor with absolute discretionary powers. The proper use of state discretion at the IMT and IMTFE could have advanced at least two interests. First, the recognition of the primary of Germany and Japan could have

[31] WA Schabas *Unimaginable atrocities: justice, politics, rights at the war crimes tribunals* (2012) 76.
[32] Charter of the International Military Tribunal Charter (IMT Charter) art 14.
[33] Schabas (n 31 above) 75.
[34] MM de Guzman & WA Schabas 'Initiation of investigations and selection of cases' in G Sluiter & H Friman (eds) *International criminal procedure: principles and rules* (2013) 133 - 134.
[35] Charter of the International Military Tribunal for the Far East (IMTFE Charter) art 8.
[36] Guzman & Schabas (n 34 above) 134.

given the two states the first bite in trying their nationals. In that case, the Allied powers could have rendered support to strengthen national systems. Secondly, by allowing Germany and Japan to prosecute Allied powers, the perception of biased and partial trials could have been avoided.

The lesson for the ICC is that state discretion is a priority. The intervention of the Court is only justified if political bias or discrimination (understood differently from national interests or political goals) or any form of bias on the part of the state can be established. In the *Kenyatta* case, these elements were not established by the Prosecutor. Therefore, it cannot be said that Kenya wanted to exercise its discretion in a manner that intended to shield Kenyatta from prosecution or accountability. Kenya used its discretion to address the big picture in the post-electoral violence with the aim of finding long-lasting peace solutions.

In view of the shortcomings of both the IMT and IMTFE, the UNSC was explicit in conceptualising prosecutorial discretion for the ICTY and the ICTR.[37] The ICTY and ICTR had a single Office of the Prosecutor until 2003 when the two were given separate prosecuting authorities.[38] The entrenched provisions of the ICTY[39] and ICTR[40] Statutes are better summed up in the position of the ICTY Appeals Chamber on discretionary powers. In the *Delalić et al* decision, the Appeals Chamber confirmed the broad discretionary powers of the prosecutor in selecting and prosecuting crimes.[41] The Appeals Chamber held that the prosecutor acts independently and is only subject to statutory limitations.[42]

Despite clear guarantees of independence, the ICTY and ICTR were criticised for bias. Critics argued that the expectation of a perfect system of international criminal justice was utopian.[43] Defenders of prosecutorial discretion dismissed accusations of bias. Kerr emphasised the differentiation between discretionary and case selection powers

[37] Schabas (n 31 above) 76.
[38] UNSC Resolution 1503 (2003).
[39] Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) art 16.
[40] Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) art 15.
[41] *Prosecutor v Delalić et al* (20 February 2001) IT-96-21-A para 602.
[42] *Delalić et al* (n 41 above) para 603.
[43] See for example T Mariniello 'One, no one and one hundred thousand: reflections on the multiple identities of the ICC' in T Mariniello (ed) *The International Criminal Court in search of its purpose and identity* (2015) 8.

of a prosecutor.[44] Discretion is based on a defined and fixed criterion, while selective prosecution permits prosecutorial partiality or bias due to certain limitations such as financial implications.[45]

Criticisms against the ICTY and ICTR were a precursor to future discussions on the exercise of discretion. At the SCSL, the Prosecutor was expected to act independently without interference from any government or other source.[46] The Prosecutor's deputy was a Sierra Leonean.[47] This meant that the Prosecutor needed someone who understood the local context. The Prosecutor was further given powers to resort to alternative truth and reconciliation mechanisms where appropriate.[48]

In East Timor, the reports of the UN and Indonesia commissions of inquiry into the violence of 1999 recommended prosecutions of perpetrators of violence.[49] The Indonesia's Ad Hoc Human Rights Court first prosecuted crimes committed in Timor-Teste amid international criticism on the effectiveness of the national process.[50] Following its limited success in prosecuting the crimes, the UN Transitional Administration in East Timor (UNTAET) created the hybrid Special Panels for Serious Crimes (East Timor Tribunal) to try serious criminal offences that had been committed in East Timor in 1999.[51] The Deputy Prosecutor-General who headed the Serious Crimes Unit (SCU) reported to the Timorese Prosecutor-General and the Attorney General.[52] That way, some domestic ownership of the process was maintained. In the earlier years of the East Timor Tribunal, several prosecutors resigned due to alleged external political interference.[53] The appointment of Siri Frigaard as Deputy General for Serious Crimes was accompanied by prosecution reclaiming its independence.[54]

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[44] Kerr (n 26 above).
[45] Kerr (n 26 above).
[46] SCSL art 15(1).
[47] n 46 above, art 15(4).
[48] n 46 above, art 15(5).
[49] C Reiger & M Wierda 'The serious crimes process in Timor-Leste: in retrospect' March 2006 http://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf (accessed 5 October 2020).
[50] Reiger & Wierda (n 49 above) 10.
[51] Reiger & Wierda (n 49 above) 10 - 12.
[52] Reiger & Wierda (n 49 above) 17.
[53] See for example C Vasconcelos, "Briefing on East Timor's Serious Crimes Unit," Annual Conference of the International Association of Prosecutors, 2001.
[54] Reiger & Wierda (n 49 above) 20.

The appointment of co-prosecutors in the Extraordinary Chambers in the Courts of Cambodia (ECCC), one Cambodian and the other an international staff member, was an interesting innovation.[55] However, divergent views between the two prosecutors led to conflict between the two prosecutors. On an interesting note, there are two observations of benefit to this study, as far as the exploration of the state versus prosecution discretionary power is concerned.

First, the rationale for two co-prosecutors was meant to protect prosecutorial discretion in the expectation that an international prosecutor would resist political manipulation. A national prosecutor may be susceptible to manipulation, particularly in undemocratic states or where there is a breakdown of the rule of law. Secondly, the most notable cause of tension between the national and international prosecutor in Cambodia was the unresolved question of state versus prosecutor discretion. The international prosecutor and national prosecutor differed on investigating top Khmer Rouge leaders, with the national prosecutor arguing on the prevention of undue tension and frustration of reconciliation efforts.[56]

Similar to the aforementioned, the tension between Kenya and the ICC stemmed from the unresolved discretionary boundaries. Kenya sought to prevent tensions and promote reconciliation in the country through the selection of preferred individuals for possible future prosecution. Persons excluded from the prosecution list were likely to be a focus of the national dialogue for peace and reconciliation. The Prosecutor, on the other hand, maintained a rigid approach to attain justice through the prosecution of the most responsible in Kenya.

The Rome Statute was drafted against the backdrop of tensions between, on the one hand, prosecutorial independence and discretion, and on the other hand, the supremacy of state sovereignty. In addition, the Rome Statute was drafted after the power politics had pervaded the IMT and IMTFE.[57] Also, the broad prosecutorial discretion had proven problematic for the ICTY and ICTR.[58] As such, the ICC adopted

[55] Law on the Establishment of the Extraordinary Chambers (Law on ECCC) art 16.
[56] Open Society for Justice Initiative 'Political interference at the Extraordinary Chambers in the Courts of Cambodia' (July 2010) 16) http//www.opensocietyfoundations.org/reports/politicalinterference-extraordinary-chambers-courts-cambodia (accessed 3 November 2018).
[57] MR Brubacher 'Prosecutorial discretion within the International Criminal Court' (2004) *Journal of International Criminal Justice* 71.
[58] Dukic (n 3 above) 711.

a different approach to prosecutorial discretion. A compromise was reached between states who favoured the ICTY or ICTR approach and those who raised concerns about an overzealous, abuse-prone and politically inspired Prosecutor.[59] Arguably, the Court is designated as a mechanism to advance the ambitions of sovereign states who negotiated the Rome Statute. Therefore, it is submitted that the Court should concentrate on helping states to promote national interests when faced with internal crimes.

The goal to end impunity, the application of complementarity and the exercise of prosecutorial discretion must be rooted in the fact that the Court exists to succour states in the pursuit of national interests. National interests are paramount before the consideration of international concerns. The Prosecutor is at the heart of balancing the interventions of the Court and the interests of states. As will be discussed in this chapter and subsequent chapters, the Court is criticised, particularly in Africa, for its application of complementarity while disregarding national interests. Kenya has been one of the vocal states on how the Court has interfered with its national interests.

5.2.4 Administration of justice and prosecutorial independence

States and institutions which act under the Rome Statute enjoy the flexibility to discharge their functions when given discretion.[60] The centrality of discretion in the administration of justice requires all the actors to appreciate their part and timing in decision making.[61] The Prosecutor and judges of the ICC exercise discretion guided by the fact that the ICC is a court of last resort.[62]

Independence is one of the elements of prosecutorial discretion.[63] The integrity and quality of legal proceedings largely rests on prosecutorial independence.[64] The ICC endeavours to prevent impunity by prosecuting persons without fear or favour of their

[59] Dukic (n 3 above) 711.
[60] Jallow (n 16 above) 142.
[61] Nsereko (n 30 above) 125.
[62] Coalition for the International Criminal Court ʻSetting the mark for Rome Statute 20: Argentina first to conclude a full range of cooperation agreement with ICC' (7 March 2018) http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/CICCPR_ArgentinaCooperationAgreement_March2018.pdf (accessed 12 June 2018).
[63] n 9 above, art 42; M Bergsmo & P Kruger 'Article 54: Duties and powers of the Prosecutor with respect to investigations' in O Triffterer (ed) *Commentary on the ICC Statute of the International Criminal Court* (1999); Jallow (n 16 above).
[64] Jallow (n 16 above) 145 - 146.

positions and the political interests of states.[65] Paradoxically, there is a legal basis for incorporating issues of international peace and security in the exercise of prosecutorial discretion.[66] Practically, discretion facilitates the selection of cases and shared responsibility in the prosecution of cases.[67]

The major tension between Kenya and the ICC was based on the cases preferred by the two institutions. The Prosecutor could have considered the status of Kenya as a common law jurisdiction. As a common law jurisdiction, Kenya's understanding may be that the availability of evidence does not result in automatic prosecution. A state may still use discretion not to prosecute. The public interest is a dominant consideration in common law systems.[68] A national public prosecutor has unrestricted discretion on whether to prosecute.[69] The powers given to the Director of Public Prosecutions by the current Constitution of Kenya support the discontinuation of prosecutions when the Director deems it necessary.[70]

5.2.5 Prioritisation needs

The preceding chapter discussed the need for the Prosecutor to endorse the selection of persons at the same level of hierarchy under certain circumstances. This chapter provides an additional observation on the selection of cases. Stigen states that prosecutorial discretion is both absolute and relative.[71] Absolute discretion entails the overall result of the preferred mechanism.[72] Relative discretion prioritises the most demanding matters to deliver justice, considering available resources.[73] The first categorisation of discretion is pertinent to the arguments advances in this study.

In states, absolute discretion is not only limited to the power to exercise unfettered discretion but allows states to consider all appropriate options to deal with violations. The Prosecutor and the Court opposed Kenya's discretion to select persons for

[65] Brubacher (n 57 above) 76.
[66] Brubacher (n 57 above) 81.
[67] OC Imoedemhe *The complementarity regime of the International Criminal Court: national implementation* (2017) 21.
[68] H Shawcross *House of commons debates* (1951) 681; Nsereko (n 30 above) 127 - 128.
[69] Nsereko (n 30 above) 127 - 128.
[70] Constitution of Kenya sec 157(6).
[71] J Stigen *The relationship between International Criminal Court and national jurisdictions: the principle of complementarity* (2008) 343.
[72] Stigen (n 71 above).
[73] Stigen (n 71 above).

prosecution. Both maintained that the same persons must be under investigation by a state. The Prosecutor may strongly argue that the most responsible persons were targeted using relative discretion. Arguably, a rigid application of the same person requirement makes it difficult at times to justify the absolute limb of discretion. However, prosecution is not always the best mechanism to address transitional or post-conflict contexts. Kenya can be said to have favoured absolute discretion that looks at numerous options such as alternative forms of justice, the interests of justice and regional mechanisms.

5.2.6 Co-existing national systems

International criminal justice is secured through multiple systems which either complement or compete. Arguably, the effective functioning of the ICC depends on its relationship with states. The tensions between the Prosecutor and states may be reduced when it is established who and when discretion must be exercised. Even in *proprio motu* cases where the discretion of the Prosecutor appears paramount, all possible available interests should be considered in all stages of proceedings. In any event, it is desirable for the Prosecutor to take advantage of state action when state action is likely to yield better results for international criminal justice.[74] The excitement for the Prosecutor should not be on the lack of capacity of national systems but on how these can be capacitated to preserve states' primary obligation to prosecute.

5.3 Demarcated prosecutorial discretion at the International Criminal Court

5.3.1 Controlled powers

The powers, independence and discretion of the Prosecutor were contested at the Rome Conference and beyond. The Prosecutor receives, assesses and sometimes initiates cases which come before the Court. Hence, the Prosecutor is key to the administration of justice. The Prosecutor has enormous discretionary powers in the Rome Statute. Although the discretion given to the Prosecutor is clear on paper, varying legal interpretations call for scrutiny of the concept. Prosecutorial discretion, the exercise of powers and control mechanisms are extensively outlined in the Rome Statute. The defined nature of prosecutorial powers not only puts restrictions on

[74] CC Jalloh 'The contribution of the Special Court for Sierra Leone to the development of international law' (2007) 15 *African Journal of International and Comparative Law* 173.

prosecutorial discretion but also allows other actors, such as states, to explore and exercise their own discretion.

5.3.2 Operational environment

Undue influence from political actors and the undermining of justice are undesirable in the operations of an international criminal justice system.[75] Still, the decision to use complementarity to allocate jurisdiction between states and the Court indicates that state sovereignty was not entirely abandoned with the adoption of the Rome Statute.[76] The Rome Statute strikes a balance between sovereignty and the intervention of the Court. In striking the balance, the Court acknowledges the reality of politics while protecting its legal mandate. The former ICC President, Judge Sang-Hyun Song, explicitly stated that the Court 'is a judicial institution which operates in a political world'.[77] Louise Arbour observed that a system based on complementarity is ill-defined and complex when the issue of prosecutorial discretion arises.[78]

The foregoing observations show that the Court is enclosed within a political structure that makes the Court dependent directly or indirectly on states, the UNSC and the ASP.[79] The political entities can trump prosecutorial efforts through contribution to prosecutorial policy development, scrutinising the prosecutorial use of power and creating a difficult environment for the operation of the Court.[80]

In collaboration with the aforementioned observations, most criticisms on the exercise of prosecutorial discretion are due to a blurred distinction between law and politics in the practice of the Court.[81] The Prosecutor is often seen as confining discretion to the plain reading of the Rome Statute, leading to an improper, insufficient and inadequate

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[75] DNN Nsereko 'Genocidal conflict in Rwanda and the ICTR' (2001) 31 *Netherlands International Law Review* 43.
[76] I Brownlie *Principles of international law* (2008) 289; M Shaw *International law* (2008) 487 - 490; D Harris *Cases and materials on international law* (2010) 161 - 170.
[77] Sang-Hyun Song 'The role of the International Criminal Court' 19 May 2009 http://www.asp.icc-cpi.int/iccdocs/asp_docs/Publications/ASP-PUB-PoA-Sem2009-ENG.pdf (accessed 5 November 2018).
[78] L Arbour 'The need for an independent and effective prosecutor in the permanent International Criminal Court' (1999) *Windsor Yearbook of Access to Justice* 212.
[79] H Olàsolo *The triggering procedure of the International Criminal Court* (2005) 5.
[80] Olàsolo (n 79 above); Human Rights Watch Policy Paper 'The meaning of the interests of justice in article 53 of the Rome Statute' (2005) 8 http://www.hrw.org/campaigns/icc/docs/ij070505.pdf (accessed 5 November 2018); Stigen (n 71 above) 383.
[81] MM Arsanjani & WM Reisman 'The law-in-action of the International Criminal Court' (2005) 99 *American Journal of International Criminal Law* 385 - 386.

application of complementarity.[82] In this regard, the Prosecutor underscores the apolitical function of the prosecutorial office and the duty of the Prosecutor to apply the law strictly.[83] The Prosecutor has consistently found support from human rights organisations. These dismiss the invocation of political factors to guide prosecutorial decisions.[84] In a forum organised by the International Peace Institute in 2012, Luis Moreno-Ocampo argued against the 'politicisation' of the ICC:

> I follow evidence. I'm a criminal prosecutor, I'm not a political analyst. Maybe you don't like it, but I will not prosecute people for political reasons. Contrary to public perception, the court's intervention never destroyed a peace process. On the contrary, the court intervention was used by negotiators to start a peace process. The issue is who's in charge of peace, who's in charge of justice. How much these two dimensions are connected, how much this affects the prosecutor's office. My point is, the Security Council is in charge of peace, the ICC is a new international institution doing justice. Peace is not the responsibility of the prosecutor. The prosecutor has the responsibility to do justice, and judges will review in accordance with critical law," he said. "Prosecutors cannot adjust to political considerations. We cannot decide that when the negotiator says 'okay, now it is better to stop,' I stop. I have no mandate to do that, and I will destroy the Office of the Prosecutor and the court if people perceive that the court is just adjusting to political considerations.[85]

The arguments for law and against politics are far from convincing, since the complex environment of international criminal law hardly separates law and politics.[86] While scholars such as Zappala attempt to give assurances that the political dimension is not ignored by the Rome Statute as evidenced by the powers given to the UNSC,[87] the Court's practice appears to ignore the political considerations of states, leading to concerns. Political considerations dominated the *Kenyatta* case in Kenya and at the

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[82] JA Goldston 'More candour about criteria: the exercise of discretion by the Prosecutor of the International Criminal Court' (2010) *Journal of International Criminal Justice* 2.

[83] LM Ocampo 'Statement at the commemoration of the 10th anniversary of the adoption of the Rome Statute of the ICC' 17 July 2008 https://www.asp.icc-cpi.int/iccdocs/asp_docs/ASP7/10th/ICC-ASP-10thAnni-Ocampo-ENG.pdf (accessed on 5 November 2018; LM Ocampo 'Keynote address at the Council on Foreign Relations' 4 February 2010 https://www.cfr.org/search?keyword=Jolie (accessed on 5 November 2018, ('I shall not be involved in political considerations….I shall apply the law without political considerations').

[84] Goldston (n 82 above) 4.

[85] L Moreno-Ocampo 'I follow evidence, not politics' 20 January 2020 http://www.ipinst.org/2012/01/moreno-ocampo-i-follow-evidence-not-politics (accessed 10 October 2020). See also M Mutouta 'Ocampo: I am not playing politics' 11 April 2011 http://www.capitalfm.co.ke/news/2011/04/ocampo-i-am-not-playing-politics/ (accessed 10 October 2020).

[86] C Gosnell 'Editorial comment. The request for an arrest warrant in Al Bashir: idealistic posturing or calculated plan? (2008) *6 Journal of International Criminal Justice* 845.

[87] S Zappala *Human rights in international criminal proceedings* (2003) 43 - 44.

AU, thereby suffocating any support or co-operation the Court may have hoped to get in Africa.

5.3.3 Narrowing discretion

The Rome Statute incorporated oversight provisions to ensure accountability and minimise the abuse of power by the Prosecutor.[88] The Rome Statute prohibits arbitrariness in the exercise of power. The Prosecutor is obliged to make well-reasoned and thoroughly assessed decisions which benefit international criminal justice.[89] Limitations on prosecutorial power were negotiated in Rome and finally inserted with some adjustments. Arguably, the major limitation is the general prohibition on the Prosecutor to intervene in state affairs and to defer to genuine national efforts for the prosecution of international crimes.[90]

Discussions on potential prosecutorial abuse in the administration of justice started before the IMT trials. A former US Supreme Court judge, Robert Jackson – who later became a prosecutor at the IMT – remarked the influence and discretion of the prosecutor.[91] Jackson argued that the prosecutor may either promote the interests of a society or act against such interests.[92]

What influenced Jackson's approach to prosecutorial discretion or acceptance of broad control by states at the IMT cannot be easily ascertained. A hint may be drawn in his opening remarks at the IMT in 1945, when he presented 'a United States case' rather than 'a Prosecutor's case'.[93] The statement indicated that at the international criminal justice level, Jackson viewed prosecutorial discretion as subordinate to state discretion.

In the early days of the Court, the Prosecutor was mindful that the world will continuously evaluate the success of the Court. The success criteria was highlighted as based on the proper functioning of national courts to exclude the ICC from

[88] Bergsmo & Pejić (n 12 above) 363.
[89] Bergsmo & Pejić (n 12 above) 367 - 368; RH Jackson 'The federal prosecutor' (1940) 31 *Journal of Criminal Law and Criminology* 1 - 6; Dukic (n 3 above) 716.
[90] CC Jalloh 'Regionalizing international criminal law' (2009) 9 *International Criminal Law Review* 445.
[91] Jackson (n 89 above).
[92] Jackson (n 89 above).
[93] RH Jackson 'Opening statement before the International Military Tribunal' 21 November 1945 http://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/ (accessed 5 November 2018).

exercising jurisdiction.[94] The dawn of realities at the Court, just like in the experiences of *ad hoc* tribunals, shows that the successful functioning of the Court depends on the ability of the Court to stay on its 'lane' and not to encroach beyond politically acceptable state boundaries. For states, the effective application of international criminal justice is motivated mainly by political goals, as opposed to legal goals.[95]

The narrowing of prosecutorial discretion to a level understood and acceptable by both the Prosecutor and states will strengthen the complementarity principle and lead to stronger ICC-states co-operation. This argument is not a call for an amendment of the Rome Statute but an inspiration to make more use of the provisions on state discretion, as some remain dormant and sealed. The policy of the OTP may be developed in a more state-centred than prosecutorial-centred way to enable the Prosecutor to give states leeway to explore all options before intervening.

5.3.4 Hard and soft law constraints

The Rome Statute and the UN Guidelines for Prosecutors regulate the discretion of the Prosecutor.[96] The Rome Statute does not expressly mention the application of soft law, although this is implied through the inclusion of rules and principles of international law as a source of law applicable by the ICC.[97] The UN system, with which the Rome Statute works in parallel, uses both hard and soft laws. The realisation of international norms and standards when the Court applies the law persuades one of the applications of both hard and soft law. Soft law encompasses norms and standards that are not legally binding, but which are accepted by states.[98] Therefore, it follows that if an ambiguity exists in the Rome Statute, reliance may be made to the Guidelines to determine what the Prosecutor can do or cannot do.

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[94] LM Ocampo 'Address at the ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court at The Hague' 16 June 2003 http://www.icc cpi.int.library/organs/otp/030616_moreno_ocampo_english_final.pdf. (accessed 5 November 2018).
[95] M Koskenniemi 'The politics of international law' (1990) 1 *European Journal of International Law* 6.
[96] UN 'Guidelines on the role of prosecutors' https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx (accessed 6 November 2018).
[97] n 9 above, article 21(1).
[98] P Kwiatkowski 'Soft law in international governance' (2017) *Adam Mickiewicz University Law Review* 93.

Checks in the Rome Statute

Prosecutorial discretion is exercised in subordination to superior powers who can stop the exercise of discretion.[99] The PTC has review powers over prosecutorial powers. The absolute discretion of the Prosecutor freezes after the conclusion of a preliminary examination. The Prosecutor is accountable to the PTC to justify a decision to proceed or stop an investigation.[100] Article 15(3) of the Rome Statute indicates that the Prosecutor proposes, rather than decides, to launch a full investigation. The final decision on an investigation is the prerogative of the PTC. In a shared power with the other Chambers, the PTC also enjoys the discretion to determine the admissibility of a case.[101]

A referring state may request the Court to reconsider a decision of not pursuing a matter.[102] The state interests are not only limited to state referrals but extend to UNSC referrals and *proprio motu* cases. If a state is given power to interrogate the Prosecutor for a *nolle prosequi*, it is submitted that a state has more powers to reject the Prosecutor's decision to investigate or prosecute because this prosecutorial decision has a bearing on the primacy of a state to investigate or prosecute.

The UNSC can influence the exercise of prosecutorial discretion. The PTC may review the decision of the Prosecutor not to proceed at the request of the UNSC.[103] Most prominently, the UNSC may use its political powers under the UN Charter to request a deferral of an investigation or prosecution in the interests of international peace and security.[104] A deferral lasts for 12 months but is renewable. The Rome Statute does not stipulate the number of permitted renewals. However, renewals are not automatic but at the determination of the UNSC. It is also unclear whether the UNSC can advise on the termination of an investigation or prosecution prior to or after successive deferrals. Also, it is unclear whether the UNSC can recommend deferral to state jurisdiction.

[99] Bergsmo & Pejić (n 12 above) 397.
[100] n 9 above, art 53(1)(c).
[101] n 9 above, art 19(1).
[102] n 9 above, art 53(2)(c).
[103] n 9 above, art 53(3)(a).
[104] n 9 above, art 16.

Clearly, the UNSC can trigger the jurisdiction of the Court. Arguably, the UNSC may also trigger a state to use its deferral powers. The UNSC failed to utilise an opportunity not only to request a deferral for 12 months but to establish a new practice of recommending a deferral to state jurisdiction when an article 16 deferral request was made by Kenya and the AU in the *Kenyatta* case.[105]

The completion strategy of the UN-controlled *ad hoc* tribunals serves as guidance on the viability of deferring cases to national authorities.[106] The Prosecutor has endorsed the UNSC's political powers in the justice versus peace debate, allowing the UNSC to refer a case to a state. Through this transfer, a state is endowed with increased discretional powers to exercise its primacy under the complementarity regime.

Soft law checks

The UN Guidelines explore means to enhance the contribution of prosecutors in the criminal justice system and define the scope of prosecutorial discretionary powers.[107] The Guidelines apply to both national and international prosecutors.[108] Prosecutors are encouraged to consider alternatives to prosecution, such as the diversion of criminal cases from formal justice systems when the interests of the suspects or victims so demand.[109]

Factors considered when determining whether prosecution is in the interests of justice are substantially the same in article 53(2)(c) of the Rome Statute and article 19 of the Guidelines. The factors include the nature and seriousness of the crime, personal circumstances of the accused, and the interests or protection of victims. In view of the Guidelines, prosecutorial discretion at the ICC should be exercised in consideration of many other interests engraved in the criminal justice systems.

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[105] Al Jazeera 'UN rejects trial deferral of Kenyan leaders' 16 November 2013 https://www.aljazeera.com/news/africa/2013/11/un-rejects-trial-deferral-kenyan-leaders-20131115154921984213.html (accessed 26 November 2018).
[106] D Gozani 'Beginning to learn how to end: lessons on completion strategies, residual mechanisms, and legacy considerations from ad hoc international criminal tribunals to the International Criminal Court' (2015) 4 *Loyola of Los Angeles International and Comparative Law Review* 142 - 147.
[107] n 96 above, Preamble para 11.
[108] n 96 above, Preamble para 12.
[109] n 96 above, art 18.

5.3.5 Limitations from within

Beyond the checks imposed through various mechanisms, the OTP continuously develops prosecutorial policies, documents, guidelines and practices. The initiatives bear on prosecutorial discretion and form the basis through which the Prosecutor concedes to a certain extent the practicability of exercising some prosecutorial functions. The Prosecutor makes efforts to diffuse misconceptions and misunderstandings on the exercise of prosecutorial discretion. The 2013 Policy Paper on Preliminary Examinations is an example. The Paper outlines the policy and practice for the determination of the Prosecutor's intervention.[110] It further mentions the independence, impartiality and objectivity of the Prosecutor. On admissibility, the Paper states that the Prosecutor must assess complementarity and satisfy himself or herself before proceeding.

The position of the Prosecutor in the *Kenyatta* case, as discussed in Chapter 4, conflicted with the ideals of the Paper. A reading of the policy indicates that the onus is on the Prosecutor to justify intervention under the complementarity provisions. In the *Kenyatta* case, the Prosecutor shifted the onus to the state. On complementarity, the Paper acknowledges that the principle is case-specific.[111] Thus settling the question of whether the *same person* and *same conduct* test can be used in all the cases that come before the Court or a case-by-case basis is the appropriate approach.

5.4 Rebuttable presumption on the fulcrum of prosecution

5.4.1 Rome Statute objectives

When there is discretion, several options are available to the persons exercising discretionary powers. The ICC was created to address global concerns on persistent violations of the set legal order. The Court aims to contribute to peace, security and the well-being of the world.[112] The Court is positioned to prosecute or adopt other mechanisms to prevent serious crimes and to promote peace. The synergy between justice and peace is vital to fulfil the overall objective of the Rome Statute. The

[110] The Office of the Prosecutor 'Policy paper on preliminary examinations (Policy paper on preliminary examinations)' November 2013 http://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf paras 19-24 (accessed 6 November 2018).
[111] n 110 above, para 46.
[112] n 9 above, Preamble para 3.

Prosecutor is entitled to step in when national jurisdictions fail to investigate and prosecute.

On the other hand, persuasive voices for alternative forms of justice highlight that the Rome Statute is not confined to the investigation and prosecution of crimes. The Preamble of the Rome Statute provides guidance for the rebuttal of the presumption that the prosecution of international crimes is the only goal for the Prosecutor. The Prosecutor is yet to fully appreciate the role of states on matters involving competing prosecution and peace initiatives. The Prosecutor has acknowledged the powers of the UNSC to request deferral of cases on peace and security considerations.

5.4.2 The obligation to prosecute

During the Rome negotiations, many states preferred complementarity due to arguments that states must prosecute international crimes and that an international court should not enjoy primacy.[113] In essence, states meant that they enjoy discretion on how to proceed with their internal affairs. In view of sovereignty entitlements, the choices of states in dealing with crimes come in various forms. Nevertheless, what matters is the good faith and the ability of states to justify the preferred course of action.[114]

The preferences of states often differ from those of international criminal tribunals.[115] Accordingly, a state's duty to prosecute is not absolute. There are exceptions in both international and national levels which accommodate considerations of peace, security and the interests of justice.[116] Arguably, the Court misdirected itself when it used the failure by Kenya to establish a special tribunal as a pretext for the Court's intervention in Kenya. The focus on the special tribunal arguably led the Prosecutor to pay little attention to other efforts which Kenya initiated to keep the *Kenyatta* case and other five cases in Kenya.

[113] MM El Zeidy 'The genesis of complementarity' in C Stahn & MM El Zeidy (eds) *Complementarity from theory to practice* (2011) 71 - 141.
[114] Stigen (n 71 above) 419.
[115] L Vinjamuri 'The ICC and politics of peace and justice' in C Stahn (ed) *The law and practice of the International Criminal Court* (2005) 27.
[116] Stigen (n 71 above) 432.

Notwithstanding the foregoing analysis, some schools of thought believe that the preambular paragraphs of the Rome Statute establish a strict standard for prosecution. For example, Human Rights Watch contends that prosecution provides a safeguard against impunity and that the intention of the drafters of the Rome Statute is reflective through the insertion of the need to punish international crimes in the Preamble.[117] Human Rights Watch further dismisses the argument that the interests of justice encompass non-prosecution mechanisms. Later in this chapter, this study attempts to show that the position adopted by Human Rights Watch is inaccurate.

5.4.3 Conflicting or complementary judicio-political system?

The Court has been described as a multifaceted body which targets individuals, leaves room for restorative justice, carries the justice aspirations of the public, and is a contributor to stability and the protector of human dignity. Also, the Court has a catalytic effect on prosecutions by national jurisdictions.[118] The conceptions demonstrate the complexities faced by the ICC in defining its main goal and the expectations of outsiders. The Court cannot afford to be rigid if it is to be better understood. The contextualisation of the operations of the Court is the panacea to a widely endorsed and understood Court. Law is no longer an autonomous discipline presenting itself as an end but a socially entangled and controlled discipline.[119] Therefore, the law should be understood, criticised and developed in the context of a society.[120]

Supporters of the Court advocate for the Prosecutor to strictly apply the law and disregard political factors in initiating investigations and prosecutions.[121] The views ignore that the wings of the Court are already clipped by restrictions placed on the discretionary powers of the Prosecutor. The negotiations leading to the adoption of the Rome Statute are an experience of balancing judicial and political interests. While the Prosecutor should guard against politically influenced decisions, Nsereko posits that restrictions placed on the Prosecutor are necessary to make him or her relevant to

[117] Dukic (n 3 above) 698.
[118] Mariniello (n 43 above) 4.
[119] RA Posner 'The decline of law as an autonomous discipline' (1987) *Harvard Law Review* 762 - 763.
[120] Posner (n 119 above).
[121] Goldston (n 82 above) 4.

global politics, for transparency and protection of the Prosecutor from the temptation of pursuing politically motivated prosecutions.[122]

The argument by Nsereko infuses the legal and political landscapes to the end that the two provide checks and complement each other. There is an endeavour to protect the integrity of the Prosecutor and to avoid abuse of prosecutorial powers through consideration of the interests of states in the exercise of prosecutorial discretion. Politics has an important influence on the development of legal systems. The OTP needs a formula to integrate politics into prosecutorial policy and practice. The law may be subordinate to politics and play a less decisive role in directing prosecutorial preferences.[123]

The Rome Statute presents a Prosecutor who is a servant of both the law and political powers. As a servant of the law, the Prosecutor decides whether to prosecute independent of the direction and control of any person.[124] As a servant of politics or states, the Prosecutor needs to dissect what constitutes interests of justice, peace and security. By including the UNSC and states in the operations of the Court, the Rome Statute endorses the goals of peace and security advanced by these two political entities in the context of international criminal justice.[125]

5.4.4 The unique nature of crimes against humanity

Although war crimes are covered by the 1949 Geneva Conventions, and whereas genocide is covered by the 1948 Genocide Convention, the international community is yet to adopt a specialised convention on crimes against humanity.[126] The *lacuna* has not stopped the inclusion of crimes against humanity in the statutes of almost all international criminal tribunals, including the ICC. In addition, the prohibition of crimes against humanity, has been considered a peremptory norm of international law, from which no derogation is permitted, and which is applicable to all states.[127] Hence, crimes against humanity are also considered crimes under customary international law. The

[122] Nsereko (n 30 above) 141.
[123] LM Friedman *American law in the twentieth century* (2002) 493.
[124] Nsereko (n 30 above) 129.
[125] S Chesterman & D Malone *Law and practice of the United Nations: documents and documentary* (2008) 22; G Werle *Principles of international criminal law* (2009) 31.
[126] LN Sadat *Forging a convention for crimes against humanity* (2010).
[127] UN Office on Genocide Prevention and the Responsibility to Protect `Crimes against humanity' http://www.un.org/en/genocideprevention/crimes-against-humanity.shtml (accessed 10 October 2020).

statutes of all the tribunals inserted different definitions (with areas of commonality), resulting in a dozen definitions.[128] The thin line between what an international criminal tribunal identifies as a crime against humanity and an ordinary crime is another challenge.[129] It is unclear what converts an ordinary crime into a crime against humanity when moving from the domestic to the international realm and which mechanism is better placed to determine the threshold.[130]

The crimes against humanity dilemma is like the one faced when a threshold is drawn between a non-international armed conflict (NIAC) and other situations of violence. The intensity threshold[131] is not entirely clear due to its subjectivity. In the *Tadić* case, the ICTY determined that a non-international armed conflict exists when armed violence within the territory of a state reaches a certain intensity and duration. As highlighted in the preceding chapter, this study does not focus on whether the gravity test was reached in the *Kenyatta* case. However, the dilemma associated with the nature of crimes against humanity is helpful in reinforcing the reality of jurisdictional tensions between states and the ICC.

It is submitted that in a system that operates on complementarity, the determination of a mechanism that enjoys primacy should be given preference. The decision of a state to prefer ordinary crimes and to identify the mechanism to address the crimes should be respected, except when the interpretation deviates completely from the letter and spirit of the Rome Statute. The AC endorsed such a position in the Libyan cases. The Chamber held that 'there is no requirement in the Rome Statute for a crime to be prosecuted as an international crime domestically'.[132] This position leaves room for amnesties at a national level. As will be discussed later in this chapter, the general position is the prohibition of amnesties for serious international crimes.

[128] MC Bassiouni 'Crimes against humanity: the case for a specialized convention' (2010) 4 *Washington University Global Studies Law Review* 583.
[129] CC Jalloh 'What makes a crime against humanity a crime against humanity' (2013) 28 *American University International Law Review* 384.
[130] Jalloh (n 129 above) 385.
[131] *The Prosecutor v Limaj* IT-03-66-T (30 November 2005) paras 135 - 170.
[132] *Prosecutor v Gaddafi and Al-Senussi* 01/11-01/11 OA ICC (24 July 2014) para 119.

5.5 Preserving a state-centric interpretation

5.5.1 The ideal application of complementarity

The current interpretation of the Rome Statute largely demonstrates a two-horse contest between the Prosecutor and the UNSC when the interests of peace and security are discussed. The centrism of states is pushed down the ladder. The Collins English Dictionary defines centrism as the state or condition of having (a specified thing) as the centre of attention or focus.[133] It follows that state-centrism in international criminal law is premised on the assumption that other entities, such as courts, exercise discretion with a focus on state interests. The assumption augurs well in a complementary system such as the one for the ICC. Therefore, complementarity has roots in state-centrism, making it obligatory for any meaningful interpretation and application of the concept to be holistic enough to encompass the ingredients and ideals of state-centrism.[134]

When a conflict of discretions exists, the subdued state discretion must arise to determine the course of action. Apart from proving the unwillingness or inability of a state, another duty accrues to the Prosecutor to prove the exhaustion of state discretion. The Prosecutor must demonstrate a condition of impracticability in a state before extracting a case from a state. The Rome Statute supports the exhaustion of state discretion first and obliges the Prosecutor to notify states with jurisdiction and check their status of investigation or prosecution before commencing his or her own investigation.[135]

Secondly, the assistance rendered by a state to the Court may be within the ambit of national laws or procedures.[136] In this regard, the Court must consider the intention for future investigations as per the demands and uniqueness of each case. Some national procedures may be cumbersome to allow a state to demonstrate its willingness or ability in the time fixed by the Court.

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[133] http://www.collinsdictionary.com/dictionary/english/centrism (accessed 13 November 2018).
[134] C Hale 'Does the evolution of international criminal law end with the ICC-the roaming ICC: a model International Criminal Court for a state-centric world of international law' (2007) 35 *Denver International Law and Policy* 479 - 480.
[135] n 9 above, art 18(1).
[136] n 9 above, arts 96(3) & 93(1).

Lastly, article 17(1) of the Rome Statute reads in the negative to demonstrate the interpretation of complementarity envisaged by the Rome Statute. The article foresees situations when the Prosecutor claims and proves the admissibility of cases in view of several factors that favour state discretion.

The Court considers many factors to determine whether national remedies have been exhausted before accepting the admissibility of a case. The exhaustion of domestic remedies is normally associated with the claims of individuals against states.[137] The Rome Statute has inadmissibility checks which are reminiscent of the exhaustion of national remedies found in most international and regional human rights instruments.[138] The allowance to use applicable treaties as an interpretive guide to the Rome Statute[139] provides a basis for the Court to further draw from the jurisprudence of the African Commission on Human and Peoples' Rights (African Commission),[140] the European Court of Human Rights (European Court)[141] and the Inter-American Court of Human Rights (Inter-American Court).[142]

The African Commission considers whether remedies are 'available, effective and sufficient' in its admissibility determinations.[143] The African Commission assumes that national procedures are in place and capable of providing redress for a violation.[144] Interestingly, the African Commission only considers judicial remedies.[145] Therefore, non-judicial remedies available at the discretion of a state, such as amnesties, are excluded.[146] Other international actors such as the European Court have a different view and permit states to exercise discretion and to utilise non-judicial remedies as long as the remedies meet the availability, effectiveness and sufficiency test.[147]

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[137] AO Enabulele & B Bazuaye 'Setting the law straight: Tanganyika Law Society & anor v Tanzania and exhaustion of domestic remedies before the African Court' (2014) 8 *Mizan Law Review* 237.
[138] n 9 above, art 17.
[139] n 9 above, art 21(1)(b).
[140] African Charter on Human and Peoples Rights (African Charter) art 56.
[141] European Convention on Human Rights (European Convention) art 35.
[142] Inter-American Commission on Human Rights (Inter-American Commission) art 46.
[143] *Jawara v Gambia* 147/95-149/96 paras 30 - 31.
[144] Communication 288/04, *Shumba v Zimbabwe,* Merits Decision, 51st Ordinary Session; Communication 308/05, *Majuru v Zimbabwe,* Admissibility Decision, 44th Ordinary Session.
[145] Communication 221/98, *Cudjoe v Ghana*, Admissibility Decision, 25th Ordinary Session.
[146] ACommHPR, Monim Elgak, Osman Hummeida and Amir Suliman v Sudan, para 67.
[147] *De Jong & Others v Netherlands* (1984) 8 EHRR 38.

5.5.2 State-centrism as a pillar of the Rome Statute

The ICC operates in a state-centric world of international law which make the Court push for survival and success on the irresistible political reality.[148] Post-Cold War ambitions to tilt the tide towards the supremacy of international criminal tribunals over international crimes succeeded to a certain extent, and yet failed to dismantle the state-centric nature of the international legal structure.[149] The international community and the ICC are restricted from interfering with the state's legitimate use of force,[150] internal affairs[151] and discretion on the use of non-judicial mechanisms.[152] The Court needs to adjust its approach to fit into the state-centric model. The existing ICC case law favours a strong ICC-centric vision, and this is one of the causes of tension with states.[153]

International criminal enforcement is prone to frequent disruptions from states that claim primacy over international crimes. Whereas the deferral powers of the UNSC give the institution primacy on matters of peace and security,[154] there is little guidance on the effect of state deferral powers on complementarity. Human Rights Watch noted that a peace process supported by the UNSC is the only means to 'trump' prosecutorial efforts.[155] The UNSC powers can influence the suspension rather than withdrawal of a case.[156] A deferral request by a state also has a suspensive effect on the determination by the AC.[157] Deferral requests by states provide opportunities for states to demand their right to primacy.[158] In this regard, the AU has previously sought increased participation of states in the granting of deferral requests.

[148] Hale (n 134 above) 479.
[149] GM Lyons & M Mastanduno *Sovereignty and the international intervention: reflection on the present and prospects for the future* (1995) 250 - 251.
[150] n 9 above, Preamble para 7.
[151] n 9 above, Preamble para 8.
[152] B Broomhall *International Justice and International Criminal Court* (2003) 58 - 60.
[153] Stahn (n 15 above) 231.
[154] Goldston (n 82 above) 16.
[155] Human Rights Watch Policy Paper 'The meaning of the interests of justice in article 53 of the Rome Statute' (2005) 8 http://www.hrw.org/campaigns/icc/docs/ij070505.pdf (accessed 5 November 2018).
[156] F Gioia 'State sovereignty, jurisdiction and modern international law: the principle of complementarity in the International Criminal Court' (2006) 19 *Leiden Journal of International Law* 1121 - 1122.
[157] n 9 above, art 82(3).
[158] Bergsmo & Pejić (n 12 above) 401.

The AU proposed an amendment of the Rome Statute to allow the UNGA to consider deferral requests when a state request is not approved or attended to by the UNSC.[159] States may feel undermined and vent their frustration through non-co-operation with the Court when their primacy is overlooked against their wishes. Kenya went to the extent of regarding ICC's intervention and continued resistance to defer cases to Kenya as neo-colonialism.[160] Kenyatta argued that the ICC's administration of justice is increasingly questionable.[161] The controversies can be minimised through clear guidelines on state and prosecutorial discretion in the ICC system.

5.5.3 Protection of national interests

Sovereign states adopted complementarity as a model to govern their relations with the ICC primarily to protect their national interests.[162] States reasonably expect the Court to give them time and assistance to carry out their primary obligations. States are historically and consistently sensitive to the protection of their political, strategic and economic interests ahead of the interests of international criminal justice.[163] Any unwarranted intervention by the Court may compromise the support an international prosecutor needs from states to keep the enforcement of international criminal justice alive.[164]

The co-operation of states is almost guaranteed and the marginalisation of the Court is minimised when the Prosecutor incorporates state interests in the exercise of discretion.[165] The inclusion of the UNSC in the ICC affairs was to provide for multidimensional protections including the protection of legitimate interests of states

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[159] D Akande 'Addressing the African Union's proposal to allow the United Nations General Assembly to defer ICC prosecutions' 30 October 2010 http://www.ejiltalk.org/addressing-the-african-unions-proposal-to-allow-the-un-general-assembly-to-defer-icc-prosecutions/ (accessed 26 November 2018).

[160] L Barasa 'ICC: Uhuru's tough talk on imperialism' 21 October 2013 http://www.nation.co.ke/news/politics/-Uhuru-tough-talk-on-imperialism/1064-2040708-1sb0ypz/index.html (accessed 26 November 2018).

[161] Standard digital 'Speech by President Uhuru Kenyatta at the Extraordinary Session of the African Union' 13 October 2013 http://www.standardmedia.co.ke/article/2000095433/speech-by-president-uhuru-kenyatta-at-the-extraordinary-session-of-the-african-union (accessed 26 November 2018).

[162] R Cryer 'International law vs state sovereignty: another round? (2006) 16 *European Journal of International Law 979 - 1000.*

[163] MC Bassiouni 'Combating impunity for international crimes' (2000) 71 *University of Columbia Law Review* 409; MC Bassiouni 'Searching for justice in the world of realpolitik' (2000) 12 *Pace International Law Review* 213; MC Bassiouni 'The perennial conflict between international criminal justice and realpolitik' (2006) 22 *Georgia State University Law Review* 547.

[164] Jalloh (n 129 above) 452 - 453.

[165] D Forsythe 'Politics of the ICTY' in R Clark & M Sann (eds) *The prosecution of international crimes* (1996) 198; Brubacher (n 57 above) 93.

from potential abuse of prosecutorial discretion and protection of victims when no forum is available to initiate prosecutions.[166]

National interests were considered during the revival of international criminal tribunals in the late twentieth century. After the international community had given the ICTY primacy over crimes committed in the former Yugoslavia, the importance of national interests was revisited with the proposal for a Truth and Reconciliation Commission (TRC) to function concurrently with the ICTY. The proposal was, however, shot down by the leadership of the ICTY who thought a TRC would interfere with the mandate of the ICTY and act as a possible stronger competitor.[167]

The acknowledgement of the doctrine of state sovereignty is central to the debate on national interests in the international relations arena. As seen in chapter 6 of this study, the African states interpret the doctrine partly based on the continent's colonial past. This view is endorsed by scholars such as Anghie who asserts the following:

> [C]olonialism was central to the constitution of international law in that many of the basic doctrines of international law – including, most importantly, sovereignty doctrine – were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation.[168]

The sentiments from Africa on the relationship between ICC prosecutions and violations of state sovereignty would occupy the international criminal justice space for a time to come. One can argue that as some colonial injustices remain unresolved on the continent, the debate on state sovereignty will feature occasionally when the ICC is discussed in Africa. Some definitions of the doctrine of state sovereignty may provide guidance on balancing state sovereignty and the prosecution of crimes at an international level. According to Crawford, the doctrine of state sovereignty entails the `… totality of international rights and duties recognised by international law.'[169] Bodley

[166] A Bradford & A Posner 'Universal exceptionalism in international law' (2011) 52 *Harvard International Law Journal* 389.
[167] LA Nkansah 'The dance of truth and justice in post-conflict peacebuilding in Sierra Leone' (2015) 23 *African Journal of International and Comparative Law* 215.
[168] A Anghie 'Towards a post-colonial international law' in P Singh & B Mayer (eds) *Critical international law: postrealism, postcolonialism and transnationalism* (2014) 12.
[169] JR Crawford *The creation of states in international law* (2007) 26.

highlights an element of equality among states through the doctrine.[170] In the view of Cassese, state sovereignty enables a state to exercise its functions without external interference, and to claim immunity for their officials from foreign courts.[171] Therefore, there is little or no argument that state sovereignty is accompanied by rights and responsibilities for states. The doctrine may be waived for the international good.

From the foregoing, it can be deduced that any intervention by the ICC should avoid a perception of bias and inequality among states, should acknowledge that temporary immunities may be in the national interests, and should avoid interference with the proper functioning of governance systems where the ICC operates. That state sovereignty is not absolute[172] and indeed on the decline,[173] shows the desire for external intervention on a case-by-case basis and in accordance with laid down procedures. The move should be towards restricted sovereignty developed in conduit, with an emphasis on individual criminal responsibility in the commission of international crimes.[174]

5.5.4 The interests of justice

Article 53 of the Rome Statute introduced one of the most contentious and undefined concepts, namely, the 'interests of justice'. Ordinarily, the concept denotes a retributive approach to justice.[175] The possibility of deferrals to a non-prosecutorial mechanism is not expressly provided in article 53.[176] The broader concerns of transitional societies, truth commissions and amnesties either occupy the back seat or have no space at all.[177] The existing literature leans on the proposition of a broader understanding of the concept in order to accommodate these concerns.[178]

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[170] A Bodley 'Weakening the principle of sovereignty in international Law: the International Criminal Tribunal for the former Yugoslavia' 1999 *New York University Journal of International Law and Politics* 417.
[171] A Cassese *International Law in a Divided World* (1987) 130.
[172] Bodley (n 170 above) 419.
[173] Bodley (n 170 above).
[174] MP Snyman-Ferreira 'The evolution of state sovereignty: a historical overview' 2006 (12) *A Journal of Legal History* 12 -13.
[175] Dukic (n 3 above) 696 - 697.
[176] Dukic (n 3 above) 695.
[177] Dukic (n 3 above) 696 - 697.
[178] D Robinson 'Serving the interests of justice: amnesties, truth commissions and the International Criminal Court' 2003) 14 *European Journal of International Law* 486; C Stahn 'Complementarity, amnesties and alternative forms of justice: some interpretative guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 697 - 698.

In the application of complementarity, preservation of state-centrism and protection of state interests, the OTP can use the ambiguity of 'interests of justice' to allow states to tap into non-prosecutorial options. The Prosecutor cannot pursue all cases because of limited resources. The Prosecutor mostly selects cases to advance the interests of justice.[179] The non-exhaustive list of what should be considered under the interests of justice and different interpretations of the concept presents the Prosecutor with an advantage to adapt discretion in accordance with a context.[180]

Rodman believes that the safety net for the Prosecutor is to consider the exigencies of different situations when exercising discretionary powers.[181] Rodman further states that the pursuit of justice finds its strength and success when it considers political realities.[182]

The Prosecutor has the discretion to apply and interpret the concept 'interests of justice'. The Prosecutor has an advantage derived from the flexibility attached to the concept. The challenges are associated with the lack of definition of the concept in the Rome Statute and the Rules of the Court.[183] However, the ambiguity has seen the Prosecutor adopting an interpretation which conflicts with the overall object of the Rome Statute and which ignores the interests of states. Moreover, the OTP has previously made a vague distinction between the 'interests of justice' and the 'interests of peace'.[184]

As a safeguard against arbitrary prosecutorial decisions, the Prosecutor owes the PTC, UNSC and states an explanation on the basis for declining an investigation or prosecution.[185] The opposite is implied in that the Prosecutor needs to outline that a decision satisfies the interests of justice. The burden to prove the admissibility or inadmissibility rests with the Prosecutor, as discussed in Chapter 4.

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[179] Stigen (n 71 above) 339.
[180] Dukic (n 3 above) 694.
[181] K Rodman 'Is peace in the interests of justice? The case of broad prosecutorial discretion at the International Criminal Court' (2009) 22 *Leiden Journal of International Law* 99 - 126.
[182] Rodman (n 181 above).
[183] OTP 'Policy paper on the interests of justice' (2007) http://www.icc-cpi.int/otp/otp_docs.html (accessed on 14 November 2018).
[184] Schabas (n 4 above) 749.
[185] n 9 above, art 53(2)(c).

5.6 Qualifying notions of peace and interests of justice

5.6.1 Considerations of necessity

Justice is a broad phenomenon that transcends criminal prosecutions for those accused of international crimes.[186] Justice encompasses peace. The two concepts of justice and peace are tightly joined together to an extent that a prosecution process can be deemed successful if it leads to national reconciliation.[187] Narrowly interpreted, justice is equal to prosecution and punishment.[188] A broad interpretation considers contextual realities and the challenges of administering justice, particularly in post-conflict situations. In a broad interpretation, criminal responsibility co-exists or is replaced by other forms of justice.[189]

The UN, in its Rule of Law and Transitional Justice report of 2004, acknowledged other forms of justice. The organisation stated that although the administration of justice is normally understood from a prosecution perspective, non-prosecutorial measures hold the same weight.[190]

Although in some contexts criminal prosecutions may be the ideal approach to end impunity, departure from criminal prosecutions may be justified by necessity in other cases. Scholars such as Robinson balance the nature and credibility of the measures adopted and the extent to which these are justified by necessity.[191] Other scholars, such as Stahn, are satisfied that any or some form of sanction, whether retributive or restorative, suffices after an investigation.[192] A situation of necessity stems from social, economic or political factors, as well as the national proceedings that opted for a non-retributive approach.[193] A state which lacks sufficiently trained lawyers and has a weak

[186] Stahn (n 15 above) 716.
[187] Jallow (n 16 above) 154.
[188] M Valiñas 'Interpreting complementarity and interests of justice in the presence of restorative-based alternative forms of justice' in C Stahn & L van den Herik (eds) *Future perspectives on international criminal justice* (2010) 276.
[189] Valiñas (n 188 above).
[190] 'The rule of law and transitional justice in conflict and post-conflict societies' UN Doc.S/2004/616 (2004).
[191] Robinson (n 178) 501.
[192] Stahn (n 15 above) 712 - 716; Valiñas (n 189 above) 277.
[193] Robinson (n 178 above) 497 - 498.

judiciary during a transition may still be willing or able to use indigenous solutions to foster the locally desired healing, peace and reconciliation.[194]

5.6.2 The peace and justice interface

The peace versus justice debate was intense during the Rome negotiations. The debate divided the negotiators into two groups. One group was made up mainly of states advocated for the express inclusion of alternative forms of justice in the complementarity principle.[195] This group was overpowered by the group which strictly favoured prosecutions. Supported by vocal non-governmental organisations (NGOs), the group successfully prevented the inclusion of an express provision on the use of national amnesties.[196]

Today, supporters of retribution postulate that anything less than punishment is an endorsement of human rights violations.[197] The opponents of 'retribution only' firmly believe that reconciliation and amnesty are part of the national healing process and at times the only feasible mechanisms.[198] Doyle maintains that restorative and retributive accountability mechanisms reinforce each other and combine to provide solutions for past violations. Both are urgent goals in the enforcement of international criminal justice.[199]

In a speech welcoming the adoption of the Rome Statute in July 1998, the UN Secretary-General, Kofi Annan, identified the role of the Court towards global respect for human rights and justice.[200] In the early days of the Rome Statute, many persons welcomed the advent of the Court as a means to intensify prosecutions.[201] Amnesty International opposed the insertion of considerations of political stability in the interests

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[194] J Snyder & L Vinjamuri 'Trials and errors: principle and pragmatism in strategies of international justice' (2003) 28 *International Security* 6.
[195] 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' A/50/22 (1995) para 46.
[196] Stigen (n 71 above) 425.
[197] MJ Struett *The politics of constructing the International Criminal Court: NGOs, discourse and agency* (2008) 164.
[198] NJ Kritz *Transitional justice: how emerging democracies reckon with former regimes* (1995) 32 - 41.
[199] N Doyle 'Chile's process of recovery from human rights violence: evaluating restorative and retributive approaches' (2004) *Dallhouse University* 31.
[200] UN 'Secretary-General says the establishment of the International Criminal Court is a major step in march towards universal human rights, rule of law' 20 July 1998 http://www.un.org/press/en/1998/19980720.l2890.html (accessed 14 November 2018).
[201] CV Vicencio 'Inclusive justice: the limitations of trial justice and truth commissions' in CL Sriram & S Pillay (eds) *Peace versus justice? The dilemma of transitional justice in Africa* (2009) 63.

of justice criteria.[202] Amnesty International favoured a restrictive interpretation of article 53 that focuses on prosecuting international crimes.[203] Amnesty International developed a prosecutorial perspective and agreed with the perspective of Goldstone who dismissed political considerations. Goldstone saw no legal justification in the Rome Statute and a threat to the credibility of the Court when treading prosecutions for amnesties.[204]

The Appeals Chamber of the SCSL ruled that, while amnesty could apply to domestic jurisdictions, it was inapplicable in international law.[205] The former ICC Deputy Prosecutor, Serge Brammertz, dismissed the notion that the Rome Statute is also occupied with political considerations.[206]

The context in which the Court operates reflects a different picture from the one envisaged by 'prosecutions only' advocates. Hence, several NGOs changed their stances and have promoted ideals of alternative forms of justice where appropriate. The NGOs realised that a discretional case-by-case basis is desirable for the effective operation of the Court.[207] Unfortunately, the Prosecutor is often disconnected from realities on the ground. Persons and institutions which operate on the ground, such as the Office of the High Commissioner for Human Rights (OHCHR) in Uganda, seek to balance the duty to punish the most serious crimes with other measures aimed to address the needs of victims and society as a whole through reconciliation and healing mechanisms.[208] The OHCHR advised states on appropriate forms of accountability following a national consultative process.[209] The recommendation supports the assertion that states need to tap into their discretionary powers to clarify the proper application of complementarity.

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[202] Stigen (n 71 above) 383.
[203] C Hall 'Suggestions concerning International Criminal Court prosecutorial policy and strategy and external relations' (28 March 2003) http://www.icc-cpi.int/library/organs/otp/hall.pdf (accessed 14 November 2018).
[204] R Goldstone 'The tribunal's progress, comment from Johannesburg' May 2001 http://www.groups.yahoo.com/group/balkanhr/message/2220 (accessed 14 November 2018).
[205] T Perriello & M Wierda 'The Special Court for Sierra Leone under scrutiny' (2006) http://www.ictj.org/static/Prosecutions/Sierra.study.pdf (accessed 16 November 2018).
[206] E Blumenson 'The challenge of a global standard of justice: peace, pluralism, and punishment at the International Criminal Court' (2006) 44 *Columbia Journal of Transnational Law* 821.
[207] Stigen (n 71 above) 425.
[208] Vicencion (n 201 above).
[209] Vicencion (n 201 above).

In contemporary times, the failure to adequately appreciate that the tension between the norms of international criminal justice and the political or peace imperatives is not the preserve of the Court and UNSC is a missing link in the practice of the Court. The UNSC has rightly been identified as a political body responsible for peace and security. However, the role of states in this field of international relations is under-discussed. The 2007 Prosecutorial Policy Paper on the Interests of Justice highlighted that justice and peace are not mutually exclusive.[210] According to the Paper, the Prosecutor will look to partner with institutions such as the UNSC to deal with the intersection of justice, peace and security.[211] The Paper should specifically define the involvement of states in the balance between the norms of justice and peace.

The ICC has missed important complementarity components by paying little attention to the political perspectives of states. States, as was the case in the Kenyan cases, may think beyond the ICC and their own jurisdictions. The Prosecutor could develop better rapport with regional structures to avoid criticisms such as the one by the former AU Commission chairman, Jean Ping who stated that 'we Africans and the African Union are not against the International Criminal Court. That should be clear. We are against Ocampo who is rendering justice with double standards.'[212] The value of the use of regional mechanisms to complement national efforts is discussed in the following chapter.

5.6.3 The influence and role of the United Nations Security Council in the maintenance of peace

As earlier noted in this chapter, the UNSC takes the lead in the maintenance of peace. Investigations and prosecutions may be suspended by the Prosecutor when the UNSC advises on the need for peace and security in a particular context.[213] Prosecutorial discretion is influenced by the UNSC, which has the prerogative to define the scope of the interests of peace and security. Before the role of the UNSC was finally inserted in

[210] M Delmas-Marty 'Interactions between national and international criminal law in the preliminary phase of a trial at the ICC' (2005) 3 *Journal of International Criminal Justice* 8; n 165 above.
[211] OTP 'Policy paper on the interests of justice' (2007) http://www.icc-cpi.int/otp/otp_docs.html (accessed on 14 November 2018).
[212] R Lough 'Africa Union accuses ICC prosecutor of bias' 30 January 2011 http://www.reuters.com/article/ozatp-africa-icc-20110130-idAFJOE70T01R20110130 (accessed 10 October 2020).
[213] Zappala (n 87 above) 44.

the Rome Statute, there was a hot debate on the role of the institution. The initial draft of the ILC mirrored an international criminal court subordinate to the UNSC.[214]

A closer look at the arguments advanced by states that wanted extensive UNSC powers, such as USA, shows a push for states to exercise their discretion with very limited Court control. In 1995, USA voiced its support for an international criminal court and argued for the UNSC to maintain and restore peace and security.[215] USA further clarified its position in 2002 by stating that the ICC cannot unilaterally control USA internal affairs.[216] According to this view, the UNSC powers should be read together with state powers or interests. USA voice is guaranteed when the UNSC is involved because it has veto power. Likewise, the AU is proposing the use of UNGA for all AU member states to be heard on matters pertaining to the ICC. The question arises on the extent to which considerations of international peace and security are being interpreted by the Prosecutor in view of both the UNSC or UNGA and states discretion.

When it exercises powers under the UN Charter, the UNSC protects states from unwarranted external interference. Article 2(1) of the UN Charter identifies 'the sovereign equality of all its members' while article 2(7) prohibits the UN from intervening 'in matters which are essentially within the domestic jurisdiction of any state'. The two principles are reflected in the Preamble of the Rome Statute. The ICC regime clearly endows states with primacy. Therefore, it is not an overstatement to argue that state discretion should also occupy a more prominent role in issues impacting peace in their territories.

Arguably, the UNSC will consider its principles relating to the primacy of states, as outlined in the UN Charter, when using its deferral powers. The consequence of this is that the UNSC and state discretions will be both considered before a decision is reached to invoke the powers of the UNSC. A prominent example is the negotiated

[214] WA Schabas 'The United States hostility to the International Criminal Court: it's all about the Security Council' (2004) 15 *European Journal of International Law* 712.
[215] JS Borek 'Statement at the 50th session of the United Nations General Assembly regarding the establishment of an international criminal court' 1 November 1995 https://www.state.gov/documents/organization/65827.pdf (accessed 29 November 2018).
[216] JR Bolton 'The United States and the International Criminal Court' 16 September 2002 http://www.state.gov/t/us/rm/13538.htm (accessed on 15 November 2018).

agreement between the UN and the government of Sierra Leone to establish an independent special tribunal alongside a Truth and Reconciliation Commission.[217]

5.6.4 Transitional justice

The term 'transitional justice' is commonly used in navigating the most suitable form of redress in a post-conflict society. Transitional justice is multifaceted and encompasses several approaches, mechanisms and comprehensive strategies that are ordinarily foreign to international criminal tribunals because of their non-judicial nature.[218] These include amnesties, pardons and alternative forms of justice such as TRCs.[219] The Inter-American Commission on Human Rights (IACHR) equates transitional justice with truth discovery, and public acknowledgment and participation. The IACHR views the first step to address impunity as truth-telling before resorting to judicial redress.[220] Voices against alternative forms of justice reject the thought of international criminal justice stepping aside to allow negotiated settlements or domestic priorities.[221]

Kenya largely considered alternative forms of justice that suited its context. Kenya's transitional justice was a reaction to the 2007 electoral violence.[222] Furthermore, Kenya stood to benefit from initiatives at UN level. On 29 September 2011, the Council resolved to establish the mandate of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence.[223] The mandate of this Special Rapporteur aims to ensure accountability and justice, provide truth about past

[217] J Almqvist 'A human appraisal of the limits to judicial independence for international criminal justice' (2015) 28 *Leiden Journal of International Law* 93.
[218] WA Schabas 'Internationalized courts and their relationship with alternative accountability mechanisms: the case of Sierra Leone' in CPR Romano & A Nollkaemper (eds) *Internationalized criminal courts and tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (2004) 157; Dukic (n 3 above) 691; PP Soares 'Transitional justice in the DRC: the 2014 amnesty law and the principle of complementarity-quid juris? in Mariniello (n 43 above) 178.
[219] Soares (n 218 above).
[220] *Ignacio Ellacuria and others v El Salvador* (1999)10, 488 inter-Am.C.H.R 136/99; *Carmelo Soria Espinoza v Chile* (1999), 133/99 inter-Am-C.H.R.
[221] Vinjamuri (n 115 above) 23.
[222] E Asaala & N Dicker 'Transitional justice in Kenya and the UN Special Rapporteur on Truth and Justice: Where to from here?' (2013) 13 *Africa Human Rights Law Journal* 326.
[223] See Human Rights Council 'Resolution 18/7'.

violations, promote the rule of law and reformation of national institutions, promote healing and reconciliation, and deter future violations of human rights.[224]

Regarding Kenya, the Special Rapporteur emphasised the importance of blending and mutually reinforcing truth-seeking justice initiatives, reparations and guarantees of non-recurrence.[225] As the Special Rapporteur observed, the main goal was to put victims at the centre of the process, to build trust among affected communities, and to contribute to the reconciliation and strengthening of the law.[226] Despite the findings and recommendations of the Truth, Justice and Reconciliation Commission (TJRC) and the Special Rapporteur, the impact of transitional justice in Kenya are yet to be fully realised. Challenges include the lack of access by the public or victims to the 2013 TJRC report with detailed findings on the proposed way forward, failure by the government to pursue accountability for crimes, and continued human rights violations by the police.[227]

The retributive versus restorative justice debate adds to the list of other dichotomies associated with the ICC, such as law versus politics, peace versus justice, and primacy versus complementarity.[228] Since the 1980s, attempts have been made to reconcile judicial and non-judicial mechanisms in dealing with international crimes.[229] An integrated and diverse response became imperative to tackle complex challenges from the era of the Cold War and beyond.[230]

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[224] http://www.ohchr.org/EN/ISSUES/TRUTHJUSTICEREPARATION/Pages/Index.aspx (accessed 1 October 2020).
[225] P de Greiff 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, P de Greiff' Human Rights Council, 9 August 2012, http://www.daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/158/58/PDF/G1215858.pdf?OpenElement (accessed 4 October 2020).
[226] n 224 above.
[227] A Ndonga 'Kenya: still grappling with a stalled transitional justice mandate' 17 December 2018 http://www.ictj.org/news/kenya-still-grappling-stalled-transitional-justice-mandate (accessed 4 October 2020).
[228] Dukic (n 3 above) 691; J Clark 'Peace, justice and the International Criminal Court: limitations and possibilities' (2011) 9 *Journal of International Criminal Justice* 521.
[229] MC Bassiouni 'Accountability for violations of international humanitarian law and other serious violations of human rights' in MC Bassiouni (ed) *Post-Conflict Justice* (2002) 40.
[230] N Kritz 'Where we are and how we got here: an overview of developments in the search for justice and reconciliation' in AH Henkin (ed) *The legacy of abuse: confronting the past, facing the future* (2002) 41.

The continued use of amnesties with or without global approval relegates justice to a secondary solution by hostile parties.[231] The Rome negotiators rejected mechanisms such as TRCs. As a result, proponents of alternative mechanisms gradually strengthened their case in the peace versus justice debate. Kofi Annan endorsed the positive contribution made by TRCs to international criminal justice.[232]

Non-judicial mechanisms are often preferred because they identify with local ownership processes.[233] Where these mechanisms offer a comparative advantage, their use is more desirable than judicial mechanisms. Considerations of reconciliation, peace and stability were used in various platforms in Kenya to oppose the intervention of the ICC. In establishing a fund for post-election victims, President Uhuru Kenyatta spoke of the preference for restorative over retributive justice and the need for forgiveness.[234] To prevent the unwarranted intervention of the Court, Kenya previously called for an amendment to the Rome Statute to prosecute Court authorities for crimes against the administration of justice[235] and to give Independent Oversight Mechanism more authority.[236]

A controversy arises from the fact that the ICC, although silent on alternative forms of justice,[237] does not expressly oppose the use of appropriate alternative mechanisms.[238] The Court adjudicates over serious international crimes and any amnesty is generally excluded for these crimes. [239] The UN Human Rights Committee considers amnesties to conflict with obligations of states to prosecute violations under

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[231] L Mallinder *Amnesty, human rights and political transitions: bridging the peace and justice divide* (2008).
[232] UN 'Report of the United Nations Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies' (2004) http://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/ (accessed 15 November 2018).
[233] Jallow (n 16 above) 173; C Garbett 'The truth and the trial: victim participation, restorative justice, and the International Criminal Court' (2013) 16 *Contemporary Justice Review* 193.
[234] P Leftie 'PEV victims get Sh10bn' 26 March 2015 http://www.nation.co.ke/news/PEV-victims-get-Sh10bn-fund/1056-2667062-11obmum/index.html (accessed 29 November 2018).
[235] 'Kenya's bid to amend the Rome Statute likely to fail' *The Star* 23 November 2013 http://africog.org/kenya-s-bid-to-amend-rome-statute-likey-to-fail-the-star-november-23-2013/(accessed 25 November 2018).
[236] n 235 above.
[237] J Dugard 'Possible conflicts of jurisdiction with truth commissions' i4n A Cassese *et al* (eds) *The Rome Statute of the International Criminal Court* (2002) 700.
[238] Soares (n 218 above) 179 - 180.
[239] K Obura 'Duty to Prosecute International Crimes under International Law' in C Murungu & J Biegon (eds) *Prosecuting international crimes in Africa* (2011) 28; *Malawi African Association and Others v Mauritania* (2000) AHRLR 149.

the International Covenant on Civil and Political Rights (ICCPR).[240] Some see amnesties as the promotion of impunity from criminal prosecution.[241] The opposition is despite amnesty laws dominating post-conflict contexts and their perceived effectiveness in reconciling broken societies.[242]

The inconclusiveness of international law on the place of amnesty derives from article 6(5) of Additional Protocol II to the Geneva Conventions of 1949. Some contend that the Protocol encourages amnesties through its references to possible use of amnesty by authorities at the end of hostilities.[243] The argument holds, since alternative forms of justice are more appealing after an NIAC or situation of violence which normally involve citizens of the same state as opposed to international armed conflicts (IACs) between different states. Citizens of the same state need solutions to rebuild their communities and to heal, since they co-exist with fellow citizens following a violent period. The authenticity of alternative national approaches to justice has a bearing on prosecutorial discretion.[244] If the approaches are deemed valid, they serve as another check and balance on prosecutorial discretion. At the same time, the use of alternative forms of justice widens the discretion of states to keep cases from the Court for as long as legally or politically justifiable.

The extent of the relationship of the ICC and restorative alternative forms of justice is a bone of contention.[245] The Prosecutor must adhere to the provisions of the Rome Statute while considering the place of national mechanisms in the Rome Statute. A balance must be struck between the test laid down in the Rome Statute and associated political constraints which redefine accountability for international crimes.[246] One way of modifying the practice of the OTP is to develop a living policy document which specifically mentions the validity of alternative forms of justice and that

[240] Obura (n 239 above).
[241] B Brandon & M Du Plessis *The prosecution of international crimes: a practical guide to prosecuting ICC crimes in Commonwealth states* (2005) 119.
[242] MC Bassiouni *The pursuit of international criminal justice: a world study on conflicts, victimization and post conflict justice* (2009).
[243] See for example D Cassel 'Lessons from the Americas: guidelines for international response to amnesties for atrocities' (1996) 59 *Law and Contemporary Problems* 212.
[244] Robinson (n 178 above) 481.
[245] Stigen (n 71 above) 267.
[246] J Zalaquett 'Balancing ethical imperatives and political constraints: the dilemma of new democracies confronting past human rights violations' (1991 - 1992) 43 *Hastings Law Journal* 1425.

complementarity considerations will include both judicial and non-judicial processes of states.

Since the Prosecutor operates in a court of last resort, the Prosecutor has considerable discretion about whether, when and how to proceed when called to intervene.[247] The proposed policy document will also outline the criteria for the use of non-judicial mechanisms. Above all, evidence of non-judicial mechanisms should be good enough to make a case inadmissible before the Court if the state has good faith. Encouragingly, the current Prosecutor, Fatou Bensouda, has renewed interest to improve the conduct of preliminary examinations and review previous prosecutorial policies. She has changed the strategy used by Moreno-Ocampo by prioritising more engagement with states.[248]

5.6.5 Victim participation

Victims are interested parties in proceedings of the ICC. The ICC is a forum in which the voices, interests, personal circumstances and possible reparations are considered.[249] The interests of victims are among the constituents of the interest of justice.[250] The Rome Statute impressively allows victim participation in Court proceedings. Arguably, there is no better platform for victims to be fully heard than in the restorative arena. If the intention of the Court is to advance the interests of victims, it cannot afford to undermine the use of alternative forms as accountability mechanisms. The Court faced challenges in securing sufficient evidence in the *Kenyatta* case, leading to the collapse of the case.[251] To ensure that some form of platform was availed for victims, the Court could have co-operated with willing Kenya to establish an alternative justice mechanism.

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[247] See for example Coalition for the International Criminal Court 'Setting the mark for Rome Statute 20: Argentina first to conclude a full range of cooperation agreement with ICC' (7 March 2018) http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/CICCPR_ArgentinaCooperationAgreement_March2018.pdf (accessed 12 June 2018).

[248] See for example 'OTP Strategic Plan June 2012-2015' 11 October 2013 http://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf (accessed 10 October 2020; 'OTP Strategic Plan 2016-2018' 16 November 2015 http://www.icc-cpi.int/iccdocs/otp/en-otp_strategic_plan_2016-2018.pdf (accessed 10 October 2020).

[249] n 9 above, arts 15, 19, 53, 54, 68 & 75.

[250] n 9 above, art 53(1).

[251] *Prosecutor v Kenyatta* (13 March 2015) 01/09-02/11 ICC.

The early practice of the Prosecutor exalted the interests of victims and tailored investigations and prosecutions. In issuing the first arrest warrants in Uganda, the Prosecutor noted that consultations with many stakeholders were helpful in understanding victims and local traditions.[252]

An important question that frequently arises in international criminal law is how to effectively merge retributive and restorative processes.[253] Restorative justice is primarily concerned with securing restoration through the active participation of victims, perpetrators and the community in order to build a harmonious relationship between the victims and perpetrators.[254] The proximity of processes to victims may address individual needs and concerns of many victims. However, this may not be the case when crimes are prosecuted at an international level.[255] Ultimately, victim participation may facilitate reconciliation, shame the perpetrators and contribute to the prevention of crimes.[256] In the process of pursuing national unity and reconciliation, the rights of victims should be safeguarded and never compromised.[257]

The Prosecutor must consider both the interests and personal circumstances of victims when exercising discretion on whether to proceed with an investigation. The 'personal circumstances' consideration individualises justice and is the most appropriate model if one stands true to the aspirations of justice. The incorporation of the views of ordinary citizens is crucial in the bid to confront the past and prepare for a peaceful future.[258] International criminal law is often criticised for adopting a normative worldview and neglecting the preferences of local populations.[259]

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[252] L Moreno-Ocampo 'Statement by the Chief Prosecutor on the Uganda Arrest Warrants' 14 October 2005 http://www.icc-cpi.int/nr/rdonlyres/3255817D-fd00-4072-9F58-fdb869F9B7cf/143834/lmo_20051014_English1.pdf (accessed 16 November 2018). In the case of Uganda many victims feared that ICC interference would accentuate the conflict.

[253] BN Mcgonigle 'Two for the price of one: attempts by the Extraordinary Chambers in the Courts of Cambodia to combine retributive and restorative justice principles' (2009) 22 *Leiden Journal of International Law* 128.

[254] M Maloney & B Harvey 'Breaking eggs/re-building societies: traditional justice as a tool for transitional justice in Northern Uganda' (2006) 372 *Public Policy and Dispute Resolution* 4.

[255] Maloney & Harvey (n 254 above) 130.

[256] Maloney & Harvey (n 254 above) 144.

[257] *Azanian People's Organization (AZAPO) v President of South Africa* 1996 (4) SA 671 (CC).

[258] P Hayner *Unspeakable truths: confronting state terror and atrocity* (2001) 4.

[259] M Drumbi *Atrocity, punishment and the law* (2007) 63.

5.6.6 Evading the strict standard for serious crimes

The exclusion of mechanisms such as amnesties for serious crimes means that amnesties fall outside the consideration of the Prosecutor. Proponents of amnesties have responded with proposals that do not divorce amnesties from the goal of the Court to prosecute. Stahn cites an example given by the South African TRC and argues that the ICC does not outrightly reject alternative forms of justice although the Court desires to see prosecutions at the end of the chain.[260] Stahn finds support from Dugard who views amnesties as an alternative to prosecution.[261] Hence, the notion of investigation is gradually interpreted to include judicial and non-judicial investigations.[262]

Although prosecution is not obligatory following a non-judicial process, it should be given due regard before it is discarded.[263] The lid which blocks amnesties and other alternative forms of justice for serious crimes is removed through the grounds, such as the interests of justice and the interests of victims. At the national level, international crimes may be treated as ordinary crimes without reducing liability or punishment of the offenders. The modification of the definition allows states to use non-judicial mechanisms to minimise conflict with the standards set in the Rome Statute. For example, a state may choose to prosecute a crime as murder instead of as a crime against humanity. Flexibility may also occur for child soldiers. A rehabilitative rather than a retributive forum may be developed for such offenders.

5.6.7 Selected case studies

Rwanda

Rwanda was devastated by the 1994 genocide and struggled to deal with the violent past. Rwanda implemented several justice initiatives,[264] which included the ICTR established by the UN, prosecutions in the formal national court system, and the traditional or indigenous Gacaca system aimed at community-driven conflict resolution.

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[260] Stahn (n 15 above) 695.
[261] J Dugard 'Dealing with crimes of a past regime. Is amnesty still an option?' (1999) 12 *Leiden Journal of International Law* 1005.
[262] Stahn (n 15 above) 711; Robinson (n 178 above) 500.
[263] Stahn (n 15 above) 711 - 712; Robinson (n 178 above) 500.
[264] Hayner (n 258 above).

The ICTR was 'forced' on Rwanda which at the time was a member of the UNSC with no veto powers. Rwanda shunned the resolution which established the ICTR.[265] The UNSC overrode state discretion and preferences and further gave primacy to the ICTR prosecutor. Therefore, it is not surprising that the current Rwanda President Paul Kagame is critical of international criminal justice in the form of the ICC.[266] Historical neglect of African justice needs to be coupled with the perceived bias of the ICC against Africa influenced his perception.

Although the competence and credibility of Gacaca courts was questioned,[267] several positives were derived from the courts. The Gacaca courts widened victim and citizenry participation;[268] hence, they were termed 'people's justice'. People could testify about the genocide and share their experiences.[269] The courts blended the restoration of social harmony and integration with prosecutions.[270] Arguably, Rwanda combined the norms of justice with the aspirations of the local population.[271]

Sierra Leone

The establishment of the SCSL was motivated by anger and the desire for revenge. The government of Sierra Leone, which initially endorsed amnesty in its TRC mechanism,[272] opposed the mechanism after the armed group, the Revolutionary United Front (RUF), attacked UN peacekeepers and civilians.[273] State discretion applied in both choices on amnesty when the state decided what was appropriate under the circumstances. The UN helped to establish the SCSL when its peacekeepers

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[265] F Kimenyi 'Rwanda was justified to shun Resolution 955 after all' 8 April 2014 http://www.newtimes.co.rw/section/read/74458 (accessed 4 September 2019).
[266] Jalloh (n 74 above) 494.
[267] P Uvin 'Western and local approaches to justice in Rwanda' (2003) 9 *Global Governance* 219 - 231; A Corey & S Joireman 'Redistributive justice: the Gacaca courts in Rwanda' (2004) 103 *African Affairs* E Zorbas 'Reconciliation in post-genocide Rwanda' (2004) 1 *African Journal of Legal Studies* 29 - 52.
[268] A Megwalu & N Loizides 'Dilemmas of justice and reconciliation: Rwandans and the Gacaca courts' (2010) 18 *African Journal of International and Comparative Law* 1.
[269] S Wolters 'The Gacaca process: eradicating the culture of impunity in Rwanda?' (2005) http://www.issafrica.org/AF/current/2005/050805rwanda.pdf (accessed 16 November 2018); Megwalu & Loizides (n 268 above) 3.
[270] L Graybill 'Pardon, punishment and amnesia: three African post-conflict methods' (2004) 25 *Third World Quarterly* 1123.
[271] Snyder & Vinjamuri (n 194 above) 5 - 44.
[272] Truth and Reconciliation Commission Act (TRC Act) 2000.
[273] UN 'Letter of President Tejan Kabbah addressed to the UN Secretary-General requesting the assistance of the UN to prosecute the RUF' 12 June 2000 http://www.rscsl.org/Documents/Establishment/S-2000-786.pdf (accessed 18 November 2018) .

were kidnapped and killed by the RUF.[274] The UN respected state discretion on the preferred approaches – SCSL and TRC.

The SCSL operated parallel to the dynamics of culture, reconciliation, forgiveness, dialogue and local ownership of a post-conflict process.[275] The court focused on the prosecution of the most responsible in Sierra Leone.[276] However, the prosecutorial definition of persons most responsible was too narrow and excluded several perpetrators. The definition confined itself to commanders who 'caused' or 'instigated' war in Sierra Leone.[277] The Prosecutor of the SCSL exercised discretion with due consideration to international and Sierra Leonean law.[278] The use of national law enhanced a sense of identity and local ownership of the court processes. It also integrated national and international perspectives of justice. [279]

A more reconciliation-inspired mechanism was the TRC whose objective was to stabilise Sierra Leone and attain long-lasting peace.[280] The TRC had no punitive component and was tasked with promoting healing and national reconciliation through extracting truth.[281] In appropriate circumstances, there was acceptance of the need to sacrifice judicial trials for the sake of peace.[282] In the *Norman* case, the Appeals Chamber of the SCSL held that the work of the TRC and the SCSL complemented each other in the advancement of the interests of justice and the desirability of the co-existence of the two institutions.[283] The Chamber thwarted the decision of the Trial Chamber that rejected the proposal by the TRC for a public hearing before the TRC.[284]

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[274] R Vincent 'Written testimony of Vincent, the first Registrar of the Special Court of Sierra Leone before the Truth and Reconciliation Commission' (21 July 2003) 1 - 2.
[275] LA Nkansah 'Justice within the arrangement of the Special Court for Sierra Leone versus local perception of justice: a contradiction or harmonious?' (2014) 22 *African Journal of International and Comparative Law* 110 - 119.
[276] Statute of the Special Court of Sierra Leone (Statute of the SCSL) arts 1(1) & 6(1).
[277] C Bhoke 'The trial of Charles Taylor: conflict prevention, international law and impunity-free Africa' in P Menon (ed) *War crimes and law* (2008) 179.
[278] Jalloh (n 74 above) 172 - 173.
[279] Jalloh (n 74 above) 173.
[280] LA Nkansah 'The dance of truth and justice in post conflict peacebuilding in Sierra Leone' (2015) 23 *African Journal of International and Comparative Law* 199.
[281] S Berewa 'Addressing impunity using divergent approaches: the Truth and Reconciliation Commission and the Special Court' in United Nations Mission in Sierra Leone (ed) *Truth and Reconciliation in Sierra Leone: a compilation of articles on the Sierra Leone Truth and Reconciliation Commission* (2001) 60.
[282] R Bennett 'The evolution of the Sierra Leone Truth and Reconciliation Commission' in United Nations Mission in Sierra Leone (n 281 above) 51.
[283] *Prosecutor v Norman* SCSL-03-08-PT (28 November 2003) para 44.
[284] *Prosecutor v Norman* SCSL-03-08-PT (29 October 2003); *Norman* (n 283 above).

The law of the 'big picture' demands that a clear picture of the past[285] and the investigation of the abuses according to the context in which they were committed[286] should provide guidance on the appropriate mechanism. In Kenya, the crimes were part of recurrent electoral violence as discussed in Chapter 1. Such a context can be adequately dealt with using different mechanisms.

The SCSL and the TRC faced their own 'same person' requirement. The requirement, in the ICC, requires the same person identified by the Court to be the subject of investigation or prosecution by a state alleging the inadmissibility of a case. In the case of Sierra Leone, the requirement revealed an interesting dimension, for the question was, under which forum a person needed to appear when identified by both mechanisms. A conflict ensued as the SCSL and the TRC fought over the same persons.[287] The SCSL was uneasy with the attempts of the TRC to access the indictees of the SCSL.[288]

The problem was exacerbated by lack of guidance on the relationship between the two mechanisms, a problem which was caused by the fact that the TRC and its working methodology were enacted at a time when the SCSL was not envisaged.[289] The ICC faces a similar problem on the application of the 'same person' requirement due to lack of guidance on alternative forms of justice. The Prosecutor appears blind to the fact that a state may genuinely exercise its discretion to refrain from investigating or prosecuting a person identified by the Prosecutor. Instead, the person identified by the Prosecutor may concurrently be under a non-judicial mechanism in a state.

Extraordinary Chambers in the Courts of Cambodia

The negotiations for the establishment of the ECCC to prosecute the Khmer Rouge regime started in 1997. The initial UN assessment concluded that Cambodia was unable to prosecute due to incapacitated national courts.[290] In reaction, Cambodia

[285] N Roht-Arriaza 'The need for moral reconstruction in the wake of past human rights violations: an interview with Josè Valaquett' (1999) 200.
[286] Truth and Reconciliation Commission Act sec 6.
[287] 'Report of the Truth and Reconciliation Commission of Sierra Leone' (2004) http://www.trcsierraleone.org/drwebsite/publish/index.shtml (accessed 17 November 2018).
[288] Nkansah (n 275 above) 208.
[289] Nkansah (n 275 above) 208.
[290] S Linton 'New approaches to international justice in Cambodia and East Timor' (2002) 84 *International Review of the Red Cross* 96.

safeguarded its right to prosecute and rejected the recommendations of the UN and a unilateral passage of the Law on the Establishment of the ECCC in 2001. The Law provided for the creation of special Chambers within the domestic court structure.[291] Eventually, an agreement between the UN and Cambodia led to the establishment of the ECCC in 2003[292] and amendment of the Law on the Establishment of the ECCC in 2004. The ECCC's approach to justice is one of combining retributive and restorative or victim-centred processes.[293] The objectives of the ECCC law are anchored on the aspirations of the Cambodian government and Cambodian people. Justice, reconciliation, healing and victim participation are identified as the main concerns.[294]

Uganda

In Uganda, the ICC indictments were made against the existing and locally driven immunities granted under the Uganda Amnesty Act.[295] The extent to which the Prosecutor could have taken the domestic law into consideration is debatable. In any event, the Prosecutor should have weighed the indictments in view of the interests of justice to keep track of the proper application of complementarity in the circumstances. In the *Kenyatta* case, Kenya attempted, without success, to convince the ASP to amend the Rome Statute for sitting heads of states to enjoy immunity from prosecution.[296] This section does not support the granting of blanket immunities. Instead, it proposes the use of other forms of justice when there is a deadlock on complicated and politically sensitive cases such as for the *Kenyatta* case.

Some people opposed the ICC indictments in Uganda on the grounds that they would be detrimental to peace efforts which included the use of amnesties.[297] Complementarity was interpreted for Uganda with the conclusion that it was better to

[291] BN Mcgonigle 'Two for the price of one: attempts by the Extraordinary Chambers in the Courts of Cambodia to combine retributive and restorative justice principles' (2009) 22 Leiden Journal of International Law 128.
[292] Extraordinary Chambers in the Courts of Cambodia (ECCC Agreement).
[293] Mcgonigle (n 291 above).
[294] *Prosecutor v Nuon Chea* (2008) 002/19-09-2007 ECCC/OCIJ.
[295] Refugee Law Project 'Whose justice, perceptions of Uganda's Amnesty Act 2000: the potential for conflict resolution' (2005) http: refugeelawproject.org/working_papers/RLP.WP15.pdf (accessed 16 November 2018).
[296] N Musau & S Jennings 'Kenya continues push for ICC changes' 4 June 2014 http://iwpr.net/global-voices/kenya-continues-push-icc-changes (accessed 25 November 2018).
[297] See for example B Chinedu 'Implementing the International Criminal Court treaty in Africa: the role of Non-Governmental Organizations and Government agencies in constitutional reform' in KM Clarke (ed) *Mirrors of justice: law and power in the post-Cold War era* (2010) 114.

try members of the LRA in Uganda.[298] Debates on the African approach to justice arose, with some accusing the ICC of imposing Western values in an African context.[299] To the Acholi people in Uganda, justice has a restorative, and not punitive, meaning and purpose.[300] The Prosecutor was accused of presenting a manipulated version of complementarity.[301]

Democratic Republic of Congo

The DRC ratified the Rome Statute on 30 March 2002 and was the second state after Uganda to allow the ICC to investigate and prosecute international crimes committed in the state.[302] Various pieces of legislation highlight that the DRC has frequently adopted legislation to end impunity. The 2014 DRC Amnesty Law prohibits amnesty for serious violations of IHL.[303] Prior to the Amnesty Law, the 2002 Military Criminal Code criminalised 'crimes of genocide, crimes against humanity and war crimes'.[304]

To harmonise the national legislation on international crimes with the Rome Statute, three new laws were promulgated by the DRC on 31 December 2015, including the DRC Implementation Act.[305] The DRC has also applied the Rome Statute directly when there are deficiencies in the national legislation. For example, in the *Ankoro* case on crimes against humanity, the military tribunals (that enjoyed exclusive jurisdiction over core international crimes until 2013) invoked article 215 of the 2006 Constitution to prefer the Rome Statute over national legislation.[306]

In the last two and a half decades, the DRC experienced various armed conflicts. The instability continues today. The UN Mapping Report of 2010 documented armed

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[298] A Perkins 'Justice for war criminals or peace for Northern Uganda?' http://www.guardian.co.uk/society/katineblog72008/mar/20/justiceforwarcriminalsorp (accessed 17 November 2018).
[299] Perkins (n 298 above).
[300] T Allen 'Ritual (ab)use? Problems with traditional justice in Northern Uganda' in N Waddell & P Clark (eds) *Courting conflict? Justice, peace and the ICC in Africa* (2008) 47.
[301] C Dolan 'Imposed justice and the need for sustainable peace in Uganda presentation to beyond Juba' (2008) http://www.beyondjuba,org/Conference_presentations/Imposed_Justice_and%20the_need_for-Sustainable_Peace_in_Uganda (accessed 18 November 2018).
[302] Democratic Republic of Congo 'Letter of Referral from President Joseph Kabila to Prosecutor of the ICC' 3 March 2004 http://www.issafrica.org/uploads/M164APPEND1.PDF (accessed on 22 November 2018).
[303] Soares (n 218 above) 180 - 184.
[304] Military Criminal Code (Criminal Code).
[305] DRC Implementation Act (Implementation Act).
[306] *Public Prosecutor & 54 Civil Parties v Kayembe & 29 Others* (2004) RP 01/2003 (unpublished).

conflicts of various types dating back to 1993.[307] The long history of instability calls for integrated mechanisms beyond judicial measures to attain a long-lasting end to impunity. The frequency of violence is analogous to that of Kenya, albeit in different circumstances, motivations and gravity. In this vein, the ICC should adopt a complementarity approach that pays attention to the historical context of a state.

The ICC activities in the DRC are limited to crimes committed from 1 July 2002.[308] Bearing in mind these considerations, the ICC cannot go solo in a context such as the DRC, since the Court is likely to achieve favourable results by allowing the DRC, which better understands its history and future aspirations, to oversee the crimes. Also, the DRC has options other than judicial mechanisms at its disposal.

5.7 Entrenched exceptionalism

5.7.1 Exceptionalism in international law

There is a thin line between exceptionalism and exemptionalism. Exceptionalism is when states interpret and apply international law and norms to reflect their own values and interests.[309] Exemptionalism is refusal by a state to be bound by the rules of international law.[310] While some states may be exempt from the jurisdiction of the ICC, there are universal norms of international law that bind all states.[311] In one way or the other, all states have features of exceptionalism in their approach to international law.[312]

Kenya's opposition to the ICC intervention was a demonstration of exceptionalism. The background to its arguments and criticisms were essentially based on the protection of

[307] UN OHCHR 'Democratic Republic of the Congo, 1993-2003: Report of the mapping exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003' (August 2010) http://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf (accessed 22 November 2018).
[308] n 9 above, art 24.
[309] Bradford & Posner (n 166 above) 8.
[310] M Ignatieff 'Introduction: American exceptionalism and human rights' in M Ignarieff (ed) *American exceptionalism and human rights* (2005) 4.
[311] Bradford & Posner (n 166 above) 5 - 6.
[312] Bradford & Posner (n 166 above) 3.

its values and interests. Kenya regarded the ICC as interfering with its sovereignty and broadly as fighting against the Kenyan people.[313]

The frequent conflicting interpretations of international law at the UNSC, ICC and state levels have a basis in state exceptionalism. The sooner the Court appreciates the existence of exceptionalism, the more the Court will recognise the exercise of state discretion to the greatest extent possible. The strong opposition to the work of the Court by USA and recently by the AU give a wrong impression that only a small clique of nations believe in exceptionalism.[314]

The Rome Statute is among instruments that accommodate exceptionalism expressly or impliedly. The Rome Statute recognises and is powerless on agreements entered into by states to entrench their discretion and to limit the intervention of the Court. Related agreements were reached in countries such as Sierra Leone and the DRC as discussed above. Some states may make reservations to limit the intervention of the Court. This is in addition to states having autonomy to crimes committed in Peace Support Operations (PSOs).

5.7.2 Agreements by states

The issue of state agreements and their impact on the operations of the ICC is often understood within the context of article 98 agreements. These agreements aim to preserve harmony among states through respect of international obligations, particularly to non-state parties to the ICC. Under article 98 of the Rome Statute, a state gives preference to obligations to another state including a third state or non-state party against the competing co-operation with the ICC. This gives states leverage to adopt an interpretation that protects their values and interests.

The article 98 agreements can therefore be said to promote exceptionalism and to curtail the Prosecutor from exercising discretion without the consent of relevant states. Prosecutorial discretion is suspended to pave the way for priorities that states have at

[313] R Wanjala 'Acting out justice in Kenya' 25 February 2013 http://www.iwpr.net/report-news/acting-out-justice-kenya (accessed 29 November 2018).
[314] S Hoffman 'American exceptionalism: the new version' in Ignarieff (ed) (n 310 above) 225 - 226.

a given time. Reference to article 98 agreements dominated the controversy on the continued protection of Al Bashir by African states.[315]

In predominately contemporary internal conflicts, local agreements may be entered into by the belligerents to facilitate the peace process. The question that arises is the extent to which the Court should respect such agreements, some of which are constitutionally enacted. An example is the Promotion of National Unity and Reconciliation Act of South Africa.[316] Although adopted before the Rome Statute, the Act serves as a guidance on the approach a state that has an option to prosecute may instead take a non-prosecutorial approach.

Other examples include the Agreement on Accountability and Reconciliation, reached on 29 June 2007 in Uganda.[317] Unfortunately, the peace accord was not signed because the LRA snubbed the ceremony on two occasions.[318] The Preamble of the Agreement indicates that the customary processes are deemed to be among the most appropriate justice mechanisms with a specific objective to promote reconciliation.[319] In the Agreement, the parties undertook to use judiciary and reconciliation institutions of Uganda.[320] In that regard, the parties endorsed the use of alternative justice mechanisms, such as traditional justice processes and reparations for victims.[321] The parties agreed that formal courts would prosecute the most serious international crimes.[322] The failure by Kenya to pass a Bill to establish the STK should have motivated the ICC to propose to Kenya the considerations of other possible national mechanisms.

5.7.3 Reservations by states

The Rome Statute prohibits reservations in its application.[323] However, Colombia adopted a contrary approach and made a reservation when it ratified the Rome Statute.

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[315] J Petrovic *et al* 'To arrest or not to arrest the incumbent head of state: the Bashir case and the interplay between law and politics' (2016) 42 *Monash University Law Review* 773.
[316] Promotion of National Unity and Reconciliation Act (Reconciliation Act).
[317] Agreement on Accountability and Reconciliation (Uganda Agreement).
[318] C Mbazira 'Prosecuting international crimes committed by the Lord's Resistance Army in Uganda' in C Murungu & J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 208.
[319] Mbazira (n 318 above) 207.
[320] Agreement on Accountability and Reconciliation (Uganda Agreement) para 2(1).
[321] n 320 above, para 5(3).
[322] n 320 above, para 6.
[323] n 9 above, art 120.

Colombia declared that it was necessary in its context to use amnesties and pardons if these conformed to national and international law.[324]

Colombia exercised its discretion to outline what works best in its political and legal context. The state departed from a plain reading of the reservation article in the Rome Statute and accordingly argued that reservations are allowed under certain circumstances to enable, *inter alia,* amnesties and pardons. The overall objective is to promote national peace and reconciliation.[325]

France also made a reservation to protect its nationals and territorial integrity.[326] As a permanent member of the UNSC, the French stance is illustrative that a member with veto power will use such power to advance its national interests. Article 16 deferrals or refusals to defer thereof is not only a matter of international peace and security but largely a reflection of the national interests of members of the UNSC, particularly the ones with veto powers. The weakness of the Rome Statute is that it limits the power to invoke national interests at the UNSC level. To respect the equality of nations,[327] the Court should allow national interests to take precedence over the desire of the Court to intervene.

The positions of France and Colombia are strengthened by what some call the 'opt out' article in the Rome Statute. Article 124 allows a state to make a declaration which invokes the application of exceptionalism over war crimes for a period of seven years from the date of its ratification. The provision develops a strong assertion that a state may prevent the intervention of the Court within seven years.[328]

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[324] UN treaty collection 'Declarations and Reservations to the Rome Statute' http://www.untreaty.un.org/ENGLISH/bible/enflishinternetbible/partI/chapterXVIII/treaty11.asp (accessed 19 November 2018).
[325] Stigen (n 71 above) 425 - 426.
[326] UN treaty collection 'France Declarations to the Rome Statute of the International Criminal Court' 21 June 2000 http://www.treaties.un.org/doc/Treaties/1998/11/19981110%2006-38%20PM/Related%20Documents/CN.404.2000-Eng.pdf (accessed 22 November 2018).
[327] Charter of the United Nations art 1.
[328] M Scheffer 'America's stake in peace, security and justice' (1998) http://www.state.gove/www/policy_remarks/1998/980831_scheffer_icc,html (accessed 19 November 2018).

5.7.4 Exceptionalism in Peace Support Operations

Military and civilian personnel who participate in PSOs are subject to the exclusive jurisdiction of their states and immune from other jurisdictions.[329] To this effect, the sending states (or the UN as the case may be) and host states enter into status-of-forces agreements (SOFAs) or status-of-mission agreements (SOMAs).[330] The SOFAs or SOMAs as secondary sources for the immunity of peacekeepers are primarily derived from customary law.[331] The immunity does not absolve members of the sending states from accountability. Instead, the sending states must investigate and prosecute alleged violations by their members.[332]

The doctrine of exceptionalism with regard to PSOs was advanced at the Rome negotiations after some states, particularly USA, threatened to stop their contributions to peace missions if the ICC was given jurisdiction over crimes committed in PSOs.[333] Despite these and other submissions on the immunity of peacekeepers, the Rome Statute appears to be a departure from the traditional protection approach given to peacekeepers, as it leaves a possibility for their prosecutions.[334]

To reiterate that the exclusive application of national laws is still operational, the UN Secretary-General's Bulletin released a year after the Rome Statute was adopted included national action in the event of violations in PSOs.[335] Section 4 of the Bulletin authorises states to prosecute IHL violations by their own soldiers. The position of the UN derived from the Bulletin makes it difficult for the ICC to prosecute a case arising from a PSO environment. To honour agreements between sending and host states, and to respect the provisions of the Bulletin, the UNSC must initiate the deferral of such

[329] D Fleck 'The legal status of personnel involved in United Nations peace operations' (2013) 95 *International Review of the Red Cross* 614.
[330] UN Safety Convention art 4; Convention on the Privileges and Immunities of the United Nations section 18(a).
[331] TD Gill & D Fleck *The handbook of the international law of military operations* (2010) 199 - 200.
[332] M Zwanenburg 'The Statute for an International Criminal Court and the United States: peacekeepers under fire? (1999) 10 *European Journal of International Law* 128; TD Gill 'Legal aspects of the transfer of authority in UN Peace Operations' (2011) 42 *Netherlands*
Yearbook of International Law 37 - 52.
[333] Zwanenburg (n 332 above) 126.
[334] Zwanenburg (n 332 above) 129.
[335] Observance by the United Nations forces of International Humanitarian Law (Secretary-General's Bulletin).

cases. States also have every cause not to co-operate with the Court in view of existing PSO agreements between states.

5.7.5 USA and Exceptionalism

While all states have a measure of exceptionalism, no state has made its exceptionalism known to the international community more than USA. To comprehend the vocal stance of USA against the Court, the discussions at Rome and what USA wanted form a perfect basis. USA was very supportive of the creation of the Court at the initial stages. In 1994, the report and proposals of the ILC to the UNGA made an impression on USA.[336] It endorsed the ILC draft that provided for a Court that was subordinate to the UNSC.[337] USA support of the draft was motivated by the measure to which the draft allowed UNSC control over the Court. [338]

The exceptionalism model of USA developed following the conception of a Court with significant prosecutorial independence.[339] USA perceived the Court as having detrimental effects on its national sovereignty, interests and independence.[340]

USA also presented policy declarations with the main emphasis on the prominent role of the UNSC before the Rome Statute was adopted.[341] Following the adoption of the Rome Statute, USA resorted to the use of agreements with other states, national legislation and veto powers in the UNSC to preserve the concept of exceptionalism. At the state relations level, it has coerced (through financial, military and humanitarian aid) several states to sign article 98 agreements (Bilateral Impunity Agreements) to guarantee protection of American citizens from the ICC.[342]

At the national front, USA adopted a legislation in 2002 to penalise any state for handing over a USA national to the ICC.[343] The Court has not publicly rebuked USA.

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[336] DJ Scheffer 'The United States and the International Criminal Court' (1999) 93 *American Journal of International* 13.
[337] Schabas (n 4 above) 712.
[338] B Clinton 'Remarks at the University of Connecticut in Storrs' (1995) 2 *Pub Papers* 159.
[339] Schabas (n 4 above) 701 & 717; J Bolton 'The risks and weaknesses of the International Criminal Court from America's perspective' (2001) 64 *Law and Contemporary Problems* 173.
[340] US Department of State 'The United States and the International Criminal Court' (2002) http://www.state.gov/t/us/rm/15158.html (accessed 19 November 2018).
[341] Schabas (n 4 above) 713.
[342] Coalition for the International Criminal Court 'USA and the ICC: Bilateral Immunity Agreements' http://www.iccnow.org/?mod=bia (accessed 19 November 2018).
[343] See American Service Members Protection Act.

The silence may be interpreted as acceptance of the validity of exceptionalism.[344] At the UNSC level, USA has used its veto power to block some resolutions intended to trigger the intervention of the Court in a non-state party.[345]

5.8 Conclusion

In international criminal justice, prosecutorial discretion is not a matter of competition between the Prosecutor and states. Instead, discretion provides guidance for the maximisation of complementarity to unlock state discretion and assist states to consider various options to deal with international crimes under their domain. The Court is demotivated to interfere in state affairs when interference creates tensions instead of binding the Court and states. Options for states extend beyond the Rome Statute and necessitate a flexible approach on the part of the Prosecutor when dealing with states. The current misunderstandings on the application of complementarity are rooted in the unresolved state and prosecutorial discretions.

Future dialogue between the Court and states should decisively deal with the place of law and politics in the exercise of discretion. For states, some allegiance or dependence on political forums cannot cease, as they are political institutions and subject to interstate politics. In this regard, the following chapter discusses the role of regional mechanisms in the application of complementarity. While reference is made to different regional or international mechanisms, the focus is on African mechanisms because such are more relevant to this study. Kenya is an African state and Africa is currently involved in the debates on prosecutorial-state discretion.

[344] Jalloh (n 74 above) 493.
[345] E Hey Teaching international law: state-consent as consent to a process of normative development and ensuing problems (2003) 8 - 9.

CHAPTER 6

ENHANCING STATE DISCRETION THROUGH THE USE OF REGIONAL MECHANISMS

6.1 Introduction

The lack of common positions among states on who exercise discretion and to what extent in the prosecution of core crimes deprives the ICC of potential universal acceptance. As seen in the preceding chapter, USA raised concerns on the powers given to the Prosecutor during the creation of the Court. USA advanced proposals to limit the discretion of the Prosecutor through broadening the powers of states and UNSC. USA strongly argued for state consent to be sought before the intervention of the Court[1] and for the UNSC's referrals to encompass broad considerations.[2]

Had the above proposals been adopted, state discretion could have been strengthened in the Rome Statute. The approach favoured greater state involvement before a UNSC referral to the ICC. The extension of the scope of the UNSC beyond Chapter VII of the UN Charter opens a window for states to consider peaceful settlement of disputes under their jurisdiction and to request assistance from institutions such as regional agencies.

After the creation of the ICC, USA envisaged to influence the operations of the Court and considered ratification of the Rome Statute. Despite concerns, the Clinton administration made inroads towards the ratification of the Rome Statute.[3] However, USA actively opposed the ICC during the Bush administration and was convinced of insufficient safeguards to protect national interests and discretion of states.[4] This chapter explores how the preservation of state discretion, as initially promoted by USA and advanced by the AU in the last decade, can be enhanced through the use of regional mechanisms.

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[1] F Mckay 'US unilateralism and international crimes: the International Criminal Court and terrorism' (2004) 36 *Cornell International Law Journal* 461.
[2] DJ Scheffer 'The United States and the International Criminal Court' (1999) 39 *American Journal of International Law* 12 - 13.
[3] DJ Scheffer 'Staying the course with the International Criminal Court' (2001-2002) 35 *Cornell International Law Journal* 55 - 61.
[4] Mckay (n 1 above) 463 - 468.

The ICC underwent a tumultuous phase in the last decade due to allegations of unwarranted intervention in national affairs. The opposition came mainly from African states and their mother body, the AU, that increasingly view the Court as biased,[5] imperialistic,[6] insensitive to African values,[7] undermining state sovereignty,[8] exacerbating conflicts in the continent,[9] making politically motivated interventions[10] and misinterpreting the principle of complementarity.[11] As a result, the rapport between the ICC and some African states has deteriorated. The situation raises fears for the creation of an unpleasant gap in the prosecution of international crimes.

The last decade tested the survival of the ICC and the direction of the AU on future engagement with the Court.[12] To mend the relations and save the principle of complementarity requires the addition of regional frameworks to the complementarity project.[13] The calls for the addition of regional mechanisms have merit, given their role in the field of international law from the second half of the twentieth century.[14]

Africa can persuasively claim that it has always been proactive and occupied with the establishment of its own mechanisms that advance international criminal justice. The continent has devised ways to counter allegedly undesirable intrusions of the ICC. Africa's backup plan has manifested in crucial intervals in the age of international

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[5] T McNamee 'The International Criminal Court and Africa. Between aspiration and reality: making international justice work better for Africa' http://www.worldcat.org/title/icc-and-africa-between-aspiration-and-reality-making-international-justice-work-better-for-africa/oclc/967780844 (accessed 16 February 2019).

[6] EY Omorogbe 'The African Union and the International Criminal Court: What to do with non-party heads of state' (2014) 17 - 19 *University of Leicester School of Law Research Paper* 42.

[7] Omorogbe (n 6 above) 43; F Mangena 'Restorative justice's deep roots in Africa' (2015) 34 *South African Journal of Philosophy* 1 - 12.

[8] BS Brown 'The International Criminal Court in Africa: impartiality, politics, complementarity and Brexit' (2017) 31 *Temple International and Comparative Law Journal* 168.

[9] RJV Cole 'Africa's relationship with the International Criminal Court: more political than legal' (2013) 14 *Melbourne Journal of International Law* 3.

[10] A Niang 'International Criminal Court politricks, Africa is a country' 14 February 2017 http://africaisacountry.com/2017/02/international-criminal-court-politricks (accessed 16 February 2019).

[11] 'Africa and the International Criminal Court: mending fencing' (2012) *Avocats Sans Frontières Paper* 12; EALA 'Resolution seeking to try Kenya 2007 general elections aftermath at the EACJ and not ICC' 04 November 2011 http://www.eala.org/oldsite041111/keydocuments/doc_details/266-resolution-seeking-to-try-kenya-2007-general-elections-aftermath-accusedpersons-at-eacj-not-icc.html (accessed 16 February 2019).

[12] FK Tiba 'Regional International Criminal Courts: an idea whose time has come?' (2016) 17 *Cardozo Journal of Conflict Resolution* 539 - 540.

[13] G Naldi & K Magliveras 'Ever difficult symbiosis of Africa with the International Criminal Court' (2013) *Revue Hellénique De Troit International* 61.

[14] FL Morrison 'The role of regional organizations in the enforcement of international law' in J Delbrück (ed) *Allocation of Law Enforcement Authority in the International System* (1995) 39 - 56.

criminal law. The Constitutive Act[15] came into force a year earlier than the Rome Statute.[16] It is not clear whether this was a coincidence or deliberate design by Africa. Discussions on the establishment of a permanent international criminal court and an African Court gathered momentum in the early 1990s. An Additional Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights was adopted in 1998 when the Rome Statute was adopted. The foregoing developments reveal a continent that has made strides to create mechanisms that either replicate or strengthen the achievement of the objectives of international criminal law. Africa finds a basis to claim jurisdiction over international crimes through its mechanisms.[17]

In the unfolding tensions with the ICC, Africa is demonstrating not only the need for regional ownership of justice but also the importance of the preservation of the supremacy of state discretion. African states also prefer a multifaceted approach to resolve African problems. South Africa's plan to withdraw from the Rome Statute was motivated by the alleged failure of the ICC to consider peace, security and stability issues in the pursuit for international criminal justice.[18] In South Africa's view, the ICC's interpretation of justice should not conflict with the peace obligations of states.[19] South Africa represents Africa's desire to balance competing interests in the application of the complementarity principle as envisaged in the Rome Statute.

The AU and associated sub-regional mechanisms want recognition as participants in the complementarity system of the Rome Statute. Recognition will enable them to help in the balancing process.[20] Hence, due diligence is needed from the ICC to explore opportunities to resolve violations beyond the Court and states. It is an exercise the ICC may be interested in overseeing as evidenced by the Prosecutor's hint in 2016

[15] Constitutive Act of the African Union (Constitutive Act).
[16] The Constitutive Act entered into force on 26 May 2001 while the Rome Statute of the International Court (Rome Statute) entered into force on 1 July 2002.
[17] P Manirakiza 'The case for an African Criminal Court to prosecute international crimes committed in Africa' in VO Nmehielle (ed) *Africa and the future of international criminal justice* (2012) 27 - 28.
[18] 'South Africa's withdrawal from the Rome Statute of the International Criminal Court' http://www.dirco.gov.za/milan_italy/newsandevents/rome_statute (accessed 17 February 2018).
[19] n 18 above.
[20] Avocats Sans Frontières Paper (n 11 above).

that the ICC as a court of last resort is not necessarily opposed to proposals for an African Court.[21]

The emerging African approach intends to preserve the equality of states in ending impunity and creating a violence-free continent. Africa believes that it can find African solutions to African problems and that the continent can keep states as the centrepiece of initiating solutions in their respective territories.[22] The use of regional mechanisms also promotes a decentralised approach in the enforcement of international criminal justice.[23] To its credit, Africa can draw from the relative success of hybrid mechanisms such as the SCSL and the Extraordinary Chambers to augment the position that Africa reached judicial maturity and is ready to provide a continental forum to deliver international criminal justice.[24] With this foundation, Africa can confidently pursue the ratification of the Malabo Protocol to stretch the hand of the AU in combating impunity.[25]

The ICC would benefit when regional mechanisms influence and assist states to craft strategies of resolving internal problems. Likewise, the ICC will not experience negative consequences if regional courts play a role that the Court would ordinarily play in bringing perpetrators to justice. In a complementary system that involves regional organisations, the ICC can nurture the regional mechanisms to align regional prosecutions of international crimes to internationally recognised standards.[26] The eventual use of the regional mechanisms finds support in the lingering proposals for a broader use of positive complementarity.[27] Arguably, the spirit of complementarity is more concerned about whether adequate action is taken against perpetrators than the forum that takes the action.[28]

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[21] C Schmitt '13 years, 1 billion dollars, 2 convictions: Is the International Criminal Court worth it?' 27 January 2016 http://www.dw.com/en/13-years-1 -billion-dollars-2-convictions-is-the-international-criminal-court-worth-it/a-19006069 (accessed 19 February 2019).
[22] Constitutive Act (n 15 above) arts 3 - 4 & Preamble para 10.
[23] KW Abbott 'International relations theory, international law, and the regime governing atrocities in internal conflicts' (1999) 93 *American Journal of International Law* 374.
[24] C Clifford 'Justice beyond the International Criminal Court: towards a regional framework in Africa' (2019) 293 *South African Institute of International Affairs Paper* 19 - 20.
[25] Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).
[26] ST Ebobrah 'Human rights developments in subregional courts in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 25; JM Isanga 'The International Criminal Court ten years later: appraisal and prospects' (2013) 21 *Cardozo Journal of international and Comparative Law* 237 - 238.
[27] Brown (n 8 above) 170 - 172.
[28] WA Schabas *Regions and international criminal law* (2006).

This chapter begins by exploring the role played by international organisations in the development of international criminal law and justice. The exploration demonstrates the importance of international organisations as partners to international criminal courts. The chapter proceeds to discuss the emergence of regional mechanisms and the associated dynamics in the evolution of international criminal law and justice. The chapter largely adopts Africa as a case study to highlight the need for the use of regional mechanisms to complement national efforts.

Africa is used in this chapter as a case study for several reasons. First, the study is based on Kenya – an African state. Second, historical developments indicate that Africa spearheads the push for alternative mechanisms when both national and international courts are not appropriate forums to deal with situations. Regional mechanisms are suitable substitutes for international efforts in the advancement of international criminal justice. Lastly, Africa is at the forefront of tensions with the ICC and the UNSC. Common positions of African states have adversely hindered co-operation with the ICC. The ICC, states and the UNSC are notable participants in the ICC processes and are all acquainted with the position of the AU on ICC operations, making Africa a strong fourth participant in international criminal justice.

6.2 International organisations and international criminal law

6.2.1 Overview of international and regional organisations

International organisations and regional organisations are often seen as one and the same thing. In some instances, regional organisations are considered as part of international organisations.[29] The interdependence of the two in areas of peace, security, stability and other international relations matters makes them to be closely associated.[30] For purposes of this chapter, international and regional organisations are differentiated to allow a discussion on the contribution of the AU to be separate from that of the UN.

[29] AF Snyman 'Regionalism and the restructuring of the United Nations with specific reference to the African Union' (2011) 44 *Comparative and International Law Journal of South Africa* 361 - 362; BO Chinedu 'The African Union, the United Nations Security Council and the politicisation of international justice in Africa' (2014) 7 *African Journal of Legal Studies* 359 - 360.
[30] Chinedu (n 29 above).

International organisations refer to organisations with global coverage, such as the UN, whereas regional organisations refer to organisations that deal specifically with regional issues, such as the AU and the EU. International organisations consist of members who agree to be bound by common goals, aspirations and concerns.[31] International organisations cover the global community. On the other hand, regional organisations, due to regional coverage, can be said to consist of states joined by both geographical location and common values.[32]

6.2.2 Status of international organisations

The ICJ and the ILC treat international organisations as legal persons, giving international organisations the capacity to assume rights, duties and jurisdiction in international law.[33] Bearing this capacity, these can contribute to the development of international criminal law and bring about new dimensions and norms. Despite their notable contribution, international organisations are often labelled as tools for the pursuit of the interests of powerful states.[34] The negativity explains the rationale for both international and regional organisations reinforcing one another and filling gaps in their operations.

In the context of the complementarity regime of the Rome Statute, the role of international organisations is better understood by revisiting the reason for the ICC. The ICC aims to end impunity for international crimes and to contribute to international peace and security. The practice of the ICC has confined the preservation of international peace and security to the UNSC.[35] The inclusion of the UN – an international organisation – in the ICC processes[36] is a recognition of the pivotal role of international organisations in the work of the Court. Article 23 of the UN Charter regards the maintenance of international peace and security to be in the ambit of the

[31] W Hanrieder 'International organizations and international system' (1966) 10 *The Journal of Conflict Resolution* 297 - 314.
[32] JS Nye 'International regionalism' (1968); Tiba (n 12 above) 524; AL Bennett & JK Oliver *International organizations: principles and issues* (2002) 237.
[33] International Court of Justice 'Reparation for injuries suffered in the service of the United Nations, advisory opinion' (1949) 174.
[34] JJ Mearsheimer 'The false promise of international institutions' (1994 - 1995) 3 *International Security* 5-49; Bennett & Oliver (n 32 above) 5.
[35] W Schabas 'The International Criminal Court' in DR Black & PD Williams (eds) *The International politics of mass atrocities: the case of Darfur* (2010) 147.
[36] Rome Statute of the International Criminal Court (Rome Statute), Preamble para 7, arts 13 &16.

UNSC. In turn, the UNSC partners with regional bodies to secure a peaceful and stable world (article 52 - 54).

The Rome Statute establishes two prominent institutions with primacy, namely, states (which prosecute international crimes)[37] and the UNSC (which determines situations which threaten international peace and security).[38] The UN Charter brings the UNSC into a relationship with regional actors. The voluntary subscription of states into regional establishments brings states into a relationship with regional actors. The common denominator between the two forums of primacy is their position that states may need assistance from regional organisations and that regional actors may be handy in assisting states to abide by internationally recognised standards and norms. The forums take this common approach to give sovereign states more and suitable options in dealing with internal affairs.

It follows that in the operations that concern states, both international and regional organisations exalt the discretion of states to choose a forum to assist with internal matters, thus explaining the obligation of the ICC to always consider the best interests of states before intervening. To protect their interests, states should be allowed to offer secondary jurisdiction to a forum of choice, including regional courts and international criminal tribunals. Once the ICC accepts the reality of the existence of other forums that a state may use, the Court will truly become a court of last resort. The ICC is a court of last resort not only by operation but also by observation.

Arguably, the Court has an 'observer status' through which it watches, with a subdued interest, the breadth, length and depth of the exercise of state discretion in the prosecution of international crimes. Although some situations require the Court's contribution, states remain the main drivers of dispute settlement in their jurisdictions. Before *proprio motu* triggers, the Prosecutor must diligently observe state processes and be persuaded that states have reached the end of their discretion. The willingness or ability of a state must be considered by the Prosecutor, being mindful that there could be room for a state to resort to alternative mechanisms of justice.

[37] n 36 above, arts 10 & 17.
[38] n 36 above, art 16.

6.2.3 Law and decision-making powers

Modern international law is associated with the development of a strong bond between international institutions and states.[39] States entrust international organisations with a responsibility to succour them to realise certain goals and objectives.[40] Accordingly, states maintain interest in the performance and practice of international organisations.[41] International organisations influence the governance and behaviour of states through law and decision-making powers.[42] They invoke certain norms that serve as a standard for states in setting their own laws and justice systems.[43] States can draw from the new rules, patterns of conduct and compliance mechanisms brought about by international organisations.[44]

The UN is the main arena which shapes the policies and actions of states. The UN also shapes the response of the ICC through UNSC referrals and deferrals. The UN is credited for the development of the 'common law of international organisations'.[45] In pursuit of effective global systems, the UN seeks the co-operation of regional organisations to ensure security, development and respect for human rights at regional level. The joint efforts of the UN and regional organisations will immensely contribute to the prosecutorial policy of the ICC on complementarity to encourage states to adhere to the principles and purposes of the UN when they exercise discretion in the prosecution of international crimes.[46]

The Constitutive Act of the AU gives states primacy in internal affairs. The AU only intervens to stop the commission of core international crimes in Africa.[47] The African Peace and Security Architecture is designed for peace and stability on the African

[39] MN Shaw *International Law* (2008) 1284.
[40] D Akande 'International organizations' in M Evans (ed) *International law* (2003) 271.
[41] Akande (n 43 above).
[42] JE Alvarez 'Governing the world: international organisations as lawmakers' (2007) 31 *Suffolk Transnational Law Review* 596.
[43] Alvarez (n 42 above); T Forsberg 'Normative power Europe (once more): a conceptual classification and empirical analysis' (2009) 16 http://www.allacademic.com/meta/p_mia_apa_research_citation/3/1/1/2/8/p311280_index.html (accessed 18 February 2019).
[44] I Brownlie *Principles of public international law* (2008) 691 - 693; Shaw (n 39 above).
[45] Akande (n 40 above); M Du Plessis & C Gevers 'Balancing competing obligations: the Rome Statute and AU decisions' (2011) *Institute of Security Studies Paper* 11.
[46] n 36 above, Preamble para 7.
[47] n 15 above, art 4g & f.

continent.[48] The UN retains the primary responsibility to ensure peace and security globally.[49] The UN and AU share a lot of similar objectives, but the intervention of these two institutions differ in scope, complexities and capacity to respond. The general view is that the AU needs the authorisation of the UNSC before invoking article 4(h) of the Constitutive Act to intervene in grave circumstances.[50]

6.2.4 Interpretation of complementarity

The UNSC has demonstrated that regional organisations could be brought into the fore to advance positive complementarity. In Resolution 1593, through which the UNSC referred the conflict in Darfur to the ICC, the UNSC encouraged the Court and the AU to co-operate on the situation. The UNSC specifically considered a regional solution to the crisis.[51] Some scholars argue that Resolution 1593 offered options for Africa which included allowing the ICC access to the conduct of investigations in Africa, the AU conducting proceedings itself and enabling the ICC to sit in Africa.[52] In addition, the resolution left it open for the AU to use African mechanisms to assist and pressure Sudan to craft an appropriate road map to resolve the conflict in Darfur.[53]

The Darfur resolution required the AU and Sudanese authorities to consider alternative justice mechanisms to complement criminal prosecutions.[54] The Darfur example is a scenario in which an international organisation (the UN) emphasised the importance of a regional organisation (the AU) in assisting a state resolve a conflict.[55] For the first time, a UNSC resolution indicated to the ICC that complementarity is not limited to states and the ICC.

If the UNSC and the ICC consider and pursue the Darfur approach in relevant situations and cases in the future, it would bring into fruition the proposal of USA that encouraged the UNSC to exercise powers granted under chapters VI, VII, VIII and XII

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[48] AU 'African Peace and Security Architecture' 19 November 2019 http://au.int/en/documents/20191119/african-peace-and-security-architecture (accessed 12 October 2020).
[49] UN Charter art 24(1).
[50] SA Dersso 'The legality of intervention by the African Standby Force in grave circumstances' http://issafrica.org/amp/iss-today/the-legality-of-intervention-by-the-african-standby-force-in-grave-circumstances (accessed 12 October 2020).
[51] UNSC Resolution 1593 (2005) para 5.
[52] See for example Chinedu (n 29 above) 364.
[53] Chinedu (n 29 above) 364.
[54] n 50 above.
[55] Chinedu (n 29 above) 365.

of the UN Charter.[56] When the UNSC uses these powers, the institution is not limited to intervene in internal affairs only to enforce international peace and security. Instead, its intervention is authorised to encourage states to find solutions through consultation, mediation, judicial settlement, use of regional agencies and other means chosen by states.[57]

6.2.5 International theorism and regional realities

International theories on the relationship between states and external institutions are unsettled on who is the dominant actor in international relations. Notwithstanding, it is apparent that states are participants in all the theories advanced by different scholars. Whether dominant or subordinate, states should be complemented to advance their interests and those of the international community. The prominent theories of realism, institutionalism, liberalism, constructivism and legalism[58] place states at the centre of discourse. The establishment of effective global governance structures requires political will and the extent to which states allow interference with their sovereignty.[59]

Since states are at the centre of the discourse, a consideration emanates that states are en route to the periphery of regional or international systems and that states should be involved in decisions which trigger the prosecution of international crimes by alternative mechanisms. Beyond the focus on states, international theories cannot escape the universalism versus regionalism debate. Universalism represents intervention in state affairs by the broader international community, while regionalism represents the 'localisation' of international criminal justice by preferring regional mechanisms over international ones. The universalism versus regionalism debate is revisited later in this chapter.

Realism considers state interests to be fundamental even when international co-operation is sought to advance state interests.[60] Realists believe that international rules

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[56] n 49 above, art 24.
[57] n 49 above, chapters VI and VIII.
[58] Abbot (n 23 above) 364 - 367; M Koskenniemi *'From apology to utopia: the structure of international legal argument'* (2005) 17 - 18.
[59] PF Diehl & B Frederking 'Introduction' in B Diehl & PF Frederking (eds) *The politics of global governance: international organizations in an independent world* (2010) 4.
[60] HJ Morgenthau *Politics among nations* (1948); JH Herz *Political realism and idealism* (1951); J Asin 'Pursuing Al Bashir in South Africa: between apology and utopia' in HJ Van der Merwe & G Kemp (eds) *International criminal justice in Africa: issues, challenges and prospects* (2015) 9 - 10.

and institutions are too weak to control states that have deep sovereignty roots.[61] To this end, Goldsmith and Posner assert that international criminal tribunals lack the pulling power in getting state co-operation in the prosecution of crimes.[62] For institutionalists, states may need supportive international institutions to shape state behaviour and create platforms to tackle international crimes.[63] It is expedient for states to cede some sovereign rights to these institutions.[64] Co-operation with external actors may be induced either by the benefit accruing to states or duress from the international community.[65]

According to liberalists, international politics is debated by states, individuals and private groups in the context of domestic politics.[66] International organisations serve as a platform of interaction for states to extract best practices from one another.[67] Constructivists consider shared norms, such as cultural values, to identify forums that regulate state conduct.[68] The shared norms are internalised by states. The realisation of shared norms occurs through the support of actors such as individuals and local organisations. The actors are authorised to work with states to advance and influence the position of states in international institutions.[69] As discussed in Chapter 2, local, regional and international NGOs played a prominent role in the creation of the ICC. Finally, legalists try to separate law from politics – an approach criticised for its leanness and inconsiderate reasoning, since law is a product of politics.[70]

The above theories guide the ICC on the proper application of complementarity. When translated into practical realities, the theories support the proposition that regional organisations are better positioned to solve challenges related to state sovereignty, political will, forum options and appropriate co-operation. The creation of the AU mechanisms reflects the views of institutionalists, since African states were inspired by

[61] Koskenniemi (n 58 above) 29 - 30; Asin (n 60 above).
[62] J Goldsmith & E Posner *The limits of international law* (2005) 116.
[63] J Alvarez *International organizations as law-makers* (2005) 25.
[64] J Goldsmith 'Sovereignty, international relations theory and international law' (2000) 52 *Stanford Law Review* 960.
[65] Diehl & Frederking (n 59 above) 3 - 4).
[66] Abbot (n 23 above) 366.
[67] R Keohane & L Martin 'The promise of institutionalist theory' (1995) 1 *International Security* 39 - 51.
[68] Abbot (n 23 above).
[69] Alvarez (n 63 above) 44; K Sikkink *The justice cascade: how human rights prosecutions are changing world politics* (2011).
[70] J Maogoto *War crimes and realpolitik: international justice from World War I to the 21st Century* (2004) 10 - 11.

regional harmony, integration and co-operation on regional issues.[71] The operation of the AU mechanisms reflects the constructivist theory because they advance common regional positions and interpretation of international norms in the African context.[72]

African mechanisms adopt a realist approach due to reluctance to intervene in the internal affairs of states. The intervention of the AU is construed as a last and unpopular resort.[73] Intervention is unpopular because practice has shown that the intervention clause is difficult to enforce. This will be seen under Section 6.7 of this chapter on the discussion of article 4(h) of the Constitutive Act. The blurred distinction between politics and law[74] brings liberalism and legalism into play.

The theories also highlight that states should be at liberty to express their objectives and desires through regional organisations to which they belong before resorting to the ICC. Although at times the ICC may theoretically be the best alternative mechanism to intervene and open dockets, in practice a regional mechanism may be preferable to secure co-operation, conflict resolution and compliance with international law. States consider motivating factors when they join and use external institutions. The underlying basis is for the interests and needs of states to be considered and respected, and for the said institutions to respect their right to choose forums to intervene in internal affairs.

6.3.1 The great debate

The ICC views the use of regional mechanisms to complement national mechanisms as a creation of a triangular relationship crisis. The ICC was unprepared to appreciate the seemingly new dimension of state discretion in which states prefer to push the Court down the ladder in the complementarity project. The Rome Statute has no express provision regarding regional mechanisms. Consequently, the ICC has endorsed the view that the relationship between the Court and states excludes regional mechanisms. The view of the Court highlights the challenges brought by the possible complementary role of regional mechanisms. However, the advantages of using

[71] n 15 above, paras 1 & 9.
[72] n 15 above, art 3.
[73] n 15 above, art 4.
[74] B Leebaw *Judging state-sponsored violence, imagining political change* (2011) 24.

regional mechanisms as an alternative to the ICC effectively overshadow the challenges that may arise.

Scholars explore the feasibility to incorporate regional mechanisms in the complementarity project.[75] While some scholars, such as Gathii and Turner, shy away from being entangled in debates regarding the potential relationship between the ICC and regional courts,[76] several scholars are occupied with the debate. Gallant believes that regional courts can fill the gaps created by the restrictive operation of the ICC.[77] Africa can use its experience with international criminal tribunals that operated on the continent, such as the ICTR and the SCSL, to develop a strong mechanism to address impunity.[78] However, other scholars oppose regional mechanisms because the African Court has failed to execute its mandate since establishment in 2008.[79] Sub-regional mechanisms are not an option if prematurely used in the absence of legal fundamentals, capacity and competence to adjudicate international crimes.[80]

Opponents of regional mechanisms further argue that the best option for Africa at the moment is to encourage states to co-operate with the ICC.[81] They are concerned about the motives of African leaders who are bent on avoiding prosecution by the ICC and the lack of political will for an effective regional court.[82] As persuasive as the opposition is, it can be argued that in a developing system such as the African Court, it would be fair to avoid conclusive judgments before the system fully matures and to consider that

[75] See for example KS Gallant 'Africa and beyond: should the International Criminal Court be the sole international organ of criminal justice? (2012) *Bowen School of Law Working Paper* http://www.ssrn.com/abstract=2044876 (accessed 6 March 2019).
[76] J Gathii 'Mission creep or a search for relevance: the East African Court of Justice's human rights strategy' (2012) 19 *Loyola University Chicago School of Law Working Paper* http://www.ssrn-com/abstract=2178756 (accessed 6 March 2019).
[77] Gallant (n 75 above).
[78] Naldi & Magliveras (n 13 above) 59 - 60.
[79] Avocats Sans Frontières Paper (n 11 above) 13.
[80] East African Law Society 'Statement on East African Legislative Assembly (EALA)'s Resolution seeking the transfer of the cases of the 4 accused Kenyans facing trial at the ICC, in respect of the aftermath of the 2007 Kenyan elections to the East African Court of Justice (EACJ) 2 May 2012 http://www.modernghana.com/news/392696/1/statement-by-the-east-africa-law-society-om-ealas.html (accessed 6 March 2019).
[81] VO Nmehielle 'Saddling the new African Regional Human Rights Court with international criminal jurisdiction: innovative, obstructive, expedient' (2014) 7 *African Journal of Legal Studies* 37 - 41.
[82] Avocats Sans Frontières Paper (n 11 above) 15; F Viljoen 'From a cat into a lion? an overview of the progress and challenges of the African human rights system at the African Commission's 25 Year Mark' (2013) 17 *Law Democracy and Development* 307.

the ICC itself is battling with accusations. The accusations levelled against the ICC are aimed at encouraging the Court to reform rather than to destroy it.

6.3.2 Room in ambiguity

The UN is a precursor to regional mechanisms that emerged two decades after its formation. The regional mechanisms are the Organization of American States (OAS),[83] the EU[84] and the Organization of African Unity (OAU).[85] The OAU changed to AU with time.[86] In addition to the definition provided earlier, regional mechanisms or organisations in this chapter encompass both judicial and non-judicial institutions that influence the political, economic, social and legal governance of regions of the world. Such mechanisms are expected to complement states to advance compliance with international law.[87]

The operations of regional mechanisms show that states function in established complementary relationships outside the ICC.[88] For this reason, it is expedient to mention that the inseparability of states and regional organisations cure the silence of the Rome Statute on the role of regional mechanisms in the complementarity regime of the ICC. This creates room to advocate and convince the ICC to recognise regional mechanisms in its application of complementarity.[89]

There is a need for an undertaking by all stakeholders to ensure that the relationship between the ICC and regional mechanisms would stem from a common objective to help states to exercise their discretion in the prosecution of international crimes. The discretion allows states to request assistance from a forum of choice in the investigation, prosecution and resolution of international crimes.

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[83] The OAS was founded on 30 April 1948 to promote regional solidarity and cooperation among its member states.
[84] European political and economic integration began with the Declaration of 9 May 1950.
[85] The OAU was formed on 25 May 1963 to encourage political and economic integration among member states.
[86] The OAU became the AU on 9 July 2002.
[87] TE Sainati 'Divided we fall: how the International Criminal Court can promote compliance with international law by working with regional courts' (2016) 49 *Vanderbilt Journal of Transnational Law* 225.
[88] Sainati (n 87 above) 232 - 233.
[89] AM Danner 'Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 544.

States should not be ignored in the discussion that is likely to shape the approach to complementarity because states have primacy under the Rome Statute. The ICC prosecutorial policy should be revised and developed in consultation with states because states are the intended beneficiaries of protection. A limiting of the revision to a group of experts and the exclusion of states would overlook the perspectives of states on obsolete state efforts.

The ICC practice should ride on the experiences of states and regional organisations and start to cement the strong bond between politics and law.[90] The exigencies of the problem faced by the ICC requires legal and political clarifications.[91] It is inevitable for the Court to rely on both legal and political interpretations in future situations and cases.

The silence of the Rome Statute neutralises the prohibition of regional mechanisms in the complementarity project.[92] Since the Rome Statute does not prohibit regional mechanisms, the ICC should study the role of regional mechanisms to determine their contribution to the attainment of international criminal justice. The ICC should avoid competition with regional mechanisms and should ward off any connotations that its work would be undermined if the Court accepts new ideas and structures.[93] The Court should close the important gap created by the failure of the Rome Statute to improve from the traditional weakness of crafting international law with ambiguities.[94]

It is not surprising that the ICC has not defined the scope of intervention by regional mechanisms in its application of complementarity. Unlike the express provisions on the relationship between the ICC and the UN, the Rome Statute created an implied role of regional mechanisms.[95] As a result, there is no need for an amendment of the Rome Statute to recognise regional mechanisms. The role and hierarchy of regional mechanisms can be catered for through development of the prosecutorial policy. The policy would help the ICC to answer questions on how to adequately include regional

[90] O Imoedemhe 'Unpacking the tension between the African Union and the International Criminal Court: the way forward' (2015) 74 *African Journal of International and Comparative Law* 104.
[91] Du Plessis & Gevers (n 45 above) 1 - 2.
[92] Naldi & Magliveras (n 13 above) 123.
[93] Naldi & Magliveras (n 13 above) 123.
[94] NB Pityana 'Reflections on the African Court on Human and Peoples' Rights' (2004) 4 *African Human Rights Law Journal* 126.
[95] n 36 above, Preamble.

mechanisms in the operations of the Court and to prefer regional mechanisms when appropriate.

6.3.3 Regionalism

Regional organisations increasingly assume the roles of defenders and promoters of international law.[96] They offer enlarged enforcement of international law through the use of diverse approaches, treaties and tribunals.[97] Regional organisations anchor the space between states and the international system.[98] As earlier alluded, it is not too ambitious to argue that regional mechanisms exist to enhance national interests.[99] Regional organisations must reflect on the facilitation of the interests of states before they contend for a place in the complementarity project.[100] The same applies to the ICC whose primary responsibility is to complement states and not the international community.

In view of the foregoing, states should develop guidelines on when to resort to the ICC and regional mechanisms. The former UN Secretary-General, Boutros-Ghali, normatively appealed for the use of regional mechanisms to advance international criminal law. In his view, these mechanisms may be relevant in diplomacy and peace initiatives of states.[101]

Boutros-Ghali saw an opportunity to use regional mechanisms because of the advantages of diversity in their operations. The international community should step up efforts to end the underutilisation of regional mechanisms and to discover their potential in the restoration of peace and stability, and attainment of justice. The observation of Boutros-Ghali represented the UN view during the formative years of the ICC. The observation must be revisited and pursued to enlarge the discretion of states in tackling issues under their jurisdiction.

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[96] C Schreuer 'Regionalism v universalism' (1995) *European Journal of International Law* 484.
[97] R Burchill 'Regional arrangements and the UN legal order' in R Collins & ND White (eds) *International organization and the idea of autonomy: institutional independence in the international legal order* (2011) 332.
[98] H Bull *The anarchical society: a study in world politics* (1977) 305.
[99] Bennett & Oliver (n 32 above) 273.
[100] Burchill (n 97 above); Tiba (n 12 above) 528.
[101] 'Agenda for Peace: report of the Secretary General' (1992) UN GAOR 47th Session paras 63 - 64' UN Doc. A/47/277-S24111.

The freedom to delegate authority will satisfy states for an adequate balance of their sovereignty with the pursuit to end impunity.[102] It will also align with the ambitions of states to promote their interests through the combined use of international and regional mechanisms.[103] States may also be willing to utilise regional mechanisms and often consider the importance of restorative justice *in lieu* of prosecutions.[104]

The potential surrounding regional mechanisms need to be checked to determine whether they are viable options for states. Africa embraces assistance from actors such as civil society organisations to develop jurisprudence and protection of human rights. Africa's support for the creation of the ICC had strong backing from civil society organisations. Although most civil society organisations are generally pro-ICC prosecutions, they have shown flexibility in the endorsement of alternative mechanisms. In the case of Uganda, civil society organisations considered the need to delay justice to secure peace.[105] The ICC works in a co-operative relationship with several civil society organisations. The Court will do well to embrace the views of civil society organisations to allow regional mechanisms to work with states in a multidimensional approach to the prosecution of international crimes.

The localisation option provides an added advantage of preserving cultural and political homogeneity, cohesion, co-operation, integration, pursuit of common interests and peaceful resolution of disputes within a particular regional set-up.[106] African civil society organisations can influence the operations of the African Court, since 'any African organisation recognised by the OAU (AU) may request an advisory opinion from the African Court'.[107] The engagement enables the sharing of information and discussion on how to solve problems presented to the African Court.

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[102] A Moravcsik *The choice for Europe: social purpose and state power from Messina to Maastricht* (1998) 73.
[103] Bennett & Oliver (n 32 above) 239.
[104] WW Burke-White 'Regionalization of international criminal law enforcement: a preliminary exploration' (2003) 38 *Texas International Law Journal* 736.
[105] International Crisis Group 'Eight priporities for the African Union in 2019' 6 February 2019 http://www.crisisgroup.org/africa/eight-priorities-african-union-2019 (accessed 25 March 2019).
[106] J Sarkin 'The role of regional systems in enforcing state human rights compliance: evaluating the African Commission on Human and Peoples' Rights and the new African Court of Justice and Human Rights with comparative lessons from the Council of Europe and the Organization of American States' (2008) 1 *Inter-American and European Human Rights Journal* 206.
[107] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol to the African Charter) art 4.

However, some scholars argue for the exclusion of regional mechanisms because there are no express provisions for regional mechanisms in the Rome Statute.[108] Some scholars also consider the debate on the inclusion of regional mechanisms as a push for an uncalled duplication.[109] The opposing voices may diminish with careful thought on the relationship between the ICC and the UN, and the former's subordination to the objectives of the latter. The universal appreciation of the use of regional mechanisms finds itself in the UN's encouragement for the establishment of such mechanisms to tackle human rights issues.[110] In essence, the UN largely interprets universal jurisdiction in the context of regional priorities and politics, as well as national circumstances.

What was initially brushed aside or devoid of specificity during the formulation of the UN Charter[111] later became central to the approach of the UN to regional issues. In the 1970s, the UN adopted resolutions which encouraged the establishment of regional mechanisms.[112] Currently, the focus is on how to use these mechanisms for the benefit of international criminal justice. Possible approaches include the use of regional mechanisms as an alternative to the ICC and complementary to the ICC.[113]

6.3.4 Multidimensionalism of regional mechanisms

The AU, like other regional mechanisms, has multidimensional and multipurpose features that allow it to address legal and other aspects.[114] In addition to sharing the aspirations of the ICC to prosecute international crimes, the AU system is designed to consider several approaches, most of which are likely to be used after the adoption of a broader interpretation of complementarity. Considering numerous African institutions, a way has been devised for some of these to complement one another. A known example is the mentioned complementarity between the African Commission and the African Court.[115] However, the Protocol to the African Charter does not clarify

[108] See for example A Abass 'Historical and political background to the Malabo Protocol' in G Werle & M Vormbaum (eds) *The African Criminal Court: a commentary on the Malabo Protocol* (2017) 22 - 23.
[109] See for example Burke-White (n 104 above) 731.
[110] n 49 above, art 52(1); BH Weston *et al* 'Regional human rights regimes: a comparison and appraisal' (1987) 20 *Vanderbilt Journal of Transnational Law* 585.
[111] Bennett & Oliver (n 32 above) 239 - 240.
[112] UNGA Resolution 32/127 (1977); UNGA Resolution 33/167 (1978).
[113] Naldi & Magliveras (n 13 above) 61; WW Burke-White (n 104 above) 730 - 761.
[114] Bennett & Oliver (n 32 above) 244 - 253.
[115] n 107 above, arts 2 & 8.

the complementarity relationship, thereby raising questions on the practical application of the relationship.[116]

The ICC has a similar dilemma on the practical application of complementarity. Although complementarity has different meanings under the Rome Statute and Protocol to the African Charter, it is interesting that Africa is dealing with the meaning of the term under the ICC and AU statutes. The African approach to complementarity, as advanced by the Rome Statute, can be understood through 'Africanisation' in the regional legislation, as will be discussed later in this chapter.

The multifaceted nature of African institutions enables them to deal with impunity, promote peace and enhance accountability in Africa.[117] A cautious and patient dialogue with states is the norm in African institutions.[118] The AU does not deprive states of primacy but intervenes in internal matters of states as a last resort when states have explored various options available to them.[119] The African Charter ensures the respect of state discretion by preferring amicable settlement of disputes between states before resorting to other options.[120]

African states exercise considerable discretion because the African Commission shares recommendations and trusts states to deal with internal problems.[121] The fact that the recommendations of the African Commission are not binding shows the idea of the AU not to decide the course of action to be taken by states. While there is a move towards an African Court with criminal jurisdiction,[122] the AU is not shy to allow peace processes to prevail in a state where such are desirable.[123] Complementarity in the Rome Statute will fare better if the ICC does not dictate to states but invests

[116] A O'Shea 'A critical reflection on the proposed African Court on Human and Peoples' Rights' (2001) 2 *African Human Rights Law* Journal 296.
[117] C Aptel & W Mwangi 'Developments in international criminal justice in Africa during 2009' (2010) 10 *Africa Human Rights Law Journal* 291 - 292.
[118] C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 33.
[119] Grand Bay (Mauritius) Declaration and Plan of Action para 15; Kigali Declaration (2003) para 27.
[120] Okoloise (n 118).
[121] C Heyns & F Viljoen 'An overview of international human rights protection in Africa' (1999) 15 *South African Journal on Human Rights* 429.
[122] AU 'Decision on the implementation of the Assembly decision on the abuse of universal jurisdiction' Doc.Assembly/AU/3(XII) Assembly/AU/Dec.213 (XII) para 9.
[123] S Odero 'Politics of international criminal justice: the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis' in C Murungu & J Biegon (eds) *Prosecuting international crimes in Africa* (2011) 153.

considerable time under the positive complementarity model to encourage states to explore various options.

6.3.5 Piercing the International Criminal Court monopoly veil

The ICC has a monopoly to define and determine the scope of the application of complementarity.[124] The Court decides the admissibility and inadmissibility of cases. There is a strong competing voice which is arising amid the privilege of the ICC. The voice of the AU and African sub-regional institutions has resulted in considerations to look beyond the ICC to address crimes committed on the African continent.[125] The message to The Hague is that certain standards are crafted for specific regions and the ICC may fall short in fulfilling all regional goals.[126] The regional ambition is for national and regional justice in which states play a collective role to help one another to find domestic solutions to problems.[127]

Consequently, future agreements between the ICC and the AU should reflect the importance of state discretion in the application of complementarity. Preliminary steps taken by the sub-regional organisations in Africa point to such direction. The Southern African Development Community (SADC) Model Enabling Act on Ratification of the Rome Statute of the International Criminal Court[128] and the Arab League Model Law Project on Crimes under the Jurisdiction of the ICC[129] are illustrative regional efforts to domesticate the Rome Statute and adapt it to local conditions.[130] The models allow states to demarcate the domestic application of the provisions of the Rome Statute to suit unique circumstances. Africa has further demonstrated its ability to adopt its own interpretation of the Rome Statute by allowing the African Court to consider a vast

[124] Gallant (n 75 above).
[125] Avocats Sans Frontières Paper (n 11 above) 5.
[126] Tiba (n 12 above) 535.
[127] Avocats Sans Frontières Paper (n 11 above) 5.
[128] DDN Nsereko 'Implementing the Rome Statute within the Southern African Region (SADC)' in C Kreß & F Lattanzi (eds) *The Rome Statute and domestic legal orders: general aspects and constitutional issues* (2000) 169.
[129] Arab League Justice Ministers Council 'Arab model law project on crimes under the jurisdiction of the ICC' 29 November 2005 http://www.iccnow.org?mod=romeimplementation> (accessed 4 March 2019).
[130] O Bekou 'Regionalising ICC Implementing Legislation: A Workable Solution for the Asia-Pacific Region? ' in Boister & Costi (eds) *Regionalising International Criminal Law in the Pacific* (2006) 138.

number of human rights instruments that apply to a state appearing before the African Court.[131]

In Rome, states appeared to have surrendered their sovereignty by giving the ICC an unassailable right to dictate the pace of the application of complementarity.[132] The post-Rome scenario is one in which sovereignty is severely tested. The test defines the extent to which states can use discretion in the complementarity project.[133]

Africa is known for breaking veils.[134] In the 1970s and 1980s, the continent used the piercing strategy to withdraw from the ICJ after dissatisfaction with the Court's handling of the situation in South West Africa (Namibia) in which South Africa had extended its apartheid policy to the territory of the former.[135]

Currently, the AU is intensifying efforts to pierce the monopoly of the ICC. The efforts of the AU started before friction between the two institutions.[136] The efforts are wrapped up in the Malabo Protocol that gives the African Court jurisdiction over international crimes and does not mention the ICC.[137] The failure to mention the ICC can be viewed as piercing the monopoly of the ICC, since this assumes that the ICC may at times be completely excluded in regional dealings with states. Further, Africa exerts a conviction of finding solutions to African problems without outside guidance.[138] The monopoly veil can be effectively pierced if it is established that the ICC does not have a monopoly over prosecutions of international crimes.[139] Thereafter, the process of identifying other forums of assistance to states flows with little or no hindrance.

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[131] Naldi & Magliveras (n 13 above) 115.
[132] S Katzenstein 'In the shadow of crisis: the creation of international courts in the Twentieth Century' (2014) 55 *Harvard International Law Journal* 151.
[133] Tiba (n 12 above) 539 - 543.
[134] J Levitt 'Africa: A maker of international law' in Levitt (ed) *Mapping new boundaries in international law* (2008) 1 - 9.
[135] Tiba (n 12 above) 538 - 539.
[136] CA Odinkalu 'Concerning the criminal jurisdiction of the African Court-a response to Stephen Lamony' 19 December 2012 http://www.africanarguments.org/2012/12/19/concerning-the-criminal-jurisdiction-of-the-african-court-%E2%80%93-a-responseto-stephen-lamony-by-chidi-anselm-odinkalu/ (accessed 5 March 2019).
[137] Malabo Protocol (n 25 above) art 46H(1).
[138] Institute for Security Studies 'African solutions to African problems' 18 September 2008 http://www.issafrica.org/iss-today/african-solutions-to-african-problems (accessed 25 March 2019).
[139] Odinkalu (n 136 above).

6.3.6 Extracting from the forerunners of the African system

The African system of human rights was preceded by the European Convention on Human Rights and Fundamental Freedoms, 1950 (the European Convention) and the American Convention on Human Rights, 1969 (the American Convention). The two Conventions provide for regional courts.[140] Africa has drawn lessons from the two earlier mechanisms through embracing a commission and a court in human rights advocacy and protection. Therefore, Africa has legislated its commitment to end impunity.[141]

The EU is committed to ending impunity for the most serious international crimes.[142] Both the EU and AU support the concept of 'Responsibility to Protect' through regional organisations and co-operation.[143] Importantly, the EU and AU adopted a common strategy in 2007 to promote the prosecution of international crimes at both domestic and international level.[144] The fact that the EU assisted Senegal financially and logistically in the prosecution of Habré shows that states are capable of prosecuting and acting on atrocities if supported by well-equipped regional organisations.[145]

The ability of the African Court to interpret the African Charter, the Protocol to the African Charter and other international human rights instruments applicable to AU states is a unique feature.[146] It allows the African Court to consider various judicial or non-judicial options available to states. Another unique feature for Africa is the motivation to prosecute international crimes at a regional level compared to other regions where the activity of the ICC is almost invisible.[147] While the EU believes in

[140] European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) section IV; and American Convention on Human Rights (American Convention) chapter VII.
[141] n 15 above, art 4(h).
[142] Council of the European Union 'EU Priorities for the 64th United Nations General Assembly ' 9 June 2009 http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010809%202009%20INIT para 26.
[143] Global Centre for the Responsibility to Protect 'UN General Assembly debate on the responsibility to protect' 27 June 2019 http://www.globalr2p.org/resources/1330 (accessed 27 August 2019) .
[144] 'The Africa-EU strategic partnership: a joint Africa-EU strategy Doc 16344/07' (9 December 2007) para 30.
[145] M Du Plessis 'Complementarity: a working relationship between African states and the International Criminal Court' in Du Plessis (ed) *African guide to international criminal justice* (2008) 137 - 138.
[146] Protocol to the African Charter art 3.
[147] Tiba (n 12 above) 547.

justice preceding peace,[148] Africa holds the view that justice may be sacrificed to attain peace.[149]

Africa believes it is faced with peculiar crimes[150] and that the continent is in the age of 'Africanisation' and consequently wants to align its approach to issues with African values, concerns, traditions, conditions and aspirations.[151] It follows that the prevailing circumstances in Africa have led the continent to invent new ideas that are relevant to the continent. Other regions have also been pressured by their own circumstances to adopt certain approaches to human rights.[152] The *Kadi* case under the European system provides good guidance on the resolution of a potential conflict between the norms of regional and international bodies. The case highlights the importance of considering and respecting the laid down norms of a regional body.[153]

6.4 African Union's contribution to international criminal law

6.4.1 Exploring the AU arena

Bound by the chains of colonialism and oppression, African states forged a united front in search of freedom and independence.[154] The re-entry of African states into international affairs in the 1950s took a turn for the better with the formation of the OAU in 1963.[155] Since then, African solidarity has shaped the approach to common problems.[156] Common interests are vital in the governance system of the AU.[157] The agenda of the AU includes the promotion of human rights and the creation of regional mechanisms to deal with African issues.[158] From 2009, the AU has examined the

[148] n 144 above.
[149] PS Wegner *The International Criminal Court in ongoing intrastate conflicts: navigating the peace-justice divide* (2015) 41.
[150] Abaas (n 108 above) 18.
[151] African Charter on Human and Peoples' Rights (African Charter) Preamble; T van Boven 'The relationship between peoples' rights and human rights in the African Charter' (1986) 7 *Human Rights Law Journal* 183; A O'Shea (n 117 above) 1313.
[152] Sainati (n 87 above) 222.
[153] *Kadi and Al Barakaat International Foundation v Council and Commission ECHR* (3 September 2008) C-404/05 P & C-415/05 P.
[154] JVR Cole 'Africa's approach to international law: aspects of the political and economic denominators' (2010) 18 *African Yearbook of International Law* 291.
[155] Tiba (n 12 above) 538 - 539.
[156] FM Ndahinda 'Human rights in African political institutions: between rhetoric, practice, and the struggle for international visibility' (2007) 20 *Leiden Journal of International Law* 699.
[157] A Ferreira-Snyman 'Regionalism and the restructuring of the United Nations with specific reference to the African Union' (2011) 44 *Comparative and International Law Journal of South Africa* 371.
[158] G Bekker 'The African Court on Human and Peoples' Rights: safeguarding the interests of African states' (2007) 51 *Journal of African Law* 151.

implications of the African Court empowered to prosecute international crimes[159] and the possibility of regional influence in the processes of the ICC.[160] Several African organisations have also raised their support for regional ownership as a panacea to obstacles faced by the ICC.[161] As it stands, the African Court does not have criminal jurisdiction despite recommendations from experts for it to be conferred with such jurisdiction.[162]

The African system is one of the clustered mechanisms that continue to develop despite the establishment of the ICC.[163] African mechanisms are built on historical influences, cultural norms and the search for solutions. The history of the continent and present realities are determinant factors in the scrutiny of legal doctrines and the approach to complementarity.[164] Africa previously stated that its passion for the ICC was motivated by atrocities such as slavery and wars that are a feature on the continent.[165] The present conflict environment in Africa calls for stabilisation, conflict resolution and reconciliation among ethnic and religious groups.[166]

The AU strives to safeguard the sovereignty, territorial integrity and ability of states to adjudicate cases under their jurisdiction. The AU aims to be a last resort in its intervention to maintain peace and security in the fight against impunity. The organisation esteems interaction with the UN and other organisations where such co-operation results in the capacity building of its organs.[167] The involvement of the AU should not be interpreted as a promotion of exceptionalism to the ICC. Instead, the organisation's contribution to the preservation of state discretion should form the crux of the discussion on the value it adds to the complementarity project. Strong AU organs will ultimately result in persuasive, practical and enforceable recommendations to AU

[159] African Union 'Decision on the implementation of the Assembly decision on the abuse of the principle of universal jurisdiction' 4 February 2009 para 9.
[160] African Union 'Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court' 12 July 2009 para 8.
[161] Aptel & Mwangi (n 117 above) 282 - 283.
[162] See for example D Deya 'Worth the wait: pushing for the African Court to exercise jurisdiction for international crimes' (2002) *Openspace Issue* 22.
[163] Tiba (n 12 above) 537 - 539.
[164] CF Murphy 'Some reflections upon theories of international law' (1970) 3 *Columbia Law Review* 447; Cole (n 155 above) 291 - 292.
[165] Odero (n 123 above) 148; T Maluwa 'OAU Secretariat statement at the 6th plenary' (17 June 1998) para 116.
[166] Odero (n 123 above) 153.
[167] EO Asaala 'A critique of the subject matter jurisdiction of the African Court of Justice and Human and Peoples' Rights' in Van der Merwe & Kemp (n 25 above) 110; AU Executive Council 'The common African position on the proposed reform of the United Nations' (2005) para 1.

member states. Based on recommendations, states will use their discretion to choose the best option(s), bearing in mind that external intervention is only due at the end of a long internal chain.

6.4.2 The African judicial system

The primary human rights instrument for Africa (the African Charter) provides for a quasi-judicial body (the African Commission) and a judicial body (the African Court) to look at serious human rights violations in Africa.[168] The African Court was added to the system due to the insufficiency of the African Commission on the protection of human rights.[169] The Protocol to the African Charter states that the African Court shall 'complement the protective mandate of the African Commission on Human and Peoples' Rights'.[170] It appears from the provision that primacy is given to the African Commission and that the African Court only intervenes when necessary. In that regard, a non-judicial body may be given priority over a judicial body.

In the analysis of the recent tension between the ICC and Kenya, one may be inclined to defend Kenya for taking an African approach of prioritising peace over prosecutions. At the time Kenya and the ICC were battling to control the *Kenyatta* and other cases, the African Commission exemplified this approach through a promotional visit to Kenya in October 2011.[171] Promotional visits present the African Commission, states and other relevant stakeholders with opportunities to discuss human rights matters in a state and to identify joint approaches to find sustainable solutions to human rights violations.[172]

The African Court may either offer advice or resolve issues of contestation brought before it.[173] The African Court exercises contentious jurisdiction to interpret and apply the African Charter.[174] Advisory jurisdiction advances the protection of human rights,

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[168] R Bowman 'Lubanga, the DRC and the African Court: lessons learned from the first International Criminal Court case' (2007) 7 *African Human Rights Law Journal* 426 - 427.
[169] O'Shea (n 116 above) 286.
[170] n 107 above, art 11.
[171] M Killander & AK Abebe 'Human rights developments in the African Union during 2011 and 2012' (2012) 12 *African Human Rights Law Journal* 208.
[172] Killander & Abebe (n 171 above).
[173] n 107 above, art 4.
[174] F Viljoen & E Baimu 'Courts for Africa: considering the co-existence of the African Court on Human and Peoples' Rights and the African Court of Justice' (2004) 22 *Netherlands Quarterly of Human Rights* 249 - 250.

similar to the practice of the Inter-American Court.[175] Therefore, the African Court provides guidance when states are struggling to interpret and apply expected human rights standards.[176] The African Commission, unlike the African Court, cannot make binding and enforceable decisions.[177] Nevertheless, the African Commission can convince states to promote and respect human rights.[178] The African Commission enjoys the support of the AU Assembly (the Assembly) in rendering its decisions.[179] The vital role played by the African Commission in recommending the most appropriate approach to cases is clearly recognised when the African Court transfers cases to the African Commission.[180]

Arguably, the judicial system for Africa provides for at least three outstanding advantages for states. First, the judicial system mirrors how states can either use judicial or non-judicial bodies as persuasive, enforcement or implementation mechanisms. Second, the judicial system assists states to carry out their human rights mandate by providing guidance and recommendations. Third, complementarity should not be limited to judicial bodies.

The first advantage reiterates that states have a broad discretion to deal with issues under their jurisdiction. The second advantage suggests that states may be assisted by a regional body to exercise their discretion. The third advantage shows that non-judicial mechanisms are essential as judicial mechanisms. In view of this, the ICC should embrace a definition of the interests of justice that adequately covers judicial and non-judicial mechanisms.

[175] AP van der Mei 'The advisory jurisdiction of the African Court on Human and Peoples' Rights' (2005) 27 *African Human Rights Law Journal* 31.
[176] Van der Mei (n 175 above) 35.
[177] African Charter (n 152 above) arts 30 - 59.
[178] W Bended 'The African Charter and the African Commission on Human and Peoples' Rights: how to make it more effective' (1993) 11 *Netherlands Quarterly of Human Rights* 256.
[179] African Charter (n 152 above) art 58.
[180] n 108 above, art 6(3).

6.4.3 The complementarity parallels between the African Union and the International Criminal Court

The promotion and protection of human rights is unavoidable in the language and practice of the ICC and regional mechanisms.[181] The ICC operates as a court of last resort and intervenes when states are unwilling or unable to genuinely investigate or prosecute perpetrators of serious crimes in international law.[182] The African system demands the exhaustion of national remedies before the intervention of the African Commission. The African Court can only intervene when there are grave circumstances.[183] When national courts have done a shoddy job in the investigation or prosecution of crimes, regional courts have intervened.[184] Interventions may include, *inter alia,* sanctions for non-compliance with regional policies and decisions.[185]

One may be tempted to view the ICC and African system as sharing common ideals on complementarity. However, there is a dispute between the ICC and Africa on the interpretation and application of complementarity. The ICC is criticised for departing from its mandate as a supporting institution[186] and for its failure to acknowledge that circumstances that motivated Africa to submit to it during its early years have marginally changed, as there is an increased potential to prosecute within the continent.[187]

The growing interest in the potential role of regional mechanisms to complement states and the ICC makes a review of the justiciability of the intervention of regional mechanisms desirable. Reference instruments of both the ICC and AU mention the attainment of justice and peace. The Rome Statute is both reactive and proactive to threats to peace caused by international crimes and aims to ensure that justice prevails for victims of such crimes.[188] The Constitutive Act, and the Peace and Security Protocol

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[181] JL Cavallaro & SE Brewer 'Reevaluating regional human rights litigation in the Twenty-First Century: the case of Inter-American Court' (2008) 102 *American Journal of International Law* 769.
[182] n 36 above, art 17.
[183] n 15 above, art 4(h).
[184] Cavallaro & Brewer (n 181 above) 770; *Loayza-Tamayo v Peru* IACHR (17 September 1997) Ser C/33; *Petruzzi v Peru* IACHR (30 May 1999) Ser C/52.
[185] n 15 above, art 23(2).
[186] Ebobrah (n 29 above) 7 - 8.
[187] Bowman (n 168 above) 417.
[188] n 36 above, Preamble.

of the AU seek to ensure accountability for serious crimes and to restore peace to states ridden by conflict.[189]

However, the ICC and the AU differ on the value, circumstances and priority accorded to justice. A controversy on whether political considerations may compromise or enhance the complementary work of the ICC emerges.[190] The African Charter is recommended for attaching considerable importance to local circumstances and state discretion to define the scope and protection of human rights.[191] Accordingly, the ICC attaches more weight to the attainment of international criminal justice that punishes individual responsibility. On the other hand, the AU envisages how international criminal justice could be accomplished for the benefit of a society. For this reason, it could be expected for AU member states to take some years studying the Malabo Protocol before committing to ratification. International criminal justice would therefore progress at a slow pace to fill carefully consider and fill any gaps identified from the ICC practice.

In the pre-ICC era, many African states were explicit in expressing the hope for a court that complemented national and regional courts. The Dakar Declaration on the Establishment of the International Criminal Court, adopted in February 1998, advocated for a complementarity system which included regional mechanisms.[192]

African states hoped for a court that protected state sovereignty and that was immune from the control of the UNSC.[193] The aspiration to regulate external interference remains in Africa. The continent has established mechanisms that seek to preserve the discretion of states in the interpretation and application of complementarity. One such mechanism is the African Peer Review Mechanism (APRM) which creates an environment for states to undertake a voluntary self-assessment process under the supervision of a panel of eminent persons.[194]

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[189] n 15 above, arts 4,13&17; Protocol Relating to the Establishment of the Peace and Security Council of the African Union (Peace and Security Protocol) arts 14 &17.
[190] Imoedemhe (n 27 above) 78 - 79.
[191] AO Enabulele 'Incompatability of national law with the African Charter on Human and Peoples' Rights: does the African Court on Human and Peoples' Rights have the final say' (2016) 16 *African Human Rights Law Journal* 25 - 26.
[192] S Maqungo 'The African contribution towards the establishment of an International Criminal Court' (2000) 8 *African Yearbook of International Law* 335.
[193] Maqungo (n 192 above) 338.
[194] Killander & Abebe (n 171 above) 208.

The APRM is one of the options that could have worked in the Kenyan post-election violence scenario. First, there was an opportunity for the eminent persons, which recommended the situation to the ICC to push for a regional or national solution as advocated by Kenya. Second, Kenya showed its commitment to the APRM by becoming one of the states to submit to a second review by the APRM.[195]

The strategy for Africa developed by the African Commission is another potential mechanism. The strategy provides for a collective approach to human rights by the AU, regional economic communities and members.[196] Under the strategy, states have a say on issues affecting them without going through the cumbersome processes of the ICC.

6.4.4 Complementing the International Criminal Court

The AU stretches its hand towards the ICC and not away from the Court. There are many possibilities for regional mechanisms to contribute to the goals of the ICC. Notwithstanding that the continent currently lacks strong institutions to enforce law and justice, the steps currently underway to strength these mechanisms in addition to other non-judicial approaches are interesting.[197] After the ratification of the Malabo Protocol, Africa may do more than the ICC to prevent and prosecute crimes on the continent.[198]

Since states are likely to continue to challenge the interpretation and application of complementarity by the ICC,[199] the standard in the African Charter may offer a solution. The features of the African Charter are more aligned to the interests and considerations of states. The growing visibility of the African system and its relevance to member states can be detected from plans for a common defence policy and self-reliance within the AU.[200]

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[195] African Peer Review Mechanism 'Second review report of the Republic of Kenya' January 2017 http://www.nepadkenya.org/aprm.html (accessed 8 March 2019).
[196] AU 'Human rights strategy for Africa' 14 December 2011 http://au.int/sites/default/files/documents/30179-doc-hrsa-final-table_en3.pdf (accessed 8 March 2019).
[197] Clifford (n 25 above) 21.
[198] KA Rodman 'Justice as a dialogue between law and politics: embedding the ICC within conflict management and peacebuilding' (2014) 12 *Journal of International Criminal Justice* 437 - 469.
[199] Clifford (n 25 above).
[200] A Lloyd & R Murray 'Institutions with responsibility for human rights protection under the African Union' (2004) 48 *Journal of African Law* 71 - 72.

The following discussion demonstrates the tide towards respect for state discretion, the adoption of common positions by the AU, belief in positive complementarity, compatibility with UN aims and flexibility of AU operations. This positions the African system as a machinery to further the goals of the ICC.

The common position of the AU on ICC cases against African leaders has been widely discussed by scholars. The position is based on the application of complementarity in consideration of regional and national interests.[201] Africa learnt that states are sensitive in their protection of political and legal discretion.[202] A practical example is the SADC region where the jurisdiction of the SADC Tribunal has been limited after concerns by Zimbabwe on intrusion into its land reform programme and fears by other SADC member states that such interference with state discretion may happen to them in the future.[203]

The neglect of positive complementarity by the ICC may find full use under the African system. Making positive complementarity functional takes considerable effort and dedication.[204] The ICC may experience limitations in the advancement of the positive complementarity initiative because of distance from Africa. The same cannot be said of the AU and African civil society organisations who enjoy proximity to states and have a better understanding of local conditions and needs. The UNSC referral of the Darfur situation to the ICC acknowledged the need for the inclusion of the AU in practical arrangements to make it more feasible to conduct the proceedings in Africa.[205]

The use of regional mechanisms would be compatible with the UN goals, which the ICC purports to advance. Co-operation between the UN and regional mechanisms is implied in the Rome Statute.[206] The UN advocates for the promotion and protection of human rights through regional mechanisms.[207] On their part, the African regional and

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[201] A Shine 'AU moves to take over Hague cases' 9 May 2012 http://www.nation.co.ke/News/politics/AU-moves-to-take-over-Hague-cases-/-/-1064/1402884-/xqolwr-/index.hmtl.
[202] H Sipalla 'State defiance, treaty withdrawals and the resurgence of African sovereign equality claims: historicizing the 2016 AU-ICC collective withdrawal strategy' in Van der Merwe & Kemp (n 25 above) 84.
[203] M Killander 'On constitutional values, Marikana and the demise of the SADC Tribunal' 23 August 2012 *Africlaw.com*; M Quan 'Rising against the silencing of the SADC Tribunal: Tanzania' 5 June 2015 *Africlaw.com*; P Mwanyisa 'The SADC Tribunal: concerted efforts for waves of change we want to see' 19 June 2015 *Africlaw.com*.
[204] Brown (n 8 above) 170 - 171.
[205] n 50 above, para 3.
[206] n 36 above, Preamble para 7.
[207] C Schreuer 'Regionalism v universalism' (1995) *European Journal of International Law* 484.

sub-regional organisations contribute to the objectives of the UN Charter by revising their mandates to encompass peace and security.[208]

Numerous institutions within the AU provide for flexibility in the adoption of models or policies as well as different approaches when dealing with challenges. Likewise, states have many forums to defend their discretion to deal with issues in their jurisdictions. African states would prefer to be guided by principles that respect the dignity and sovereignty of the continent.[209]

6.4.5 Towards an expanded African Court

Africa went to the Rome Conference with reminders of unpleasant memories of previous failures by an international criminal tribunal to render assistance when the continent needed help most. The continent also carried memories of failing to establish its own court with criminal jurisdiction. The proposal for a continental court emerged in the 1970s when the African Charter was being discussed. The idea of criminal jurisdictions was struck down as premature.[210] The memories still live, resulting in delays in the empowerment of the African Court with jurisdiction over international crimes.

After the foregoing plans to prosecute the crime of apartheid on the continent on the belief that the prosecution was catered for because of the existence of an international convention on the crime of apartheid[211] and an expectation of prosecution by an international court,[212] Africa failed to get the international prosecution it had hoped for. Despite a declaration by the UNGA that apartheid was a crime against humanity in 1966[213] and the affirmation of the same in 1984 by the UNSC,[214] apartheid in South

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[208] A Jegede 'The African Union Peace and Security Architecture: can the Panel of the Wise make a difference' (2009) 9 *African Human Rights Law Journal* 430 - 431.
[209] AU 'Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court' 3 July 2009 http://reliefweb.int/report/sudan/decision-meeting-african-states-parties-rome-statute-international-criminal-court-icc (accessed 25 March 2019) ; JM Isanga 'The International Criminal Court ten years later: appraisal and prospects' (2013) 21 *Cardozo Journal of International and Comparative Law* 306.
[210] K M Baye 'Introduction to the draft African Charter on Human and Peoples' Rights' (2002) OAU Doc.CAB/LEG/67/1.
[211] International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention).
[212] n 211 above, art V; AU 'Rapporteur's report of the ministerial meeting in Banjul, The Gambia, Organisation of African Unity' (2002) OAU Doc.CAB/LEG/67/Draft.Rapt.Rpt (II) Rev.4 para 13.
[213] UNGA Resolution 2202 A (XX1) (1966).
[214] UNSC Resolution 556 (1984).

Africa and elsewhere continued unabated and unpunished at international level.[215] Additional efforts by the UN in the 1980s to try apartheid offences were in vain.[216] The enactment of national pieces of legislation that gave states universal jurisdiction to prosecute apartheid criminals provided some answers to the challenges.[217]

Arguably, Africa learnt from experience not to rely solely on international criminal tribunals. The continent has an open room for regional mechanisms to assist states when assistance at the international level is either unavailable or undesirable. The continent learnt that states are not always unwilling or unable to prosecute. International tribunals may also be unavailable, unwilling or unable to prosecute. This explains the need for a two-way complementarity process broadly interpreted to scrutinise the appropriateness, willingness or ability of international tribunals to prevent unjustified intervention of the ICC or neglect of regional needs. The unwillingness or inability of states to investigate or prosecute does not automatically translate into a right of the ICC to intervene. The Court should further test and establish whether a state has waived its discretion by exhausting other possible forums at its disposal.

The establishment of the ICC in the turn of the twenty-first century brought about a new dimension in the approach to prosecution of international crimes. During the same period, Africa revived its ambition to use regional mechanisms to complement the efforts of states. The protection and monitoring of human rights was discussed within the ambit of the African Court in the Strategic Plan of the AU Commission in 2004.[218] An idea to create a criminal chamber of the African Court was advanced during discussions to create a single African Court in 2005.[219]

The dispute of the AU with the ICC on Sudan and Kenya arose after the proposal to extend the jurisdiction of the African Court was already in motion.[220] However, the dispute has accelerated the proposal.[221] Inevitably, African states adopted a protocol

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[215] Abaas (n 108 above) 16.
[216] Abass (n 108 above) 16.
[217] J Dugard 'International Convention on the Suppression and Punishment of the Crime of Apartheid' 2008 http://www.legal.un.org/avl/pdf/ha/cspsa/cspca_e.pdf. (accessed 9 March 2019).
[218] AU 'Strategic Plan of the African Commission: vision and mission of the African Union' May 2004 http://www.africa-union.org/root/au/AboutAu/Vision/Volume.pdf (accessed 9 March 2019).
[219] Manirakiza (n 17 above).
[220] D Deya 'Worth the wait: pushing for the African Court to exercise jurisdiction for international crimes' 2012 http://www.osisa.org/opnspace/regional/african-court-worth-wait (accessed 9 March 2019).
[221] M Du Plessis *et al* 'Africa and the International Criminal Court' (2012) *Chatham House International Law* 10; AU 'Assembly/AU/Dec.482(XXI)' 13 May 2013

in 2014 to give the African Court jurisdiction on international and transnational crimes.[222] The expanded court will have jurisdiction beyond crimes mentioned in the Rome Statute. The criminal chamber of the African Court will fight impunity in complementarity to national jurisdictions and processes.[223] The Malabo Protocol is silent on the authenticity of national proceedings and on the genuineness of investigations and prosecutions by states.[224]

There are arguments for and against the criminal jurisdiction of the African Court. Some scholars view the project collapsing due to several challenges associated with the African Court and the African Commission. The challenges include financial constraints and prosecutorial independence.[225] Proponents want to give the African Court an opportunity to contribute to criminal justice on the continent.[226] The ICC and AU can agree on the division of labour and set priorities for each institution.[227] Prosecution in Africa promotes a harmonised approach to justice and peace.[228] The approach is dominated by the participation of states in decision-making processes.

6.5 The dispute between the International Criminal Court and the African Union

6.5.1 From co-operation to conflict

The ICC and Africa relationship was perfectly poised to strengthen in the early years of the Court when the Court received state referrals from Uganda and the DRC. The relationship has changed. The ICC is increasingly viewed on the continent as a destabiliser.[229] The AU is displeased by what it sees as improper and ill-timed indictments against African leaders. The indictments have a negative impact on the

http://au.int/en/sites/default/files/decisions/9654-assembly_au_dec_474-489_xxi_e.pdf (accessed 9 March 2019).

[222] n 25 above, art 28A; 'Africa to create criminal court' 15 July 2012 Daily Monitor newspaper.

[223] AU 'AU Assembly's Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court' 1 - 3 July 2009 http://reliefweb.int/report/sudan/decision-meeting-african-states-parties-rome-statute-international-criminal-court-icc (accessed 25 March 2019).

[224] H Van der Wilt 'Complementary jurisdiction (Article 46H ' in G Werle & M Vormbaum (eds*) The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 187.

[225] M Du Plessis & L Stone 'A court not found' (2007) 7 *African Human Rights Law Journal* 530 - 535.

[226] ZB Abebe 'The African Court with criminal jurisdiction and the ICC: a case for overlapping jurisdiction? (2017) 25 *African Journal of international and Comparative Law* 429.

[227] Van der Wilt (n 224 above) 198 - 199.

[228] M Du Plessis 'The International Criminal Court that Africa wants' (2010) *Institute of Security Studies Paper* 51.

[229] Chinedu (n 29 above) 353.

political, social, governance and economic developments of targeted states.[230] On the other hand, the ICC is concerned that the AU exempts African leaders from prosecution.[231]

The ICC needs an orientation to get a better understanding of local political conditions and how to unite communities divided by atrocities.[232] The Court is partly correct to say that peace achieved through neglecting justice is unsustainable,[233] since justice without peace is impossible. The combination of judicial and non-judicial demands as well as the move towards equality in global governance should encourage the ICC to think beyond legal settlements and to extend the international criminal justice debate to regional mechanisms.

The approach of the AU to the operations of the ICC is a fight for the interests of its member states. When relevant, the ICC should deal with states in a regional context, not as isolated entities. States are encircled within the wall of common positions built by the AU, the foundation of which are state interests. Notable common positions include shielding sitting heads of state or high-ranking political officials from prosecution, promotion of Pan Africanism and African Renaissance, and adoption of a common defence policy. The common positions are in addition to the balancing of peace and justice. The most prominent feature is the protection of state interests.

The first common position in Africa is temporary immunity for certain officials during their tenure in office. The AU acknowledges the general absence of immunity in the Rome Statute regardless of personal status but is uncomfortable when the timing of prosecution may have adverse effects on the political or economic operations of a state.[234] The AU is dissatisfied with the disregard of customary international law rule that grants personal immunity of certain officials before domestic prosecutions.[235]

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[230] AU 'Decision on the report of the Commission on the abuse of the principle of universalism' Doc.Assembly/AU/14 (xi) 30 June - 1 July 2008.
[231] McNamee (n 5 above).
[232] BJ Cannon *et al* 'The International Criminal Court and Africa' (2016) 2 *African Journal of International Criminal Justice* 10 - 11.
[233] F Bensouda 'International Justice and Diplomacy' The New York Times 19 August 2018 http://www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html (accessed 11 March 2019).
[234] M Du Plessis 'Recent cases and developments: South Africa and the International Criminal Court' (2009) 3 *South African Journal of Criminal Justice* 442 - 443.
[235] M Du Plessis 'Shambolic, shameful and symbolic: implications of the African Union's immunity for African leaders' (2014) *Institute for Security Studies Paper* 278.

While every person should be prosecuted for international crimes,[236] the prosecution may be suspended for the incumbents.[237] The suspension augurs well with deferral provisions in the Rome Statute. As Cryer *et al* note, the room to suspend certain prosecutions is a time-honoured approach, as follows:

> The law of immunities has ancient roots in international law, extending back not hundreds, but thousands of years. In order to maintain channels of communication and thereby prevent and resolve conflicts, societies needed to have confidence that their envoys could have safe passage, particularly in times when emotions and distrust were at their highest. Domestic and international law developed to provide both inviolability for the person and premises of a foreign [s]tate's representatives and immunities from the exercise of jurisdiction over those representatives.[238]

The old (non-negotiable immunity for state officials) and the new (prosecuting those most responsible for international crimes, regardless of status) are in competition today. The adoption of the Rome Statute appeared to have resolved the conflict between the old and the new, but the post-Rome environment indicates that the competition lingers. The two forms of immunities are functional immunity (immunity *ratione materiae* or subject matter immunity) and personal immunity (*immunity personae* or procedural immunity) with functional immunity aiming to protect conduct rendered in an official capacity or on behalf of a state.[239] Personal immunity protects a person from accountability in private and public acts, provided that the state of the office holder does not waive the said immunity.[240] State practice and jurisprudence is generally unbalanced in favour of upholding personal immunity, although there is a growing reflection on the extent to which functional immunity applies.[241]

Some states enacted pieces of legislation which prohibit immunity but struggle to use the immunity provisions in practice and often have contradictory pieces of legislation. For instance, the South African ICC Act[242] prohibits immunity in contradiction to the Diplomatic Privileges and Immunity Act.[243] The contradictory provisions made it difficult

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[236] A Cassese 'When may senior state officials be tried for international crimes?' (2002) 13 *European Journal of International Law* 840.
[237] A Cassese *International Criminal Law* (2001) 444.
[238] R Cryer *et al An introduction to international criminal law and procedure* (2007) 422.
[239] Plessis (n 235 above) 5.
[240] Plessis (n 235 above) 5.
[241] Cryer *et al* (n 238 above) 425.
[242] Implementation of the Rome Statute Act.
[243] Diplomatic Privileges and Immunities Act art 4.

for the South African government to authorise the arrest of Al Bashir when he visited South Africa. This was after a High Court of South Africa had ruled on South Africa's obligation to arrest him in terms of the International Criminal Court Act. Hence, the argument in favour of balancing legal and political considerations once again emerged.[244] In the *Kenyatta* case, the Prosecutor could have used an interpretation that considers domestic legislation. The interpretation provides for immediate political considerations and leaves room for future execution of the demands of the Rome Statute.

The ICJ has provided some guidance on the application of different forms of immunities. The domestic courts in the United Kingdom, Belgium, France, Spain and the USA, among other courts, have endorsed the interpretation of the ICJ. In the *Arrest Warrant* case,[245] the ICJ held that Belgium had 'failed to respect the immunity from criminal jurisdiction and the inviolability which the Minister of Foreign Affairs of the DRC enjoyed under international law' when it charged the minister for crimes against humanity and war crimes.[246] The case augmented the position that, under customary international law, certain state officials enjoyed absolute personal immunity for crimes, including international crimes, and that the domestic courts of other states had no jurisdiction over those officials. However, those officials may still be prosecuted in an international criminal tribunal.[247] On the other hand, it was found that those officials did not enjoy functional immunity in domestic and international criminal tribunals.[248]

The Malabo Protocol has weighed in on the issue of immunities and its article 46A bis reads as follows:

> No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

The Malabo Protocol favours deferrals of prosecutions for some state officials and suggests the granting of personal immunity to these state officials. In other words, the

[244] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others* [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP); 2015 (2) SA 1 (GP).
[245] *Case concerning the Arrest Warrant of 11 April 2000 Democratic Republic of Congo v Belgium* ICJ (14 February 2002).
[246] Arrest Warrant case (n 245 above), para 75.
[247] Plessis (n 235 above) 7.
[248] Plessis (n 235 above) 7.

immunity should be attached to the tenure of office, unlike functional immunity which continues to apply when the official has left office. In view of the foregoing, functional immunity is based on the acknowledgement that the responsibility accrues to the state as conduct was carried out on its behalf. Personal immunity detects individual criminal responsibility, but prosecution may be suspended to allow the individual to continue serving the state. Arguably, the suspension is largely for the benefit of the state and not the person.

The second and third common positions on the current AU agenda serve as eye-openers on how the AU uses various avenues to strengthen state discretion. Much has been written about these two positions. However, this does not discuss the impressive scholarly work in this regard. A brief mention in connection with state discretion is sufficient for purposes of this chapter.

Although Pan-African solidarity can be traced to the formation of the OAU[249] and the Constitutive Act,[250] the Agenda 2063 document on the 'Africa We Want'[251] is used for reference in this section. The document is rooted in Pan Africanism and African Renaissance, and prioritises a dialogue-centred strategy to the prevention and resolution of conflicts.[252] It provides for common defence, foreign and security policies. The African Standby Force which deals with defence, safety, security and peace support issues on the continent was declared operational in 2016.[253] PSOs provide an opportunity for states to conduct national investigations or prosecutions of their own troops.

6.5.2 Usurpation of state powers

There are concerns that the complementary role of the ICC erodes state discretion and regional mechanisms.[254] The interpretation of complementarity in a manner that takes away power from states is a major concern.[255] States are 'protected' entities. Hence,

[249] Charter of the Organisation of African Unity Preamble & art 11.
[250] n 15 above, art 3(a).
[251] AU Commission 'Agenda 2063: The Africa we want' (2015) http://www.au.int/sites/default/files/pages/3657-file-agenda2063_popular_version_en.pdf (accessed 11 March 2019).
[252] n 251 above.
[253] n 251 above.
[254] Bowman (n 168 above) 429 - 430.
[255] Bowman (n 168 above) 429 - 430.

the Court needs to consult them on the options at their disposal for them to retain jurisdiction over internal affairs. In *proprio motu* cases, such as the *Kenyatta* case, the Prosecutor should not limit the criteria to unwillingness or inability of states. Instead, there is a need for a holistic approach to determine whether incapacitated or unwilling states have utilised all the available options in the interests of justice.

In the *Kenyatta* case, the Prosecutor failed to use the margin of appreciation to protect Kenya's own discretion, ignored opportunities availed to Kenya through membership to regional and sub-regional mechanisms, ill-considered Kenya's ability to define the scope of complementarity, and did not fully appreciate the existence of freewill co-operation between the Court and Kenya.

It is impossible to disassociate the Rome Statute from the ICCPR, given the human rights protections found in the two instruments.[256] The doctrine of the margin of appreciation, adopted by the Human Rights Committee, which was established under the ICCPR, amplifies the need to avoid painting states with the same brush.[257] The EU had earlier crafted the doctrine. The European Court of Human Rights and the European Court of Justice applied the doctrine of the margin of appreciation.[258] Absurd decisions may be arrived at if differences in the social, economic and political circumstances of states or regions are ignored.[259] The ICC will achieve better results and reduce confrontations with states by considering the use of the doctrine in certain cases where the justice and peace debate is dominant.

Complementarity is not restricted to a two-tier system between the ICC and states. In a similar vein, the Protocol to the African Charter also does not prohibit the use of other forums.[260] The consequence is a wide range of choices that are available to states locally, regionally and internationally. In exploring the options, states are not mere spectators but participants. A desirable system for states is one that fully involves them

[256] International Covenant on Civil and Political Rights Preamble; n 39 above, Preamble & art 7.
[257] D McGoldrick 'The Human Rights Committee: its role in the development of the International Covenant on Civil and Political Rights' (1991) 467 - 468.
[258] C Morrison 'Margin of appreciation in European Human Rights Law' (1973) 6 *Human Rights Journal* 263.
[259] A O'Shea 'A human rights court in an African context' (2000) 26 *Commonwealth Law Bulletin* 1320.
[260] F Ouguergouz 'The establishment of an African Court of Court on Human and Peoples' Rights: a judicial premiere for the African Union' (2003) 11 *African Yearbook of International Law* 135.

and considers their discretion in the process. Viljoen observes that external systems should be of benefit at the domestic level.[261]

Arguably, one can deduce from the foregoing reading that the operations of regional and international mechanisms are relevant and effective at domestic level. Their operations advance the vision of domestic systems. Regional mechanisms are better positioned to consolidate the powers of states. Flexibility in approach enables regional mechanisms to ensure that states have room to execute their obligations. The African Charter includes the element of 'peoples' as a signal of a collective approach to human rights interpretation, unlike Western individualistic concepts.[262] The AU mechanisms operate more as partners than alternatives to states by maintaining a sense of oneness in tackling challenges. The AU creates a conducive environment for states to be heard and their preferences to be adequately considered.

AU member states and the African Commission engage in constructive and friendly dialogue to promote human rights standards.[263] Some scholars have noted the influence of the African Charter in the development of constitutional and human rights law on the continent, since several states have domesticated its provisions.[264] In future, the ICC may prove to be of assistance to states through the use of positive complementarity, a concept that could have helped Kenya to keep the cases had it been used by the Prosecutor. The assessment of state reports as demonstrated in the AU context should be aimed at assisting states to overcome human rights challenges rather than to serve as a fault-finding process.[265] Instead of adopting a coercive approach to co-operation with Kenya, the ICC had a chance to evaluate the Kenyan report on the basis of the intended steps by Kenya, the challenges faced and strategy to overcome the challenges.[266]

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[261] Viljoen (n 81 above) 314.
[262] F Viljoen 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *Africa Human Rights Law Journal* 20.
[263] GW Mugwanya 'Examination of state reports by the African Commission: a critical appraisal' (2001) 1 *African Human Rights Law Journal* 273.
[264] Y Akinseye-George 'New trends in African human rights law: prospects of an African Court of Human Rights' (2001 - 2002) 10 *University of Miami International and Comparative Law Review* 159 - 160; Bowman (n 168 above) 425 - 426.
[265] R Murray 'Report of the 1997 sessions of the African Commission on Human and Peoples' Rights' (1998) 19 *Human Rights Law Journal* 181.
[266] Mugwanya (n 263 above).

6.5.3 Allegations of favouritism and calls for disengagement

There are perceptions in Africa and other quarters that the ICC has an anti-African agenda.[267] Africa alleges that weaker states are targets of the Court and that superpowers are untouchable by the Court.[268] Africa is opposed to an ICC that is dominated by superpowers who sacrifice other states in the guise of promoting international criminal justice.[269] The alleged bias of the Court against Africa has resulted in several threats to withdraw from the Rome Statute. The negative perceptions have also ignited calls for the use of regional mechanisms as alternatives to the ICC. [270]

The AU member states which were once firm supporters of the ICC, including South Africa, Uganda and Kenya, are opposed to the application of complementarity by the Court in certain cases. South Africa highlighted to the UN Secretary-General in 2016 that her withdrawal decision was motivated by the UNSC interference in the operations of the ICC and an alleged departure by the ICC from its founding principles.[271] However, the political will to leave the ICC hit a brick wall in February 2017 when the High Court invalidated the notice of withdrawal on the grounds that parliamentary approval was not sought and obtained.[272] The setback has not hindered South Africa from reviving its interest to leave the ICC, although the intensity towards that goal has been reduced.[273]

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[267] L Feinstein & T Lindberg *Means to an end: US interest in the International Criminal Court* (2009) 80; WA Schabas 'The banality of international justice' (2013) 11 *Journal of International Criminal Justice* 551.

[268] Feinstein & Lindberg (n 267 above) 81; AS Knottnerus 'Growing rift between Africa and the International Criminal Court: the curious (im)possibility of a Security Council deferral' (2013) 26 *The Hague Yearbook of International Law* 36.

[269] McNamee (n 5 above).

[270] D Miriri & A Roche 'Uganda's Museveni calls on African nations to quit the ICC' *Reuters* 12 December 2014 http://wwww.reuters.com/article/us-africa-icc-idUSKBN0JQ1DO20141212 (accessed 12 March 2019; K Ainly 'The responsibility to protect and the International Criminal Court: counteracting the crisis' (2015) 91 *International Affairs* 37 - 54.

[271] Department of International Relations and Cooperation 'Tabling of the instrument of withdrawal from the Rome Statute of the International Criminal Court' (2016).

[272] *Democratic Alliance v Minister of International Relations and Cooperation & Others* (Council for the Advancement of the South African Constitution Intervening) (83145/2016) [2017] ZAGPPHC 53 (22 February 2017) http://saflii.org/za/cases/ZAGPPHC/2017/53.html (accessed 13 July 2019).

[273] B Levy 'SA revives threat to leave the ICC, using the law's back door' http://www.dailymaverick.co.za/article/2018-06-12-sa-revives-threat-to-leave-icc-using-the-laws-back-door/ (accessed 13 July 2019).

The reduced intensity may be due to lack of a common position within the AU member states on whether to leave the Court or to influence it from within. It is believed that countries such as Botswana, the Ivory Coast, Nigeria, Senegal and Tunisia rejected calls for withdrawal when tensions with the ICC were at their highest.[274] Botswana's Masisi (the then Vice President) remarked on the sidelines of an AU summit arranged to endorse withdrawals from the ICC, as follows:

> The best defence is not to abuse, but to stick to the law. We would never allow our [P]resident to get away with murder. We are not being prescriptive, we are just asking that we up the game.[275]

It is submitted that despite growing dissatisfaction with the ICC, Africa should stay with the ICC and contribute to the developing complementarity practice of the Court. On the political front, the continent has been consistent in the need for a reformed UN system.[276] In Africa, the same energy and zeal can be used to demand a reformed complementarity system at the ICC. In Africa, recent developments on the work of the ICC in Afghanistan could be used to pressurise the ICC to demonstrate that no person or entity is sacred and that the Court is not targeting Africa, as has been widely alleged. The Prosecutor, Fatou Bensouda, and another ICC official were recently banned from entering the USA and had their assets in the USA frozen for launching an investigation into whether the USA troops had committed war crimes in Afghanistan.[277] Although the USA is not party to the Rome Statute, the ICC has jurisdiction over the USA in this instance as the alleged crimes were committed on the territory of a State Party (Afghanistan).

It could be a watershed moment for the ICC should the Court stand firm against USA's hostility and proceed with the investigations (and possible prosecutions) of American personnel. The perception of the Court in Africa, and indeed globally, would change

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[274] See The East African 'Africa's push to withdraw from ICC blocked, countries blocked' 23 July 2016 http://www.theeastafrican.co.ke/tea/news/east-africa/africa-s-push-to-withdraw-from-icc-blocked-countries-divided--1352880 (accessed 30 September 2020).

[275] Weekend Post 'Masisi explains Botswana's undying support for ICC' 1 August 2016 http://www.weekendpost.co.bw/22064/news/masisi-explains-botswanaaes-undying-support-for-icc/ (accessed 3 October 2020).

[276] See for example K Sikuka 'UN Security Council reforms – Africa demands action' 9 February 2016 http://www.sardc.net/en/southern-african-news-features/un-security-council-reforms-africa-demands-action/ (accessed 30 September 2020).

[277] See Reuters 'US sanctions on ICC Prosecutor unacceptable, says EU' 3 September 2020 http://www.theguardian.com/law/2020/sep/03/us-sanctions-on-icc-prosecutor-unacceptable-says-eu (accessed 30 September 2020).

for the better. The credibility and legitimacy of the Court would also be enhanced. The USA may use its influence in the UNSC or bilateral agreements with other states to frustrate the proceedings. Even if such reactions occur, the ICC would have made its mark as a Court that is not afraid to investigate and prosecute citizens of powerful states.

The complementary role of the ICC is misunderstood and politicised when the Court solely occupies itself with pursuing cases.[278] The participation of regional organisations changes the perspective to that of unified and well-co-ordinated forums complementing rather than substituting the roles of states. The importance of regional organisations is apparent when looking at parties involved in the dispute between the ICC and the AU. Some scholars correctly observed that the dispute is mainly between the AU and the UNSC.[279] The AU and the UNSC need to strategise on the administration of justice which does not undermine the interests of states. The UNSC and the ICC are bound to make uninformed decisions if they do not involve the AU due to their detachment from regional and state realities.[280] The credibility of the UNSC and the ICC will remain questionable if regional organisations, which are better vehicles of state interests and priorities, are excluded from the debate and application of complementarity.

6.5.4 Judicio-political 'self-determination'

The history of the struggle against colonialism in Africa is well documented. Hence, important documents such as the Constitutive Act and African Charter recall the history.[281] The fight for political independence in Africa was followed by new 'wars' for economic and judicial independence. This section looks at the importance of judicial equality and independence and the discretion of states. The dispute between the AU and ICC is rooted on pertinent issues regarding the co-existence of justice and politics, as well as their meaning in national, regional and international forums.

[278] Sainati (n 87 above) 191 - 192.
[279] AS Knottnerus 'Growing rift between Africa and the International Criminal Court: the curious (im)possibility of a Security Council Deferral' (2013) 26 *The Hague Yearbook of International Law* 36; Imoedemhe (n 27 above) 74 - 75.
[280] BJ Cannon *et al* 'The International Criminal Court and Africa: contextualizing the anti-Africa narrative' (2016) 2 *African Journal of International Criminal Justice* 10 - 11.
[281] n 151 above, para 8; n 15 above, para 3.

Arguably, political oppression in Africa is being reinvented via a judicial forum in the form of the ICC.[282] In the view of the AU, there is a need for the reform of the UNSC to enable states to exercise equal sovereign rights.[283] Equality is crucial for the development of trust between regional groups, as it enables them to solve their own challenges.[284] States would enjoy greater discretion if there is a shift from the decisions of few powerful states to an inclusive determination by equal states on issues that pertain to them.[285]

It is easy to recognise and enforce equality in a regional setup. The Constitutive Act guarantees African states sovereign equality and interdependence.[286] Concepts for the protection of the equality of states are enshrined in most state pieces of legislation and customs. The doctrine of sovereign immunity is among the concepts.[287] The positions in the *Taylor* case,[288] the Rome Statute,[289] and the ICC decisions in *Kenyatta*[290] and *Al Bashir*[291] cases seemingly nullify state discretion on the use of immunity in international crimes. The discussion that follows centres on how state discretion can be preserved in controversial cases when the immunity discourse is yet to be resolved.

The ICC and AU interpret the application of immunity differently. The latter insists that immunity applies to international crimes, while the former is of the view that no person is excluded from prosecution. AU member states refrained from arresting Al Bashir because, in their opinions, he enjoyed immunity as a head of state.[292] The AU also

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[282] A Anghie & BS Chimni 'Third world approaches to international law and individual responsibility in internal conflicts' (2003) 2 *Chinese Journal of International Law* 77 - 94; M Mamdani 'Darfur, ICC and the new humanitarian order : how the ICC's responsibility to protect is being turned into an assertion of neocolonial domination' 17 September 2008 *Pambazuka News* (online) http://www.pambazuka.org/en/category/features/50568 (accessed 12 March 2019); Odero (n 124 above) 155; Cole (n 9 above)16.

[283] Sipalla (n 201 above) 94.

[284] TA Ghebreyesus 'Statement on behalf of the African Union at the 14th Assembly of State Parties to the Rome Statute of the International Criminal Court' 18 November 2015 http://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/GenDeb/ASP14-GenDeb-Ethiopia-ENG.pdf (accessed 12 March 2019) .

[285] B Baker 'Twilight of impunity for Africa's presidential criminals' (2004) 25 *Third World Quarterly* 1497.

[286] n 15 above, art 4.

[287] *Prosecutor v Taylor* (31 May 2004) SCSL-2003-01-1 (3014-3039) para 51; CC Jalloh 'Universal jurisdiction, universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction' (2010) *Criminal Law Forum* 41 - 43.

[288] *Taylor* (n 287 above).

[289] n 36 above, art 27.

[290] *Situation in the Republic of Kenya* 01/09-02/11-ICC (18 October 2013) paras 32 - 38.

[291] *Prosecutor v Al Bashir* 02/05-01/09-ICC (6 July 2017) paras 74 - 82.

[292] A Ngari 'Clutching at straws: SA's reasons for not arresting al-Bashir' 2016 http://www.issafrica.org/iss-today/clutching-at-straws-sas-reasons-for-not-arresting-al-bashir (accessed 12 March 2019).

asked the UNSC for deferral of the *Kenyatta* case on the same basis. The crux of the matter is how states can convince the ICC that immunity applies despite clear prohibitions of immunity in the Rome Statute. AU member states can use the 'self-determination' concept enshrined in the UN Charter[293] and the African Charter[294] to claim that states enjoy discretion to invoke immunity.

Self-determination refers to 'the right claimed by a people to control their destiny'.[295] The concept is mostly used for people who seek political independence or inclusion in the fight for recognition in international law before attaining statehood.[296] However, the interpretation of self-determination goes beyond the fight against colonial domination. The ICCPR scope of self-determination applies to independent states and acknowledges the participatory right of citizens in their affairs.[297] Self-determination is further recognised as an economic, social and cultural right under the 1966 International Covenant on Economic, Social and Cultural Rights.[298]

The broad interpretation of self-determination and protection of national interests is an opportunity for states to advocate for the supremacy of their immunity pieces of legislation and the priority of their interpretation. The foregoing argument does not render the provisions of the Rome Statute on immunity ineffective. The argument merely accommodates temporary immunity. The Rome Statute permits temporary immunity by allowing case deferrals as earlier argued.

6.5.5 Constraints of universalism

Universal jurisdiction is a principle of international law which empowers states to prosecute crimes committed outside their borders.[299] Universalism is one of the concepts used in response to international crimes which raise common concerns among states.[300] Some international instruments that deal with international crimes,

[293] n 49 above, arts 1 & 55.
[294] n 151 above, Preamble.
[295] NA Berman 'Sovereignty in abeyance: self-determination and international law' in M Koskenniemi (ed) *International Law* (1992) 390.
[296] M Batistich 'The right to self-determination and international law' (1995) 7 *Auckland University Law Review* 1013.
[297] International Covenant on Civil and Political Rights art 1.
[298] International Covenant on Economic, Social and Cultural Rights art 1.
[299] KC Randall 'Universal jurisdiction under international law' (1988) 66 *Texas Law Review* 785.
[300] C Bassiouni 'Universal jurisdiction for international crimes: historical perspectives and contemporary practices' (2002) 42 *Virginia Journal of International Law* 88; F Jessburger 'Universal jurisdiction' in A

such as the Geneva Conventions[301] and national implementing legislation in South Africa[302] and Kenya[303] prefer the concept of universalism. The AU supported universalism when it adopted policies and developed model legislation to apply the concept.[304]

The AU Model Law on Universal Jurisdiction applies to a wide range of international crimes.[305] Under the Model, African states commit to punish serious international crimes.[306] When there is a conflict between state action and universalism, the Model gives priority to state action.[307]

During the establishment of the UN, the concept of universalism gained endorsement ahead of the competing concept of regionalism.[308] Regional organisations and states are the main implementers of universalism. EU states are at the forefront in the application of the concept to the extent that some African nationals have appeared before the European courts.[309] Africa is uneasy with the prosecution of Africans in Europe. For example, when Spain charged 40 Rwandans for murder and other crimes using universal jurisdiction in 2008, Rwanda complained about the indictment.[310] Rwanda presented the matter to the UNGA and alleged harassment and disrespect of its sovereignty.[311]

The AU accuses Europe of abusing the concept of universal jurisdiction with an intention to oppress Africa.[312] There are emerging views that African mechanisms are

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Cassese (ed) *The Oxford Companion to International Criminal Justice* (2009) 555 - 557; *Belgium v Senegal* (2012) ICJ Reports para 68.

[301] Geneva Convention I art 49; Geneva Convention II art 50; Geneva Convention III art 129; Geneva Convention IV art 146.

[302] Implementation of the Rome Statute of the International Criminal Court Act art 4(2)(a).

[303] International Crimes Act sec 7.

[304] B Ntahiraja 'The present and future of universal jurisdiction in Africa: lessons from the Hissène Habré case' in Van Der Merwe & Kemp (n 59 above) 12.

[305] A Dube 'The AU model law on universal jurisdiction: an African response to Western prosecutions based on the universality principle' (2015) 3 *Potchefstroom Electronic Law Journal* 457.

[306] AU Model on Universal Juridiction (AU Model) Preamble para 1.

[307] n 306 above, 2 - 4.

[308] Bennett & Oliver (n 32 above) 239 - 240.

[309] WA Schabas *An introduction to the International Criminal Court* (2004) 75; Sipalla (n 202 above) 70.

[310] Commentator 'The Spanish indictment of high-ranking Rwandan officials' (2008) 6 *Journal of International Criminal Justice* 1003.

[311] P Kagame 'Facing Tomorrow Conference: Presidents discussing tomorrow' 13 May 2008 http://www.presidency.gov.rw/speeches/156-13th-may-2008 (accessed 13 March 2019).

[312] M Du Plessis 'The International Court and its work in Africa: confronting the myths' (2008) 173 *Institute of Security Studies Paper* 15-16; Ntahiraja (n 291 above) 12.

needed to solve the abuse of universalism.[313] The efforts to enable the African Court to prosecute international crimes are partly inspired by the dissatisfaction of the AU with the use of universal jurisdiction.[314] The EU and AU joined hands in 2009 to recommend the best use of the concept. The joint recommendations identified states as masters of their destiny and primary initiators of prosecutions for crimes committed in their territories.[315]

6.6 Competing obligations for states

6.6.1 The obligations

States have national, regional and international legal obligations. States create and bind themselves to the obligations as aids to national agendas.[316] The challenge for states is when complementary forums compete for jurisdiction with states and when states compete among themselves. In the multiplicity of obligations, states face challenges regarding which obligations should prevail. Du Plessis discusses the proposal to extend the jurisdiction of the African Court and observes the difficulty African states may face in balancing ICC and AU obligations.[317] The conflict is complicated such that the ICC has been unable to rise above it.[318]

Although there is guidance in certain instruments and practices such as the European Convention on the law or forum that prevails in conflicting situations,[319] grey areas remain. States should implement the judgments, decisions and resolutions of the ICC, the UNSC and regional mechanisms. The AU member states that are party to the Rome Statute, the UN Charter and AU human rights treaties are bound by the provisions of these treaties.[320] The Rome Statute creates a possibility of equally binding non-state parties through UNSC referrals or acceptance of the Court's jurisdiction.[321]

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[313] WA Schabas *An introduction to the International Criminal Court* (2011); Sainati (n 86 above) 241.
[314] Sipalla (n 202 above) 66 - 67.
[315] 'The AU-EU export report on the principle of universal jurisdiction' 8672/1/09 REV 1 (16 April 2009) para 46.
[316] TJ Miles & EA Posner 'Which states enter into treaties, and why?' (2008) 420 *Coase-Sandor Working Paper Series in Law and Economics Paper* 2.
[317] Du Plessis (n 235 above) 13.
[318] Asin (n 59 above).
[319] TC Hartley *The foundations of European Union Law* (2010) 74.
[320] Vienna Convention on the Law of Treaties (Vienna Convention) art 14.
[321] n 36 above, arts 13(b) & 12(3).

The *Kenyatta* case placed Kenya in a position in which it received competing requests and orders from different mechanisms. The AU added a voice to the debate through ordering non-co-operation with the ICC and deferral of the *Kenyatta* case by the UNSC.[322] The silence of the UNSC on the AU request served as a decision of the UNSC for the ICC to proceed with the prosecution. Viewed differently, the silence of the UNSC meant that it expected the AU to take a proactive role in finding a regional solution. The UN understands the role of the AU and is aware of existing and developing African mechanisms on security and other emergencies on the continent. The UN operates a model that gives the AU the go-ahead to act as a first responder before it takes over or assists.[323] Since the UNSC is involved with the ICC, it is submitted that the UNSC should leave it to the AU to initiate proposals to solve regional security issues.

States must co-operate with both the ICC and regional mechanisms. The effectiveness of the ICC hinges on co-operation by different partners. Hence, article 112(2)(f) of the Rome Statute requires the ASP to take steps against non-co-operation. The ICC, states and regional mechanisms may ask for co-operation and other forms of assistance.[324] The enlarged African Court anticipates co-operation with judicial bodies such as the ICC.[325]

The ICC, the UNSC and the AU are engaged in a triangular conflictual relationship.[326] The AU and the ICC are in a frosty relationship. The ICC criticises the AU for not helping the Court to effectively carry out its operations.[327] The relationship is further complicated by the role played by the UNSC in cases that have faced opposition from the AU.[328] In the midst of the conflict, the AU reacted by demanding the reform of the UN system.[329] The ICC, as seen in the *Al Bashir* case, believes that the obligations of

[322] ZB Abebe 'The African Court with a criminal jurisdiction and the ICC: a case for overlapping jurisdiction? (2017) 25 *African Journal of International and Comparative* Law 422.
[323] M Mwanasali *Emerging security architecture in Africa policy: issues and actors* (2004).
[324] n 36 above, art 87.
[325] n 25 above, art 46L(3).
[326] D Tladi 'When elephants collide it is the grass that suffers: cooperation and the Security Council in the context of the AU/ICC dynamic' (2014) 7 *African Journal of Legal Studies* 381 - 382.
[327] Chinedu (n 29 above) 372.
[328] Tladi (n 326 above) 381 - 382.
[329] Sipalla (n 202 above) 94; Presidential Strategic Communications Unit 'Respect Africa's decisions on any matter, Uhuru tells ICC' The Star (Kenya) 20 November 2016.

states under the UN Charter should prevail over other obligations[330] in line with the UN Charter which makes the obligations under the UN Charter supersede those under any other international agreement.[331] The AU position urges for a balance between AU and ICC obligations, and guidance from the AU before states allow the intervention of the ICC.[332] The AU member states are bound by the decisions of the AU in terms of article 23(2) of the Constitutive Act.

In addition, the AU maintains that its decisions prevail over the decisions of the ICC.[333] A failure by states to respect the decisions of the AU may result in sanctions.[334] Kenya highlighted to the ICC that it respected the AU obligations when it overlooked to arrest Al Bashir.[335] The balancing requirement shows that the AU is simply asking the ICC to consult and consider other competing obligations before taking decisions.[336] The AU legal framework provides for consultations and relationship-building to resolve challenges on the continent.[337]

States may make referrals to the ICC and regional mechanisms. Senegal is a case in point. When Senegal referred the *Habré* case to the AU, which in turn gave guidelines to Senegal on how to proceed,[338] the AU held that the case was admissible in terms of the Constitutive Act.[339] The AU then authorised Senegal to try Habré on its behalf. Senegal acceded to the directive and reviewed its Constitution to assume jurisdiction.[340] Habré is a Chadian national and Chad is a state party to the Rome Statute.[341]

The decision of Chad and the AU to use a regional mechanism rather than the ICC to prosecute Habré was a positive step and a reminder to the ICC that states reserve the

[330] AKA Greenawalt 'Introductory notes on the Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Malawi and the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir & African Union response'(2002) *International Legal Materials* 393-417.
[331] n 49 above, art 103.
[332] Sipalla (n 202 above) 73.
[333] AU 'Decision on the progress report of the Commission on the implementation of the Assembly decisions on the International Criminal Court' Assembly/AU/Dec.397(XVIII) para 8.
[334] n 333 above.
[335] 'ICC Assembly of State Parties, Press Release ICC-ASP-20100921-PR575' 21 September 2010.
[336] n 36 above, art 97; Du Plessis & Gevers (n 48 above) 19; Naldi & Magliveras (n 13 above) 82.
[337] n 15 above, arts 4,13 &17; Peace and Security Protocol arts 14 &17.
[338] Ntahiraja (n 304 above) 23 - 24.
[339] n 15 above, arts 3(h),4(h) & 4(o).
[340] Ntahiraja (n 304 above) 24.
[341] The Rome Statute entered into force for Chad on 1 January 2007.

right to make referrals to other forums. The decision also demonstrated that regional organisations have a part to play in referrals and deferrals.

The UNSC and regional mechanisms can request the deferral of cases. The AU Peace and Security Council (PSC) once applied for a UNSC deferral of the *Kenyatta* case when it was already before the ICC.[342] The legal basis on which the AU PSC makes applications for deferrals and implications for regional mechanisms in the Rome Statute needs discussion.

Article 16 of the Rome Statute does not specify who can request the UNSC to approach the Prosecutor on the deferral of cases. Regional organisations can capitalise on the ambiguity and the provisions on regional initiatives under chapter VIII of the UN Charter to request deferrals. The Malabo Protocol also envisages the role of the AU PSC in making referrals to the African Court.[343] The role may be interpreted to encompass the interest of the AU PSC on cases before the ICC.

The African Charter stipulates at least three ways for deferrals in the African Commission. The African Commission must submit its reports and findings on alleged human rights violations. The African Commission should also make recommendations to concerned states and the Assembly.[344] The Assembly is the supreme organ of the AU.[345] The obligation is stronger when violations are serious or massive.[346] A deferral by the Assembly is important, considering that the organ may return the matter with necessary recommendations for the African Commission to do in-depth research before further action.[347] The Assembly can give directions on resolving conflicts, war and other emergency situations.[348]

The Assembly may defer regional cases for a certain period or indefinitely in the interests of peace and security. The power to defer under the AU system is further strengthened by allowing the African Commission to make use of best practices from international law instruments.[349] Therefore, the African Commission can draw lessons

[342] 'AU PSC communiquè, PSC 87th meeting' 2007.
[343] n 25 above, art 15.
[344] n 151 above, arts 52 & 53.
[345] n 15 above, art 6.
[346] n 151 above, art 58 (1).
[347] n 151 above, art 58(2) & 58(3).
[348] n 15 above, art 9(g).
[349] n 151 above, art 60.

from the Rome Statute on the importance of deferrals in certain circumstances. Requests for deferrals may be included in its recommendations to the Assembly.

6.6.2 Absence of hierarchy

International criminal tribunals are bound to specific mandates, geographical concentration and exist as separate entities with hierarchy among themselves.[350] The only competition they contend with is from states with jurisdiction over the same crimes. The same cannot be said of the ICC that has unexpectedly faced competition from African regional mechanisms. The new development has ignited a discussion on handling the issue of hierarchy to determine the operations of secondary forums in the Rome Statute.[351] The hierarchical relationship between the ICC and the African Court is yet to be established.

In the *Kenyatta* case, considerations included prosecutions at national, sub-regional, regional and ICC levels. Just as the UN Charter permits regional arrangements or agencies to maintain peace and security, the Rome Statute should permit and prioritise – when necessary – the use of regional mechanisms to achieve the purposes and objectives of the UN. If the ICC adopts such an approach, it would wait for the unwillingness and inability of both national and regional courts before exercising jurisdiction.[352]

The Malabo Protocol demonstrates the understanding of the AU regarding the hierarchical order. It states that the African Court shall be complementary to the national courts and to the courts of Regional Economic Communities (RECs).[353] The Malabo Protocol does not expressly provide for complementarity with international courts such as the ICC. However, the Protocol permits the African Court to seek the co-operation or assistance of regional or international courts, non-state parties or co-operating partners of the AU.[354]

The hierarchy is in descending order as follows: national courts, RECs, African Court, and other forums such as regional or international courts from outside the continent.

[350] Cole (n 9 above) 26.
[351] Abebe (n 225 above) 428 - 429.
[352] Bowman (n 168 above) 444.
[353] n 25 above, art 46 (H).
[354] n 25 above, art 46 (L)(3).

This shows that the AU attempts to make every effort to keep cases at a national level or where states are more participatory in the decision-making process before considering the ICC. National or regional mechanisms may be home-grown solutions due to the degree of state participation.

6.6.3 Managing the conflict

Poor management of the relationship between states, the ICC, the UNSC and regional organisations imperils international criminal justice. The management system is not easy with the emergence of contemporary issues and mechanisms that seek to give an interpretation and application of complementarity beyond what is ordinarily endorsed by the ICC. States are determined to preserve autonomy and sovereignty. At the same time, states pay allegiance to regional and international commitments that bind them.

The ICJ highlighted the need to adopt an inclusive approach to debates that involve sovereignty and obligations. In the view of the ICJ, international systems operate with the consent of states.[355] Notwithstanding, states are searching for answers on how to manage competing regional and international obligations, and how their own discretion should be respected in the process.

The ICC, regional mechanisms and the UNSC are checks to state discretion. The ICC aims to assume jurisdiction once a state is unwilling or unable to exercise primacy. The UNSC either turns to the ICC or regional mechanisms when there are alleged human rights violations. A regional organisation (i.e. the AU) works towards complementing states in the prosecution or settlement of international crimes. The states' broader interpretation in dealing with serious violations resonates well with the approaches of the AU and the UNSC. The Malabo Protocol does not confine approaches of the AU to prosecutions.

RECs which may not have jurisdiction over criminal cases may intervene when they provide better solutions than the African Court.[356] Africa has eight RECs,[357] whose

[355] *Democratic Republic of Congo v Rwanda* (3 February 2007) ICJ 126.
[356] n 25 above, art 46 (H).
[357] The Arab Maghreb Union, The Economic Community of West African States, The East African Community, The Intergovernmental Authority on Development, The Southern African Development

main purpose is to ensure economic integration as well as the maintenance of peace and stability. The Prosecutor can manage the jurisdictional conflict by adopting a policy that allows states to make recommendations on the forum that offers an advantage to them and which considers various complementary relationships of states. In the balance of scale, the ICC needs to accept that regional mechanisms would normally be preferred ahead of it. The same ICC zeal to evaluate the capacity of states to investigate or prosecute must be transferred to an evaluation of whether regional mechanisms are able to complement states.

6.7 Proactiveness, protectiveness and normativeness in the African Union

6.7.1 What has been, what should be?

Tense engagements between the ICC and AU on the activities of the ICC in Africa are common. The AU takes proactive steps to keep African cases in Africa for as long as possible due to the potential challenges of prosecutions outside the continent. Preparatory work to turn the tide in favour of Africa prosecutions began in February 2009 when the Assembly requested the African Commission to study and furnish it with the implications of vesting the African Court with criminal jurisdiction over international crimes.[358] The desire for African solutions intensified when the ICC issued warrants of arrest against sitting heads of states.[359] The AU innovation is not surprising. Africa has taken initiatives on several occasions to clarify international criminal law.

Over the years, Africa has shown that it is not taking a back seat and that it will not let the international community and international criminal courts dictate the pace on issues of concern to the continent. Africa plays a proactive role in contributing to the creation of new rules, conduct and compliance mechanisms.[360] The SCSL became the first court in the world to complete its mandate and transition into a residual mechanism.[361] The Extraordinary Chambers marked the first prosecution of a former African head of

Community, The Common Market for Eastern and Southern Africa, The Economic Community of Central African States, and the Community of Sahel-Saharan States.

[358] 'Decision on the single legal instrument on the merger of the African Court on Human and Peoples' Rights and the African Court of Justice' Assembly/AU/December 196(XI), 11 AUA & Assembly/AU/Dec.213 (XII), 12AUA.

[359] CC Jalloh 'Universal jurisdiction, Universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction' (2010) 21 *Criminal Law Forum* 11 - 54.

[360] I Brownlie *Principles of public international law* (2008) 691 - 693; Shaw (n 42 above) 1284.

[361] Clifford (n 25 above) 19.

state in another country.[362] Through the Malabo Protocol, the African Court is due to become the first regional mechanism to exercise jurisdiction over unique crimes such as unconstitutional change of government, corruption and illicit exploitation of natural resources.[363]

Debates on the regionalisation of international crimes legislation and prosecutions continue. Africa intends to bring the Malabo Protocol and its expanded prosecution opportunities into force. Regarding when the instrument will finally attain enough ratifications and come into force (if it will), the author of this study concedes that it is still a pipe dream. This chapter proceeds based on the visualisation of a future with the Malabo Protocol in force. For now, the prospects for an African court with criminal jurisdiction remain ambitious,[364] yet worth it for scholarly analysis purposes. In this regard, the African state actors, assisted by African civil society, can reinvigorate and expedite a regional vision of international criminal justice. Such a step would not only give hope to victims and human rights advocates on the continent, but it would also generate the confidence that Africa has solutions to impunity within its institutions.

The *Habré* case is a trophy that the continent displays for the world to realise that Africa is ready to play an active part to end impunity.[365] The case is still considered historic and a beginning of a new dispensation in Africa.[366] Africa is in the process of developing its systems to effectively contribute to international criminal justice.[367] The *Habré* case unpacks how the project is likely to unfold.[368] States and regional mechanisms would work in partnership to end impunity on the continent.

States have the discretion to request assistance from regional mechanisms, as demonstrated by Senegal's request for guidance from the AU.[369] The referral did not take away the control of the *Habré* case from Senegal but was an appeal for assistance

[362] Clifford (n 25 above) 20.
[363] Asaala (n 167 above) 104.
[364] See M Mahdi 'Africa's international crimes court still a pipe dream' 15 October 2019 http://www.reliefweb.int/report/world/africa-s-international-crimes-court-still-pipe-dream (accessed 30 September 2020).
[365] MG Nyarko & AO Jegede 'Human Rights developments in the African Union During 2016' (2017) 17 African Human Rights Law Journal 318.
[366] Ntahiraja (n 304 above) 2.
[367] HJ van der Merwe 'Assessing the role of indirect enforcement in the project of international criminal justice: some lessons from South Africa' in Van der Merwe & Kemp (n 59 above) 115.
[368] Brown (n 8 above) 176 - 177.
[369] Ntahiraja (n 304 above) 23 - 24.

by a state willing to prosecute. International support was not excluded in the Africanisation of the international criminal justice process.[370] State-centrism was further promoted through the options advanced by the Committee of Eminent African Jurists for either Senegal or Chad to take the case and try the accused in an African state or by an African state.[371] Lessons learnt from the case are that impunity shall not be tolerated, although prosecutions may be delayed owing to the status of a person as a head of state.[372]

Notwithstanding the foregoing, more still needs to be done to clear doubts on the effectiveness of the AU and states in dealing with international crimes. The ambition to preserve the primacy of states may suffer from a deficiency and weakness of domestic systems and legislation. This *lacuna* has a negative bearing on effective enforcement at a domestic level. Senegal showed that the challenge can be overcome when it made constitutional modifications to prosecute Habré.[373] The AU needs to formulate a strategy to strengthen both national courts and the African Court. Necessary adjustments should be made to conform national laws with the African Charter.[374]

The AU should also craft ways to consolidate international support for its initiatives. The prosecution of Habré became a reality because of massive financial support from the international community.[375]

Africa should seize opportunities to persuade the ICC of its readiness to prosecute international crimes. The AU can invite the ICC to attend some AU meetings as an observer. Ironically, an EU team that assisted in the preparation of the *Habré* trial was headed by a serving Registrar of the ICC.[376] The involvement of the Registrar raised a question on the independence of the ICC from the EU and revealed that the ICC does recognise the work of regional mechanisms. Although the Registrar is responsible for

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[370] Nmehielle (n 80 above) 16 - 17.
[371] AU 'Report of the Committee of Eminent African Jurists on the Case of Hissène Habré' July 2006 http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf (accessed 26 March 2019).
[372] Nyarko & Jegede (n 353 above) 316; Naldi & Magliveras (n 13 above) 60.
[373] H Jallow & F Bensouda 'International criminal law in an African context' in M Du Plessis (ed) *African guide to international criminal justice* (2008) 27.
[374] *Tanganyika Law Society & Another v Tanzania* (2011) Application 009/2011 para 109.
[375] R Brody 'Bringing a dictator to justice: the case of Hissène Habré' (2015) 13 *Journal of International Criminal Justice* 8.
[376] Human Rights Watch 'EU to aid Senegal in preparing Hissène Habré's trial' 19 January 2008 http://www.hrw.org/news/2008/01/19/eu-aid-senegal-preparing-hissene-habres-trial (accessed 26 March 2019).

the non-judicial aspects in the ICC,[377] it is unfathomable for the Court to have released its Registrar to assist a mechanism which the Court did not recognise. The Court cannot disassociate itself from the political world when it allowed one of its top officials to lead a political organisation.

6.7.2 Strengthening domestic initiatives

The AU protects the interests of member states in anticipation of an increased sharing of the burden between states and the expanded African Court. The development of the AU practice in relation to complementarity may be overshadowed by the footprints already inscribed by the approach of the EU to the obligation of its member states to the ICC. The ICC-EU Agreement advances the objectives of the Rome Statute. The AU advances additional objectives of promoting the interests of Africa and commanding member states to submit to regional direction in their dealings with the ICC. It is important to note that the AU, like other separate organisations with legal personality, may enjoy its relationship with states detached from the ICC. Arguably, the degree of distinctiveness enables the AU to develop initiatives to strengthen domestic systems beyond the understanding of complementarity by the ICC.

Efforts to capacitate domestic systems are sprouting up through guidance to states, resolutions and legislation development. The *Abubakari* case[378] is illustrative in this regard where the applicant alleged a violation of his right to a fair trial by a domestic court in a case of armed robbery. On appeal, the African Court not only ruled that a violation occurred but also asserted its power to evaluate procedures and decisions of national courts to ensure consistency with international standards and the African Charter.[379] The African Court helps states to align their procedures with international standards. States expect to align domestic laws with treaty obligations.[380]

The AU may also make resolutions to help states conform to good practices and international standards. In 2016, the African Commission adopted 37 resolutions including those related to human rights in Africa.[381] Among other issues, the resolutions dealt with human rights and acknowledged transitional justice as an alternative to

[377] n 36 above, art 43.
[378] *Abubakari v United Republic of Tanzania* (3 June 2016) Application 007/2013.
[379] *Abubakari v United Republic of Tanzania* (28 September 2017) Application 002/2017 para 35.
[380] Pityana (n 93 above) 128.
[381] Nyarko & Jegede (n 353 above) 300.

prosecutions in Africa.[382] The proposal gives states many options and does not downplay the fact that when prosecutions are considered by both the ICC and a regional mechanism, the use of a regional mechanism is likely to serve the interests of a state better and therefore a regional mechanism is bound to be preferred.

It needs no further emphasis that the Malabo Protocol brings a new dimension in the prosecution of international crimes. The Malabo Protocol is an attempt to fill existing gaps in the Rome Statute. For instance, the Rome Statute is vague on the jurisdiction of the ICC over violations by multinational corporates, while the African Court is moving towards addressing corporate criminal responsibility.[383] Another example is that the African system[384] offers better protection to the environment outside wartime compared to the ICC that aims to use a prosecutorial policy to prosecute the destruction of the environment as a crime against humanity.[385] The examples indicate that a forum with better protections and a likelihood to assist domestic initiatives under any circumstance should be preferred.

6.7.3 The 'delay or suspension' theory

As seen above, Africa operates the 'delay or suspension' theory in its interpretation of the immunity of heads of state and government and other senior government officials.[386] The *Habré* and *Taylor* cases proved that the continent is not opposed to the removal of immunity once a person ceases to function in an official capacity. The theory helps to balance the demands of justice and peace in complex conflict and political environments.[387] The AU used the theory to advocate for deferrals of the *Al Bashir* and *Kenyatta* cases.

One of the striking features of the Malabo Protocol is defining the crime of aggression to include non-state actors.[388] The Rome Statute limits the crime to the action of

[382] Nyarko & Jegede (n 353 above) 301.
[383] E Colvin & J Chella 'Multinational corporate complicity: a challenge for international criminal justice in Africa' in VO Nmehielle (ed) *Africa and the future of international criminal justice* (2012) 297 - 318; n 26 above, arts 28 L bis & 46 C; Nmehielle (n 80 above) 30 - 31.
[384] n 151 above, art 24.
[385] OTP 'Policy paper on case selection and prioritisation' para 40 http://www.icc-cpi.int/items Documents/20160915_OTP-Policy_Case-Selection_Eng.pdf (accessed 27 March 2019).
[386] n 25 above, art 46A bis.
[387] Clifford (n 25 above) 13.
[388] n 25 above, art 28M.

states.[389] The modified definition of the Malabo Protocol raises several issues which support the notion that Africa is often inclined to delay or suspend prosecutions. A limitation of the definition to states in the Rome Statute assumes that the crime is committed in an IAC. On the other hand, the Malabo Protocol definition caters for both IACs and NIACs. The classification of IACs is not subject to the controversial elements of intensity, duration and level of organisation used in NIACs.[390]

The definition of IACs and NIACs in the *Tadić* case by the ICTY has been endorsed by other international bodies. The ICTY pronounced the existence of an IAC when states use armed force against one another. On the other hand, as discussed in the preceding chapter, an NIAC requires protracted armed violence between governmental authorities and organised groups or within such groups. Therefore, an IAC is a matter of international concern, whereas an NIAC is more of an internal matter. In that regard, the AU enlightened the international community on the reality of handling internal matters. Prosecutions alone are not ideal for solving internal matters.

States are reluctant to allow the ICC to preside over 'classified' internal affairs which require the full understanding and appreciation of local and regional contexts. States have every motivation to delay or suspend the prosecution of non-state actors in favour of alternative mechanisms that promote peace and harmony. States are likely to resort to these mechanisms as they watch the evolution of the situation from low-intensity violence to a fully fledged NIAC. Once a situation graduates to an NIAC, states and the AU prefer a peaceful resolution and negotiated settlement to prevent prolonged and devastating armed conflicts.

6.7.4 Invocation of implied powers

This chapter has shown that regional organisations have implied powers under the Rome Statute. The AU has begun the process of invoking these powers for them to be recognised in the complementarity project. The justification stems from the fact that international instruments generally contain both express and implied provisions. Thus, the doctrine of implied powers is widely endorsed.[391] For instance, the Treaty

[389] n 36 above, art 8bis.
[390] D Schindler 'The different types of armed conflicts according to the Geneva Conventions and Protocols' (1979) 163 *Recueil des cours* 147; *The Prosecutor v Tadic* IT-94-1-T (7 May 1997) paras 561 - 568; *The Prosecutor v Limaj* IT-03-66-T (30 November 2005) paras 94 - 170.
[391] H Schermers & N Blokker *International institutional law: unity within diversity* (2003) 175 - 183.

Establishing the European Community provides for action by the European regional body when necessary to achieve its objective(s) regardless of an express empowering provision in the European Treaty.[392] The AU can copycat the EU and take appropriate actions, including intervening politically or legally in the affairs of a state, to achieve the objectives or purposes of the organisation.

The ICC needs inspiration from another court with international recognition to determine the broad or restrictive application of the doctrine of implied powers. The majority and minority views by the ICJ in the *Reparation for the Injuries* case provide guidance.[393] The broad determination of the majority was that an international body such as the UN is deemed to have implied powers if it can be established that the powers are essential for the performance of its duties.[394] On a restrictive sense, a connectedness between express and implied powers should be established before invoking the latter.[395]

In the Rome Statute, the restrictive interpretation is more visible because of the relationship between the ICC and the UN. The ICC is in a secondary relationship with the AU on the basis that principles and purposes of the UN are mostly achieved through partnerships with regional organisations. When the ICC and AU conclude the proposed partnership agreement, there would be more clarity on the place of the AU in the Rome Statute. This may result in the AU advancing its demands for peace, security, stability and justice before the ICC, which is a broader interpretation of the doctrine of implied powers.

6.8 African Union's responsibility to protect: Beyond victims

6.8.1 Rationale for Responsibility to Protect doctrine

The discretion of a state to determine the forum for prosecution or settlement of international crimes may be interrupted using two developing doctrines, namely, the

[392] Treaty Establishing the European Community art 308.
[393] *Reparations for the Injuries Suffered in the Service of the United Nations* (1949) ICJ Reports 174 - 199.
[394] n 393 above, 182 - 183.
[395] n 393 above, 198 - 199.

Responsibility to Protect (R2P) and Humanitarian Intervention.[396] This section focuses on the R2P to demonstrate that the doctrine, as envisaged by the AU, respects the role of a targeted state when pursuing its greater purpose to protect civilians affected by an armed conflict or situation of violence. The R2P doctrine imputes responsibility on the international or regional community to protect vulnerable populations from serious or grave crimes encompassing genocide, war crimes, crimes against humanity and ethnic cleansing where a state has failed to execute its sovereign mandate to do so.[397]

Africa is making great strides to assume ownership of PSOs and other forms of intervention on the continent. Experience taught the continent that the international community may be slow to intervene and may not intervene at all to solve a crisis in a member state.[398] The need for self-sufficiency of the AU was necessitated, for example, by failure to respond satisfactorily to atrocities in Somalia, Rwanda, DRC and Sudan.[399] Following the tragedies, African states began discussions with respect to the AU's need to protect civilians from egregious crimes.

In 2000, the R2P doctrine was enshrined in the AU system. Resultantly, the doctrine changed the non-interference approach initially endorsed by the OAU.[400] Under article 4(h) of the Constitutive Act and in line with the shift to a 'non-indifference' approach that encourages solidarity in the pursuit of solutions to African problems,[401] the AU may intervene in the affairs of a member state when authorised by the Assembly to address grave crimes. The Ezulwini Consensus report of 2005 further endorsed the R2P doctrine.[402] In addition, article 4(h) of the Constitutive Act authorises the AU to decide

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[396] J Sarkin 'The role of the United Nations, the African Union and Africa's sub-regional organizations in dealing with Africa's human rights problems: connecting humanitarian intervention and the responsibility to protect' (2009) 53 *Journal of African Law* 3.

[397] C Stahn 'Responsibility to protect: political rhetoric or emerging legal norm?' (2007) T*he American Journal of International Law* 111; D Kuwali 'The end of humanitarian intervention: evaluation of the African Union's right of intervention' (2009) 9 *African Journal of Conflict Resolution* 43.

[398] M Munyangwa & MA Vogt 'An assessment of the OAU mechanism for conflict prevention, management and resolution, 1993-2000' (2002) *International Peace Academy*;
B Kioko 'The right of intervention under the African Union's Constitutive Act: from non-interference to non-intervention' (2003) 85 *International Review of the Red Cross* 852.

[399] K Powell & S Baranyi 'Delivering on the responsibility to protect in Africa. Policy brief, North South Institute' (2005) http://www.nsi-ins.ca/english/pdf/responsibility_protect_africa.pdf (accessed 21 March 2019); Kuwali (n 385 above).

[400] Powell & Baranyi (n 399 above).

[401] Kioko (n 398 above) 819 - 820.

[402] AU 'The common position on the proposed reform to the United Nations: the Ezulwini consensus' Ext/Ex.CL/2 (VII) http://www.un.org/en/africa/osaa/pdf/au/cap_screform_2005.pdf (accessed 21 March 2019) .

on threats and breaches of peace independent from the UNSC.[403] The time has come for the ICC to take note that the UNSC does not have a monopoly on politically related issues.

The initiatives of the AU caught the attention of the international community and persuaded the development of the R2P doctrine at an international level. The international process which translated into an agreed but not binding document in 2005 started in 2001. The International Commission on Intervention and State Sovereignty produced a report – 'The Responsibility to Protect'.[404] The report stated that sovereignty requires states to take responsibility both to protect their citizens and punish violations. When a state fails in its protection mandate, sovereignty is waived to enable external actors to assume the responsibility.[405]

The UN shuttles between peaceful resolution of disputes through allowing states to handle internal affairs on the one hand, and the need to take preventive and enforcement action on the other, to justify intervention in certain circumstances.[406] To this end, the UN endorsed the R2P doctrine in the 2005 World Summit Outcome document. While the document acknowledges the responsibility of states to protect their citizens and to prevent serious crimes, it mentions the need for collective action by states to remedy the inadequacies, inability or unwillingness of states to fulfil their primary responsibility.[407] The document inspired several recent UNSC resolutions to include overarching aims of protecting the civilian population and to contribute to the understanding, acceptance and development of the doctrine.[408]

6.8.2 Scope of the Responsibility to Protect doctrine

The intervention by the AU or UN is multifaceted and not limited to prosecutions or military deployments.[409] Interventions include the establishment of early warning

[403] A Yusuf 'The right of intervention by the African Union: a new paradigm in regional enforcement action? (2003) 11 *African Yearbook of International Law* 19 - 20.
[404] International Commission on Intervention and State Sovereignty 'The responsibility to protect' (2001) http://www.iciss.ca/pdf/commission-Report.pdf (accessed 21 March 2019).
[405] JM Rebecca 'The responsibility to protect: from documents to doctrine but what of implementation?' (2006) 19 *Harvard Human Rights Law Journal* 289.
[406] n 49 above, art 1.
[407] UNGA '2005 World Summit Outcome' http://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement (24 October 2005).
[408] Sarkin (n 384 above) 14.
[409] Kuwali (n 385 above) 59.

capabilities, building capacity among states, consideration of peaceful means, diplomatic pressures and prevention of crimes.[410] Military intervention is an exceptional or extraordinary measure.[411] The intervening power should consider both short- and long-term effects of intervention or preventing conflicts.[412] Short-term interventions may be in the form of deploying the ASF,[413] while long-term interventions aim to obtain lasting solutions to problems and these encompass measures to prevent recurrence of situations.

The identification of prevention and adoption of peaceful means as methods of intervention supports the growing view that state action in response to international crimes does not always require prosecutions. Among the objectives of the AU PSC is to detect and prevent disputes and conflicts on the continent.[414] When conflicts have broken out, the organ is empowered to undertake peace-making and peacebuilding activities.[415] Interestingly, Kenya brought the likelihood of violence to the AU before it broke out in 2007. Kenya quoted several strands of previous electoral violence.[416] Since the AU was appraised on the direction of the situation from the early warning stage, it was expedient for the AU to play a role in post-violence resolution. Ideally, the ICC should have taken a back seat and intervened when both Kenya and the AU had manifestly failed to deal with the situation.

Kenya correctly used its discretion to engage the AU to complement Kenyan efforts in the case of violence arising instead of giving the ICC a signal to prepare for possible investigations or prosecutions after the elections. The ICC needs to appreciate that states require assistance in various ways and that assistance does not necessarily result in the prosecution of international crimes and human rights violations.

To protect state discretion and interests in the AU system, the Constitutive Act was carefully crafted to leave the decision to intervene to the Assembly, which is composed

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[410] World Summit Outcome (n 407 above) paras 138 - 140.
[411] International Commission on Intervention and Sovereignty: the responsibility to Protect (2001, International Development Research Council) para 4; (n 404 above) para 139.
[412] D Kuwali 'R2P: Why Libya and not Syria' http://www.africaportal.org/publications/responsibility-to-protect-why-libya-and-not-syria/ (2012) 4 (accessed 21 March 2019).
[413] n 15 above, art 4(h) & (j); Peace and Security Council Protocol (n 326 above) art 13.
[414] n 326 above, art 6.
[415] n 326 above.
[416] African Peer Review Mechanism 'Country review report of the Republic of Kenya' May 2006 69 http://www.nepad.org/2005/files/aprm/APRMKenyareport.pdf (accessed 21 March 2019).

of all member states. A member state may request the AU to intervene[417] but cannot directly interfere with the internal affairs of another member state.[418] The same applies to the AU PSC, which is only composed of 15 members.[419] The objective is to promote multilateral, as opposed to unilateral or exclusive, action.[420] A multilateral action provides for broader consultation and participation before deciding on the appropriate response.[421] The affected state is also well appraised of the impeding action by virtue of its membership to the Assembly.

Africa is determined to maintain sovereign equality and interdependence among its member states,[422] as Africa is also committed to peaceful co-existence on the continent.[423] The Prosecutor should use the comprehensive consultation mechanism as a best practice before deciding to take a case. Also, the Prosecutor should avoid reinventing the wheel when the AU is already seized with a case. The Court should adopt a complementarity approach that preserves co-operation and good relations with states.

6.8.3 The failed Burundi experiment

Burundi experienced a wave of violence in 2015 following a decision by President Nkurunziza to seek a third term in office. The government of Burundi unleashed brunt of violence on protestors. The government of Burundi rejected attempts of the AU to deploy a military force in Burundi.[424] Mediation efforts and human rights monitoring efforts of the AU yielded little results.[425] When the AU failed to diplomatically convince Burundi to co-operate with regional initiatives, the organisation issued a communiqué threatening intervention through the use of article 4(h) of the Constitutive Act.[426] Africa

[417] n 15 above, art 4(j).
[418] n 15 above, art 4(g).
[419] n 326 above, art 7(1).
[420] G Pulley 'The responsibility to protect: East, West, and Southern African perspectives on preventing and responding to humanitarian crises' (2005) *Project Ploughshares Working Paper 9.*
[421] n 15 above, arts 4,13 & 17; n 326 above, arts 14 &17.
[422] n 15 above, art 4(a).
[423] n 15 above, art 4(i).
[424] M Havyarimana 'Burundi: AU peacekeepers will violate sovereignty, say Burundi MPs' *The East African* 22 December 2006 http://allafrica.com/stories/201512220942.html (accessed 21 March 2019).
[425] Y Bouka 'Missing the target: the African Union's mediating efforts in Burundi' 30 June 2016 http://www.egmontinstitute.be/missing-the-target-the-african-unions-mediating-efforts-in-burundi/ (accessed 21 March 2019).
[426] African Union PSC 'Communiqué of the 565th Meeting of the Peace and Security Council on the Situation in Burundi' 17 December 2015 http://www.peaceau.org/uploads/psc.565.comm.burundi.17.12.2015.pdf (accessed 21 March 2019).

found itself on the verge of invoking article 4(h) for the first time in its history. However, the Assembly refused to authorise intervention without Burundi's consent.[427]

The challenges faced by the AU in the Burundi scenario raise questions on the organisation's ability to protect vulnerable populations on the continent when faced with the need to balance non-indifference and non-interference. The Assembly interpreted the intervention of the AU in a manner that does not exclude the participation of a state under examination. The interpretation minimises tensions between the AU and its member states. The patient facilitation of the AU in Burundi eventually led to a reduction in violence within a few months.[428]

The Burundi scenario is a perfect example of how complementarity may be applied with due regard to state discretion without adversely affecting the need to assist a state in addressing serious violations of international law. However, the AU needs a formula to ensure that its approach to intervention in future cases does not compromise the rights of civilians to protection from violations. The AU member states have been criticised, and rightly so, for a lukewarm approach to international crimes that are prevalent on the African continent.[429] Failure to translate strong provisions in the AU legal instruments into meaningful action on the ground has adversely affected the realisation of a criminal justice system that prioritises peace and justice on the continent.

Notwithstanding the value of a consent-based approach, as demonstrated in the Burundi scenario, the political actors paid little attention to the need to establish a precedent that the commission of serious crimes was intolerable on the continent. During the AU summit held in Addis Ababa, Ethiopia, in January 2016, some AU member states agreed with Burundi that forcible intervention was unwarranted and emphasised the need to respect state sovereignty.[430] The AU had to backtrack from

[427] Bouka (n 425 above) 5.
[428] Armed Conflict Location and Event Data Project 'Burundi Local Data on Recent Unrest' 26 April 2015-31 January 2016 http://www.crisis.acleddata.com/update-burundi-local-data-on-recent-unrest-26-apr-2015-31-january-2016/ (accessed 21 March 2019).
[429] See for example O Henry 'Burundi question weighs heavily as AU summit begins in Addis' The East African (January 28, 2016) http://www.theeastafrican.co.ke/news/Burundi-the-hottest-topic-at-AU-summit/-/2558/3052614/-/2u73rt-/index.html (accessed 29 September 2020).
[430] S Dersso 'To intervene or not to intervene? An inside view of AU's decision-making on article 4(h) and Burundi' February 16, 2016 http://www.sites.tufts.edu/wpf/files/2017/05/AU-Decision-Making-on-Burundi_Dersso.pdf (accessed 29 September 2020).

its earlier decision to invoke article 4(h) and opt for dialogue over accountability.[431] In this regard, the political actors in the AU reverted to their neglect of victims and the protection of their political elites. While the ICC's impact on the realisation of international criminal justice in Africa is still questionable, even of greater concern is that within Africa itself, this project is either lacking a sound basis or must still be thought through properly. For this reason, the ICC and African initiatives remain relevant if victims on the continent are to entertain hopes of peace and justice in the future.

The complementarity project can only succeed if there are many hands on the deck and if states steer the ship. The ICC needs the political will of states and regional initiatives to advance justice and to realise the goals of the Rome Statute.[432] The neglect of regional mechanisms by the ICC is already proving costly and adverse to the pursuit of justice because of Africa's demonstrated ability to frustrate and paralyse the operations of the Court. On several occasions, Africa continuously and successfully defied the ICC on the matter of the arrest of the Al Bashir, when he was still the president of Sudan.[433] The controversy caused by the *Al Bashir* case appears settled in the meantime, following him being ousted from power and subsequently being prosecuted by Sudan. The national courts are, however, prosecuting him for crimes allegedly committed in 1989 and not crimes under the Rome Statute.[434] Crucially, Sudan stated in February 2020 that it is ready to hand him over to the ICC.[435] It remains to be seen if Sudan will transfer him to the ICC once the domestic trial has been concluded.

6.9 Conclusion

This chapter revealed that the ICC can no longer exist as the sole alternative to national jurisdictions. The AU challenges the dominance of the Court and seeks recognition in

[431] Dersso (n 430 above).
[432] O Imoedemhe 'Unpacking the tension between the African Union and the International Criminal Court: the way forward' (2015) 74 *African Journal of International and Comparative Law* 78 - 79; Brown (n 8 above) 152.
[433] Omorogbe (n 6 above) 50 - 54.
[434] K Asala 'Sudan: Bashir's Trial Adjourned to September' 2 September 2020 http://www.africanews.com/2020/09/02/sudan-bashir-s-trial-adjourned-to-september-/ (accessed 3 October 2020).
[435] Amnesty International 'Sudan: Al-Bashir handover to ICC necessary move for justice for victims' 11 February 2020 http://www.amnesty.org/en/latest/news/2020/02/sudan-albashir-handover-to-icc-necessary-move-for-justice-for-victims/ (accessed 3 October 2020.

handling violations of international criminal law in Africa. The AU does not intend to raise the status of African institutions but to remind the international community that the Rome Statute did not abolish the sovereignty and discretion of states. Whereas external actors are propelled by the ceding of some sovereign rights by states, they cannot take actions that wantonly disregard the discretion of states in dealing with their internal affairs.

The existence of the ICC as an effective international institution is threatened by the application of complementarity that yields much power to the Prosecutor. The growing resistance of African states and the AU explains the need to embrace a policy that favours states' control of the judicial process.[436] When regional mechanisms help in the endeavour to end impunity for atrocities, the ICC should allow them to complement states.

African states have the benefit of developing strong complementarity frameworks. International criminal law[437] is evolving fast in Africa; hence, the ICC needs to catch up to avoid an outdated approach to complementarity. Regional mechanisms agitate the exercise and guarantors of state discretion. The mechanisms share many commonalities with states in their grouping, thereby narrowing areas of contestation in different and complementary operations. African mechanisms were established by states for the benefit of states. Hence, states are involved in the decision-making processes of various mechanisms.

However, the decorated appearance of African regional mechanisms has failed to sway the ICC to fully embrace them. The emergence of African regional mechanisms presents both challenges and opportunities for the ICC. The advantages and disadvantages will continue into the foreseeable future. The stage is set to pressure the ICC to consider the need to maintain relations with states and the AU, and to explore the feasibility of developing a policy that provides for the use of regional mechanisms to complement states. The overarching view is that state discretion remains the dominant element in any system that depends on complementarity.

[436] SR Ratner 'The International Criminal Court and the limits of global judicialization' (2003) 38 *Texas International Law Journal* 447 - 448.
[437] Yusuf (n 391 above) 7.

This chapter highlighted the advantages of regional mechanisms. Arguably, regional mechanisms bring uniqueness that even the ICC will admire with close analysis. Regional mechanisms facilitate, expedite and lead to respect of actions by states.[438] The AU is developing a strong legal framework and is creating a good practice to prosecute and provide sustainable solutions to problems on the continent. The instruments and practices of African mechanisms reveal that the respect of state discretion is one of the core principles of the AU system. Unlike the ICC, Africa encourages states to manage internal affairs with the assistance of regional or international actors. In this regard, states use their discretion to choose prosecution or mediating forums.

[438] Yusuf (n 391 above) 19 - 20.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

This study critically analysed the theoretical and practical application of the principle of complementarity. It used the *Kenyatta* case to demonstrate that while many scholars have focused on prosecutorial discretion, there is a need for an academic study on the extent to which the ICC allows states to exercise discretion over the handling of international crimes. The study established that the Rome Statute gives the Prosecutor widespread powers and that there is a need to develop a prosecutorial policy to unlock the implied provisions on state discretion. State discretion underpins complementarity. In this study, documents, legal instruments, reports and studies showed efforts by states and the AU to adopt an interpretation that preserves state discretion.

7.2 The research question (s)

The study put forward the central question, `Is there a need for statutory and normative (de)activations to ensure that the supremacy of state discretion is adequately considered in the exercise of power by the ICC Prosecutor?' In the study, sub-questions were also posed to address whether the ICC Prosecutor should be guided by contextual realities in responding to international crimes, how non-prosecutorial and prosecutorial approaches can be used simultaneously, and the extent to which regional mechanisms can enhance the realisation of effective international criminal justice. To answer the questions, this study analysed the Rome Statute and the approach of the Prosecutor to complementarity that often leads to tensions with states. It further highlighted the need to broadly interpret and apply provisions of the Rome Statute and other instruments to strengthen state discretion. It was found that states have other options beyond the ICC, which can equally complement their efforts in pursuit of peace and justice. In particular, efforts made in Africa were identified and discussed in the context of complementarity.

7.3 Overview of the study

Chapter 1 gave an overview of the study. The first chapter established that complementarity heavily leans in favour of state discretion, the Prosecutor and the UNSC. While the Prosecutor appreciates the discretion of the UNSC on certain matters, there is a need for a full appreciation of state discretion. Controversy arises when the Prosecutor is required to merge the law with political considerations. The opening chapter discussed the main objectives of the ICC and the requirement for different actors to contribute to the prevention of international crimes, and that the requirement presents opportunities for the ICC to embrace mechanisms that address impunity and contribute to global peace and justice.

Chapter 1 also established that when the Prosecutor intervened in Kenya, the Prosecutor wanted to take over the proceedings rather than to assist Kenya to retain jurisdiction. The Prosecutor disregarded legal reforms and other non-judicial steps that were underway in Kenya. The *Kenyatta* case widened the lack of guidance on complementarity. The case showed the need to address the question of state discretion to reduce friction between the Court and political actors. Therefore, the *Kenyatta* case is an important reference in the evolving complementarity practice of the Court. This study interpreted the Rome Statute together with the UN Charter, and demonstrated the rationale for resorting to alternative forms of justice and regional mechanisms. Alleged bias and selectivity of prosecution trigger negative African responses and revive calls to debate the prosecutorial exercise of power.

The first chapter also started the discussion on the need for the development of a prosecutorial policy to enhance state discretion. The chapter indicated that the significance of this study lies in the ability of the Prosecutor to reflect innovative abilities of states in the complementarity project. States can use their discretion to address issues using national, regional and international mechanisms. While an amendment to the Rome Statute can enhance state discretion, the first chapter advanced the development of prosecutorial policy as a preferred approach. A policy would serve as a guiding instrument without creating legally binding obligations on states. A policy is desirable because of flexibility for revision.

7.4 The historical development of the International Criminal Court

Chapter 2 traced the origins of a permanent international criminal court and established reasons for the delay in the establishment of the ICC. The chapter also showed that the principle of complementarity frequently featured in the developments that led to the establishment of the ICC. The chapter further revealed that although the desire for a global institution to prosecute international crimes started as early as the fifteenth century, the twentieth century was a turning point. Political considerations and interference throughout the centuries contributed to the reluctance to establish the court, and often led to questionable trials. The creation of the ICC depended on the ability of states to overcome political hurdles associated with state sovereignty. Hence, the second chapter demonstrated that the attainment of international criminal justice is a product of political will. To that end, the ICC should devise a way to balance law and politics.

The developments before the creation of the ICC were examined in the second chapter. What was revealed was the need to counter the shortcomings of *ad hoc* tribunals, the establishment of a forum which is not motivated by revenge and that the adoption of a concerted effort to punish international crimes led to the creation of the ICC. Resultantly, co-operation and consultation are essential to the work of the ICC. Prosecutions and reconciliation efforts in conflict and post-conflict states emerge as available approaches. Also, the selection of cases should cover a wider geographical area and suspects from different contexts to address the perception that the ICC targets weaker states.

The chapter further observed that national prosecutions of international crimes was the norm for time immemorial. In discussing the importance of paying due regard to state jurisdiction, the chapter noted that weaknesses in national systems motivated the international community to propose international criminal tribunals. However, the chapter concluded that states could overcome the weaknesses through the support of the ICC and the international community.

7.5 Complementarity

In the third chapter, the study embarked on a detailed examination of the evolution of complementarity in the history of international criminal justice and how

complementarity found its way into the Rome Statute. The principle of complementarity evolved at a snail's pace. At the Rome Conference, a compromise among states led to acceptance of the principle. The principle was left undefined in the Rome Statute and thus augmented debates that the principle is not static but is adaptable to suit certain circumstances and state preferences. The basis for complementarity is the assistance external actors render to states to fill jurisdictional gaps.

Since the Treaty of Versailles, there has been inconsistency in the application of complementarity. States and international criminal tribunals took turns to exercise primacy over international crimes. The third chapter further revealed that practical factors, existence of effective co-operation and sensitivity to local realities are often considered before activation of the jurisdiction of an international criminal tribunal. A holistic interpretation of the Rome Statute demonstrates that complementarity encourages state-centric prosecutions, enhanced scope of national prosecutions, supremacy of national criminal jurisdictions in internal affairs of states and commitment by states to undertake prosecutions. To achieve these goals, states require international co-operation. External actors should exercise due diligence and good judgment for crimes to remain within the jurisdiction of states.

Complications which arise when the Prosecutor expands the interpretation of complementarity through the insertion of additional components such as 'inactivity' were further discussed in Chapter 3. The complications illustrate the tension between the static position purported in the Rome Statute and the evolving Court practice. As part of the evolving practice, the OTP has adopted prosecutorial policies to clarify the best approach to complementarity. The policies have done little to strengthen the discretion of states in the application of complementarity. The OTP needs to adjust its policy to fully capture context-tailored approaches. While the 2016 Policy Paper on Case Selection and Prioritisation is a move towards the OTP's assistance to states, the current prosecutorial policy makes it difficult for the OTP to support states because the Prosecutor retains more supervisory than complementary powers.

An analysis of cases before the ICC in the third chapter revealed that states could have retained jurisdiction in most of the cases. The Prosecutor weakened arguments for the inadmissibility of cases through the adoption of exceedingly high standards such as the *same person* and *same conduct* test, inactivity, ascertainment of a situation as too

complex for a state and consideration of the limited geographical scope of a national system. For example, the Court missed an opportunity to encourage the DRC to proceed with the investigation and prosecution of crimes in 2006. The intervention of the Court lowered the standard of accountability desired by the DRC. The chapter also considered the lowering of standard to be tantamount to shielding the accused from 'some' responsibility.

Given tensions between the ICC and the AU on the application of complementarity, the third chapter introduced the discussion in Chapter 6 on the role of regional mechanisms in the complementarity project. Chapter 3 went on to show that Africa aims to borrow and refine the complementarity principle of the ICC. State discretion is better strengthened under African regional instruments, as discussed in more detail in the penultimate chapter.

7.6 An overview of the Kenyatta case and arising complementarity issues

In Chapter 4, the study concentrated on identification of the plethora of legal issues in the *Kenyatta* case. The chapter established that the *Kenyatta* case exposed deficiencies on complementarity. It also established that difficulties arise on admissibility and preliminary examination in *proprio motu* cases. On this basis, the *lacuna* created by the *Kenyatta* case requires the OTP to develop a policy to cater for future cases. The fourth chapter demonstrated that state and UNSC referrals require the Prosecutor to seek guidance from states and the UN.

The chapter examined the insistence by the Prosecutor to separate evidentiary standards in situations and cases and endorsed the need to keep the same standards in both stages to ensure consistency in the application of complementarity. The chapter argued that state discretion is better protected if the Prosecutor adopts a higher standard before launching an investigation. The chapter also adopted the view that investigations may commence when legislative and other reforms get underway. Preparatory steps will suffice as an investigation is done in good faith. The chapter argued against the same person requirement and implores the Court to use the '*substantially same persons*' test. The proposed test works better, particularly in cases of crimes against humanity, when persons advance a state or organisational policy.

The shifting of the burden of proof to a state as unprecedented, since a state need not establish inadmissibility given that the Rome Statute already presumes inadmissibility of cases before the ICC, was discussed in Chapter 4. The shifting of the burden also negatively affects the rights of accused persons to fair trials. Arguably, state discretion is preserved when the Prosecutor utilises every opportunity to assist a state which asks for assistance to conduct investigations.

The *Kenyatta* case presented the first opportunity for the Court to apply positive complementarity at a case stage. The last part of the fourth chapter demonstrated the importance of a holistic consideration of article 17 of the Rome Statute in admissibility determinations. The neglect of the inability and unwillingness of Kenya to investigate and prosecute resulted in missed opportunities for both Kenya and the ICC. The consideration of inability could have kept the *Kenyatta* case in Kenya, while the consideration of unwillingness could have strengthened the Prosecutor's arguments.

7.7 Giving effect to state discretionary powers

The Prosecutor has a key role in the complementarity project. As such, the exercise of prosecutorial discretion could be evaluated on the impact this exercise has on state discretion to retain jurisdiction. In this context, the fifth chapter examined the discretionary powers of states in the Rome Statute and how state discretion prevents unwarranted encroachment by the Prosecutor. This highlighted checks and balances to ensure that the Prosecutor does not unjustifiably encroach into state discretion. The unresolved discretionary boundaries led to tensions between Kenya and the ICC. The tensions are not surprising, given that the Rome Statute was drafted against the backdrop of balancing the independence and discretion of the Prosecutor on the one hand and the supremacy of state sovereignty on the other hand. The chapter additionally submitted that the ICC should be wary of how the broad prosecutorial discretion proved problematic for the ICTY and ICTR. In that regard, the focus of the Court should be to help states protect their national interests.

Chapter 5 further established that disagreements between the Prosecutor and states on the exercise of prosecutorial discretion are due to the blurred distinction between law and politics in the practice of the Court. The prosecutorial discretion was checked

in the *Kenyatta* case when political considerations dominated the case and suffocated all support or co-operation the Court hoped to get from Africa.

Because of the setbacks suffered by the Prosecutor in the *Kenyatta* case, the fifth chapter outlined ways to strengthen co-operation between the Court and states. From the onset, there is a need to narrow prosecutorial discretion to a level understood and accepted by both the Prosecutor and states. In the exercise of discretion, the Prosecutor should explore opportunities to unlock state discretion and assist states to consider various options at their disposal. The use of several dormant provisions on state discretion will trigger the development of a policy by the OTP to reflect a more state-centred than prosecutorial-centred approach to investigations and prosecutions. The chapter also highlighted that the Prosecutor could use the ambiguity of 'interests of justice' to allow states to utilise non-prosecutorial options. In addition, the Prosecutor could justify the adaptation of a policy based on necessity and personal circumstances of victims.

The chapter discussed how the use of soft law, such as the UN Guidelines for Prosecutors, could help the Court to adopt best practices from international norms and standards to regulate the discretion of the Prosecutor. The potential influence of the UN on prosecutorial discretion is not limited to soft law. The UNSC may trigger both the jurisdiction of the Court and the use of deferral or adjudication powers by states, since the Prosecutor has endorsed the UNSC's political powers in the justice versus peace debate.

The fifth chapter consolidated discussions on prosecutorial and state discretion and submitted that a system that operates on complementarity should give preference to a mechanism that enjoys primacy when faced with a conflict between mechanisms. The preferred mechanism should also be allowed to explore options beyond the prosecution of international crimes. Therefore, the Prosecutor must demonstrate that it is impractical for a state to undertake any form of sanction, including the use of alternative forms of justice, before extracting a case from a state. In that regard, the future intentions of a state should be considered because states are sensitive to the protection of their political, strategic and economic interests. The development of clear guidelines on prosecutorial and state discretion is important to minimise current controversies.

It was also noted in Chapter 5 that the UNSC was included in the Rome Statute to provide a multidimensional approach to issues of international concern, including the protection of legitimate interests of states from potential abuse of prosecutorial discretion. The Court should appreciate that all states have features of exceptionalism in their approach to international law. The Rome Statute also accommodates exceptionalism by being powerless on agreements entered into by states which exclude the ICC from their internal affairs.

7.8 Enhancing state discretion using regional mechanisms

Chapter 6 began with a discussion on how the Prosecutor's application of complementarity causes opposition, mainly in Africa and in USA. The resistance calls for a policy which favours states in the control of judicial processes. In that regard, regional mechanisms are an option to complement the efforts of states. In Africa, the ICC is criticised for unwarranted intervention in national affairs, bias, imperialistic motives, insensitivity to African values, undermining state sovereignty, making politically motivated interventions and exacerbating conflicts on the continent. Since the Rome negotiations, USA has been an ardent supporter of a complementarity approach that encompasses negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, use of regional agencies and other means chosen by states.

The sixth chapter examined the place of regional mechanisms in the complementarity project with a focus on Africa. It observed that the use of regional mechanisms is implied in the Rome Statute and that the UNSC has previously turned the implication into practice. For example, Resolution 1593 referred the Darfur conflict to the ICC. The UNSC encouraged the Court and the AU to consider a regional solution to the crisis. The chapter also observed that the operations of regional mechanisms show that states already function in established complementary relationships outside the ICC.

Regional organisations are increasingly becoming defenders and promoters of international law. The diverse approach of regional organisations in the enforcement and application of international law makes them ideal forums to enhance national interests. Therefore, there is room to advocate for and convince the ICC to recognise regional mechanisms in the application of complementarity. The Rome Statute mentions the attainment of justice and peace; hence, the Prosecutor could use this

provision to align prosecutorial understanding of the two concepts to that of states and the AU.

In relation to Africa, the chapter established that historical influences, contextual realities, cultural norms and the search for African solutions motivate the incorporation of regional mechanisms into the complementarity project. The present conflict environment in Africa requires stabilisation, conflict resolution and reconciliation among ethnic and religious groups. Africa is concerned about the neglect of the equality of states at the international level and the abuse of universal jurisdiction by Europe. The concerns inspired Africa to take proactive steps to promote judicial and non-judicial responses to conflicts and other situations of violence. As a consequence, efforts to capacitate domestic systems are sprouting up through guidance to states and assistance with legislative development.

The penultimate chapter argued that Africa has the potential to do more than the ICC in the prevention and prosecution of crimes on the continent. The efforts of the AU to pierce the monopoly of the ICC are a step in the right direction and would allow states to identify forums of assistance with little or no hindrance from the ICC. The AU and states are also agreeable on the value, circumstances and priority accorded to justice or peace. Hence, a process of cautious and patient dialogue with states is regarded as the norm of African institutions. The institutions are motivated by preservation of state discretion to the greatest extent possible. The institutions appreciate that a desirable system for states is one that fully involves them and that considers state discretion.

The African Charter ensures respect for state discretion by preferring amicable settlement of disputes between states before resorting to other options. This approach gives sovereign states more and suitable options to deal with internal affairs and is also reflected in the UN Charter. The African Commission and the African Court primarily share recommendations and guidance and leave states to deal with internal problems to preserve state discretion. Africa demonstrated in the *Habré* case, the ratification of the Constitutive Act and adoption of the Malabo Protocol, that the time is ripe for regional mechanisms to play a role in the complementarity project. Kenya intended to make use of AU institutions to complement national efforts. International support is welcome in this 'Africanisation' of international criminal justice.

7.9 Recommendations

This study noted the procedural difficulty and disadvantages of amending the Rome Statute to cater for more recognition of state discretion in the exercise of prosecutorial powers. It also noted that the Rome Statute and the Rules of the Court contain sufficient provisions which support expansive state powers. Therefore, the researcher is of the view that the prosecutorial policy should be amended and developed to reflect the provisions of the Rome Statute on state discretion.

The recommendations that follow start with an analysis of the existing prosecutorial policy and strategy. The discussion also considers interpretations and proposals to amend the Rome Statute to demonstrate that the interpretations and proposals are unnecessary because concerns could be addressed in a prosecutorial policy. The recommendations that follow fill gaps to help the Prosecutor to utilise the existing Rome Statute provisions and OTP documents to give more heed to state discretion.

7.9.1 Recommendation: Enlarging the scope of dialogue

The effectiveness of the OTP depends on consultation and co-operation with states and other stakeholders. The OTP is composed of three main divisions, namely, the Jurisdiction, Co-operation and Complementarity Division; the Investigation Division; and the Prosecution Division.[1] The Jurisdiction, Co-operation and Complementarity Division is tasked with conducting preliminary examinations, providing advice on jurisdiction, admissibility and co-operation, and co-ordinating judicial co-operation and external relations. This Division is key in initiating dialogue on the concerns of states regarding the application of complementarity.

As early as April 2003, the OTP foresaw the legal, policy and management implications of complementarity, and engaged a group of experts to dissect the practical application of complementarity.[2] The group recommended, *inter alia*, proactiveness on the part of the Prosecutor to consult a state which intends to resort to an alternative approach to justice, the Prosecutor and a state to discuss issues pertaining to interests of justice, partnership and dialogue between the OTP and states with the intention of

[1] http://www.icc-cpi.int/about/otp (accessed 23 July 2019).
[2] OTP 'Informal expert paper: the principle of complementarity in practice' 2003 http://www.icc-cpi.int/RelatedRecords/CR2009_02250.PDF (accessed 23 July 2019) 2003.

encouraging national proceedings, OTP assistance and advice to states, graduated measures approach before the ICC intervenes, and the binding nature of UNSC orders to states.[3] These recommendations demonstrated to the Prosecutor that dialogue with states and other stakeholders is vital for the achievement of the goals of the Rome Statute.

In view of the foregoing, the OTP has consistently included the need for dialogue in its policy and strategy documents since the early days of the Court. The Prosecutor appreciates the need for effective co-operation in developing best practices for the OTP and awareness on sensitive issues in the operational environment.[4] The OTP identified six external challenges, including the detrimental effect on ending impunity because of the lack of co-ordination among relevant actors.[5] In practice, the OTP consults periodically with states, agencies of the UN, the UN, civil society organisations, regional organisations and other stakeholders to enhance the effectiveness of its work.[6]

7.9.2 Recommendation: The Prosecutor

The Prosecutor is commended for an open-door policy, since the policy allows dialogue on the prosecution of international crimes, the challenges faced and strategies for solutions. Notwithstanding, there is a need for the Prosecutor to devote more effort on issues that currently threaten the existence, popularity and effectiveness of the Court. The issues also have the potential to shape the OTP policy and align it to the objectives of the Rome Statute. The first step towards reducing tensions between African states and the ICC is for the Prosecutor to immediately engage the AU.[7]

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[3] n 2 above, 4 - 24.

[4] See for example OTP 'Policy on children' (November 2016) 41 http://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF (accessed 25 July 2019) ; Office of the Prosecutor 'Policy paper on victims' participation' (April 2010) 2 http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/281751/PolicyPaperonVictimsParticipationApril2010.pdf (accessed 25 July 2019).

[5] Office of the Prosecutor 'Strategic Plan 2016 - 2018' (16 November 2015) 5 - 6 http://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf (accessed 25 July 2019).

[6] OTP 'Policy paper on sexual and gender-based crimes' (June 2014) http://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (accessed 25 July 2019).

[7] M Ibrahim 'Call for the AU and ICC to engage in honest dialogue' Business Day Live (15 October 2013) http://www.bdlive.co.za/Africa/africanews/2013/10/15/call-for-au-and-icc-to-engage-in-honest-dialogue (accessed 25 July 2019).

The dialogue should be intended to establish regional perspectives on complementarity, the place of regional mechanisms in the complementarity ladder, common strategies on crimes specified by the Rome Statute and guarantees for the preservation of state discretion in the application of complementarity. Ultimately, the political and judicial organs of the AU and the ICC should consider a joint appointment of a team of experts to take stock on the complexities caused by the existing OTP strategy and policy. The objective is to unpack and bring to closure the outstanding question on the interface between law and politics. The two institutions should also develop and adopt a framework on the relationship between the ICC and the African Court when the latter assumes jurisdiction on international crimes.

7.9.3 Recommendation: The Office of the Prosecutor

The OTP should use proactive, flexible, creative and intelligent strategies to initiate dialogue with the AU.[8] The OTP has a good track record of creating and managing partnerships which contribute to its work. On an annual basis, the OTP contributes to the Report of the Court to the ASP and the Report of the Court to the UNGA.[9] The OTP should ride on the momentum created by the willingness of the AU to find sustainable solutions to contentious issues on the application of complementarity. Possibilities for the ICC include having an Office to the AU in Addis Ababa and the attainment of an Observer Status in the AU. In that regard, the OTP will gain valuable experience in the management of state-driven processes.

7.9.4 Recommendation: The need for a state-centric agreement between the African Union and the International Criminal Court

An agreement on judicial co-operation between the ICC and AU is long overdue. When the ICC concluded agreements with the UN and the EU, the OTP predicted that an agreement with the AU was imminent.[10] However, after more than a decade an

[8] n 5 above.
[9] OTP 'Policy paper on preliminary examinations' (November 2013) 22 http://www.legal-tools.org/doc/acb906/ (accessed 25 July 2019); OTP 'Paper on interests of justice' http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf (1 September 2007) 1 (accessed 27 July 2019).
[10] OTP 'Report on the activities performed during the first three years (June 2003-June 2006)' (12 September 2006) 31 http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf (accessed 27 July 2019).

agreement between the ICC and AU is yet to be concluded. The proposed agreement could benefit from two developments.

First, an existing agreement between the ICC and the EU provides a reference on the nature of ICC agreements with regional organisations. In addition, an agreement with the AU can explore gaps to develop a stronger framework which encompasses the concerns of the AU. Second, the AU is seized with ICC prosecutions in Africa, thereby raising the prospect of addressing the ICC perspectives, particularly on state discretion in the framework.

The ICC-EU Agreement expressly states that co-operation and assistance is between the ICC and the EU, and not between the ICC and the member states of the EU.[11] The Agreement also requires respect for the principles and objectives of the EU Treaty.[12] In addition, the Agreement leaves room for the recognition of privileges and immunities which conform to the interests of the EU Communities.[13] Arguably, the AU will endorse the respect of the African values and approaches in a co-operation agreement with the ICC.

The separation of the EU from its member states is a weakness in the ICC-EU Agreement. The weakness leaves EU member states vulnerable and with little backing from the EU when the ICC threatens their discretion on international crimes. In theory, the EU intends to protect its interests more than the interests of individual member states. The AU needs to carry states on its shoulders when it enters into an agreement with the ICC. The voice of a regional bloc is likely to be louder than that of a state when a state disagrees with the ICC.

The resolutions of the AU on the ICC provide a prospective direction the AU may take in the agreement with the ICC. In a recent resolution,[14] the AU Assembly discussed co-operation with the ICC and reiterated that its approach to international criminal justice is guided by the Constitutive Act and the Malabo Protocol (when it comes into

[11] Agreement between the International Criminal Court and the European Union on cooperation and assistance (10 April 2006) L115 Preamble para 10.
[12] n 11 above, Preamble para 1.
[13] n 11 above, art 12.
[14] AU 'Assembly of the Union Thirty Second Ordinary Session, Addis Ababa, Ethiopia' (10-11 February 2019) para 2 http://au.int/sites/default/files/decisions/36461-assembly_au_dec_713_-_748_xxxii_e.pdf (accessed 27 July 2019).

force). The Constitutive Act contains several provisions which protect state discretion. The Assembly also undertook to continue engagements with the UNGA and the ICJ on the question of immunities of heads of states and government and other senior officials.[15] Additionally, the Assembly requested the ICC to respect article 98 agreements as well as clarification on the complementary relationship between article 98 and article 27.[16] Finally, the Assembly discussed the application of universal jurisdiction and the need to settle outstanding controversies surrounding the principle.[17]

7.10 Further recommendations

The ICC-AU Agreement should expressly require the co-operation of the AU and AU member states in all matters involving the ICC on the continent.

7.10.1 Recommendation: International Criminal Court-European Union Agreement

There is a need to insert the provision that allows privileges and immunities in the interest of European Communities in the ICC-EU Agreement with an emphasis on the interests of states and interests of victims ('peoples'). The insertion will avoid blanket immunity for heads of states and senior government officials. At times, the prosecution of senior government officials may be in the interests of political and economic well-being of a state.

The contentious issue of immunity (article 27 of the Rome Statute) requires the ICC and the AU to make compromises. The ICC should convince the AU to limit the beneficiaries of immunity to heads of state and government. As other senior government officials usually serve in successive governments in their countries, including them as beneficiaries would see them enjoying immunity indefinitely. These officials, unlike a head of state or government, can easily be replaced should their court proceedings disrupt the proper functioning of a government. Furthermore, the ICC should encourage African states to preserve and improve on the gains made in the past few decades of limiting the number of years these officials are in office to a maximum of 10 years. The AU should rigorously implement the provision of

[15] n 14 above, paras 3 - 5.
[16] n 14 above, paras 7 - 8.
[17] n 14 above, para 9.

unconstitutional change of government to ensure that these officials do not amend the constitutions of their countries to stay in power beyond 10 years. This would enable the national courts, the ICC or the African Court to try them within 10 years of having committed international crimes. The proposal may seem as advocating for delayed justice for victims, but the reality is that even if immunity is prohibited, the ICC is unlikely to try the officials during their tenure of office. The challenges the ICC experienced with Al Bashir and Uhuru Kenyatta attest to that.

Regarding article 98 agreements, the state of the accused should have the discretion to determine how to proceed in view of national interests. This is uncontroversial for the AU. The national interests may be discussed in a meeting of the Prosecutor, the AU and a state to agree on a common position. To give effect to this proposal, the following clause is proffered as an amending clause to article 46A *bis* of the Malabo Protocol:

Article 46A *bis*: Immunities

1) No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, based on their functions, during their tenure of office*, provided that a determination has been made by the ICC, AU and the state concerned that the proceedings would be contrary to national interests.*

2) The immunity is waived when a determination has been made by the AU in terms of this Protocol that a government is in power following the commission of the crime of unconstitutional change of government in accordance with article 28 E of this Protocol.

Since the above recommendation on immunities may not solve the dilemma of bringing to justice heads of states who constitutionally occupy office until death, the dilemma can be remedied through reading the issue of immunities through the lens of the concept of ‘peoples’ enshrined in the African legal system. The concept of peoples allows victims of crimes more participation in affairs which affect them.

To avoid creating a system of communications or submissions that is weaker than the one provided by the Rome Statute, individuals and NGOs should be allowed under the

Protocol to submit cases to the African Court regardless of declarations by states. The interests of states in the African perspective encompass peoples' rights.

The proposed approach balances the rights of a leader who is ordinarily protected from prosecution against the rights of the community, which may waive the protection.[18] For the waiver by the community to be universally recognised and enjoyed by the peoples in the continent, article 30(f) of the Protocol needs to be deleted and the following inserted:

Amendment of article 30 of the Malabo Protocol: Other entities entitled to submit cases to the Court

> *30(f) African individuals or African Non-Governmental Organizations with interest in the prosecution of crimes under the jurisdiction of the African Court.*

7.10.2 Recommendation: International Criminal Court-African Union Agreement

It is also recommended for the ICC-AU Agreement to recognise the AU Model Law on Universal Jurisdiction.[19] The ICC and the AU should endorse the Model as a best practice and promote it among other regional organisations.

Universal acceptance of the Model will solve many tensions between the ICC and states. The Model acknowledges the sovereign equality of states and outlines the framework for individual states to lead in the prosecution of international crimes.[20] The Model also has provisions on immunity of high officials and thus highlights limitations imposed on foreign courts.[21] Arguably, the Model is comprehensive in allowing states to exercise primary responsibility over international crimes.

[18] 'Rapporteur's Report, OAU Doc. CM/1149 (XXXVII), Ann. 1' para 13 (1981).
[19] African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes (AU Model Law).
[20] A Dube 'The AU Model on universal jurisdiction: an African response to western prosecutions based on the universality principle' (2015) 18 *Potchefstroom Electronic Law Journal* 458.
[21] n 19 above, art 16(2).

7.10.3 Broadening the concept of 'interests of justice'

The OTP previously conceded its dilemma and inability to offer a comprehensive clarification on the scope of the interests of justice, including the facts and circumstances for consideration of each case or situation.[22] However, the last few years have seen the OTP considering assistance to states which prosecute serious crimes under national law. Crimes such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing and the destruction of the environment have caught the attention of the Prosecutor.[23]

The OTP is considerate of a comprehensive strategy which includes truth-seeking mechanisms, reparations programmes, institutional reforms and traditional justice mechanisms.[24] The developments give hope that soon the Prosecutor would move from viewing justice only within the objects and purposes of the Rome Statute.[25] The greatest undoing for the Prosecutor is a failure to discern that the Rome Statute allows the interplay of law and politics, and that discussion on politics transcends UNSC boundaries. The OTP largely views the objects and purposes of the Rome Statute as limited to prosecutions.

7.10.4 Recommendation: Broader interpretation

The OTP should refrain from a restrictive description of its operations because this ignores the broader interpretation of the objects and purposes of the Rome Statute. In addition to the Court, the broad interpretation acknowledges other institutions that are jurisprudentially sound and consistent in balancing law and politics. The Preamble of the Rome Statute advances the objects and purposes of the UN and states together with those of the Court.

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[22] OTP 'Paper on interests of justice' (1 September 2007) 1 http://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-int-just (accessed 27 July 2019).
[23] OTP 'Policy paper on case selection and prioritisation' (15 September 2016) 5 http://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf (accessed 27 July 2019).
[24] n 23 above, 5.
[25] n 9 above, 17; n 22 above, 1.

7.10.5 Amendment of the Rome Statute to incorporate the United Nations General Assembly and states in deferrals

The failure by the UNSC to grant AU requests for deferrals in Sudan and Kenya led South Africa to propose an amendment to article 16 of the Rome Statute.[26] The proposed amendment is aimed at giving states options when the UNSC fails to respond or responds negatively to requests for deferrals. When amended, article 16 could read as follows:

> Article 16
>
> Deferral of investigation or prosecution
>
> 1) No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect, that request may be renewed by the Council under the same conditions.
> 2) *A State with jurisdiction over a situation before the Court may request the UN Security Council to defer the matter before the Court as provided in (1) above.*
> 3) *Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under paragraph 1 consistent with Resolution 377(v) of the UN General Assembly.*

7.10.6 Recommendation: Provide clear guidance

The proposed amendment of the Rome Statute is unnecessary for several reasons. First, the UNSC has no power to defer matters before the Court, since decisions of the UNSC are not binding on the Court. Article 16 of the Rome Statute allows the UNSC to 'request' and not 'order' the Court to defer a case. The provision also uses the word 'may' to illustrate that the Court is not bound by the UNSC to defer a case. The decision to defer rests with the Court only.

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[26] UN 'South Africa: proposal of amendment' http://treaties.un.org/doc/Publication/CN/2009/CN.851.2009-Eng.pdf (accessed on 27 July 2019).

Second, determinations on the crime of aggression reveal the limited powers of the UNSC in influencing the decision of the Prosecutor to proceed with an investigation.[27] The Prosecutor seeks counsel from the UNSC to determine whether a crime of aggression has been committed. The failure by the UNSC to provide guidance does not prevent a prosecutor from seeking authorisation from the PTC to proceed with an investigation. Notably, the Prosecutor should proceed provided 'the Security Council has not decided otherwise in accordance with article 16'.[28] The provision gives the impression that the UNSC may defer a case to stop prosecutorial proceedings. However, article 16 is clear on the role of the UNSC concerning deferrals. Therefore, the statement should be understood to mean that the PTC must consider and decide on a request of the UNSC before authorising the Prosecutor to proceed.

Third, the Rome Statute contains a presumption in favour of prosecutorial deferrals at the request of a state.[29] Therefore, states need to deal directly with the Prosecutor on deferrals. To minimise conflicts between the Prosecutor and states on the circumstances under which the Prosecutor would grant states requests for deferral, the OTP policy should provide clear guidance to that effect.

Last, allowing the UNGA to override the decisions of the UNSC may lead to a conflictual relationship between the UNGA and the UNSC. It may also create controversy on whether the UNGA can exercise the powers of the UNSC on matters of international peace and security. The conflict between the two organs would be averse to the ICC's co-operation with the UN system.

7.10.7 Recommendation: Assembly of State Parties

Article 119 of the Rome Statute allows state parties to make use of the ASP to settle disputes among themselves. The article is silent on disputes involving the UNSC and non-state parties. However, since the ASP may invite non-state parties to participate in the work of the ASP, it is argued that the ASP can hear disputes from non-state parties.[30] The ASP is given leverage to make recommendations to settle disputes.

[27] Rome Statute of the International Criminal Court (Rome Statute) art *15* bis.
[28] n 27 above, art 15 *bis* (8).
[29] n 27 above, arts 18 &19.
[30] http://www.icc-cpi.int/asp.

Therefore, a negative response from the UNSC is subject to consideration by the ASP at the request of states.

When disputes are submitted to the ASP, it is recommended that the ASP adopt the approach it uses in its meetings, which encourages decisions to be reached by states on consensus. The ASP should seek the opinion of the ICJ as a last resort. The prioritisation of the perspectives of states on the way forward following the negative response from the UNSC is in conformity with the principle of complementarity. The ASP should consider the options available to a state to address the situation or case under the consideration of the Prosecutor. The application of complementarity in the absence of consensus has led to disputes between the ICC and African states.

7.10.8 Proposed amendments to the OTP Strategy 2019 - 2021

On 17 July 2019, the OTP released its Strategy for 2019 - 2021.[31] The Strategy is the last for the current Prosecutor.[32] The Prosecutor aims to fulfil the desire for an effective, efficient and widely embraced Court.[33] The Prosecutor recognises the successes and failures of the ICC during her tenure of office.[34] The Strategy notes that one challenge faced by the Court is the reduced support from states due to conflicting national and political interests.[35] The OTP will develop strategies and dialogue to secure the required political and operational support.[36] The Strategy proposes the narrowing of cases for the most responsible perpetrators to speed up prosecutions.[37] Therefore, the Strategy signals a new direction for the OTP and aims to address the challenges encountered by the Court in the last decade.[38]

The OTP's six strategic goals for 2019 - 2021 are: (1) to achieve a high rate of success in Court; (2) to increase the speed, efficiency and effectiveness of preliminary examinations, investigations and prosecutions; (3) to develop with states enhanced

[31] OTP 'Strategic plan 2019-2021' (17 July 2019) http://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf (accessed 30 August 2019) .
[32] n 31 above, 4.
[33] n 31 above, 4.
[34] n 31 above, 4.
[35] n 31 above, 11.
[36] n 31 above, 12.
[37] n 31 above, 19.
[38] A Whiting 'ICC Prosecutor signals important strategy shift in new policy document' (17 May 2019) http://www.justsecurity.org/64153/icc-prosecution-signals-important-strategy-shift-in-new-policy-document/ (accessed 25 July 2019).

strategies and methodologies to increase the arrest rate of persons subject to outstanding ICC arrest warrants; (4) to refine and reinforce its approach to victims, in particular for victims of sexual and gender-based crimes and crimes against or affecting children; (5) to increase the Office's ability to manage its resources in an effective, responsible and accountable manner; and (6) to strengthen the ability of the Office and of its partners to close the impunity gap.[39]

The current prosecutorial strategy is progressive, as it foresees evolution in the future understanding and application of complementarity and 'genuineness' of national proceedings.[40] In terms of the Strategy, consultations with stakeholders may result in an explanatory paper or amendment of existing policies to incorporate findings from stakeholders.[41] Since the conditions are ripe to strengthen state discretion in prosecutorial policies and practice, the amendments that follow are proffered.

7.10.9 Recommendation: Strategic goal 3

Strategic goal 3 should be amended as follows:

To develop, together with states, enhanced strategies and methodologies to increase *the national ownership of cases and* the arrest of persons who are subject to outstanding ICC arrest warrants.

7.10.10 Recommendation: Strategic goals 6 and 7

Strategic goal 6 should be amended as follows:

To further strengthen the ability of the Office and of its partners to close the impunity gap *without prejudice to the discretion of states to choose approaches and mechanisms which are otherwise not utilised by the Court*.

Alternatively, a new strategic goal should be added.

[39] n 31 above, 4 - 6.
[40] n 31 above, 17.
[41] n 31 above, 17.

Strategic goal 7

To initiate discussions with relevant actors, particularly states and regional organisations, on complementarity and state discretion.

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